CLIENT ALERT

Howard & Howard
law for business

Labor & Employment

All Employers Must Consider New Severance Agreement Terms Following Recent NLRB Decision | March 2023

By: Jessica Chang and Emily Bennett

On February 21, 2023, the National Labor Relations Board ("NLRB") released a decision in McLaren Macomb, 372 NLRB No. 58 (2023) that bans two very common provisions of severance agreements: employers can no longer prevent employees from publicly criticizing their former employer nor from disclosing the terms of their severance package. These are generally referred to as the non-disparagement and confidentiality provisions, and they are found in most severance agreements. The NLRB's decision will require both unionized and non-unionized employers to consider the terms that new severance agreements contain.

The Decision

McLaren Macomb is a teaching hospital in Michigan that terminated 11 union employees in the height of the COVID-19 pandemic, as they were deemed nonessential employees. The hospital offered a severance payout in exchange for an agreement that barred each employee from making public comments "which could disparage or harm" the hospital. The severance contract also required confidentiality about the terms of the agreement. The hospital did not want to bargain with its union over the severance provisions. All 11 union employees signed this agreement, but the union later filed an Unfair Labor Practice (ULP) charge claiming the severance agreement violated Section 8(a)(1) of the National Labor Relations Act ("NLRA").

McLaren Macomb argued that it followed the standards set forth in the Trump-era NLRB, specifically decisions involving Baylor University Medical Center ("Baylor") and International Game Technology ("IGT"). In Baylor, the NLRB held that the severance agreement that required the employees to agree not to "purse, assist, or participate in any [c]laim" against Baylor and to keep a broad swath of information confidential was lawful. A few months later in IGT, the NLRB again ruled that the non-disparagement provision in the severance agreement was lawful, stating that the agreement was "entirely voluntary, does not affect pay or benefits that were established as terms of employment, and has not been proffered coercively."

Unpersuaded by prior decisions that permitted the use of such provisions, the NLRB in McLaren Macomb overturned both Baylor and IGT, and returned to the long-standing pre-Trump era decisions that found non-disparagement and confidentiality provisions unlawful because they interfered with, restrained, and coerced employees in the exercise of their Section 7 rights under the NLRA.

What Now?

McLaren Macomb decision will have a significant impact on employers since employers can no longer arguably ask employees to choose between receiving benefits and exercising their rights under the NLRA. This new restriction applies to both union and non-unionized employees except for those who are not covered under the NLRA such as independent contractors, most managers/supervisors, and those in government, railroads and airline industries. Some employers might wonder whether they can still include non-disparagement and confidentiality provisions if the agreement itself provides that unlawful provisions will not be enforced. Another fair question is whether an employer could be found to violate Section 7 rights if the employer does not try to enforce the non-disparagement or confidentiality provisions a severance agreement contains. Such strategies will not be effective, however, because the McClaren Macomb decision finds that the mere act of offering a severance agreement with a non-disparagement or confidentiality provision violates the NLRA. Consequently, employers will now have to carefully weigh the importance of these provisions and implement a different strategy if a non-disparagement or confidentiality provision is desired.

Existing severance agreements with confidentiality and non-disparagement provisions should not be affected by this decision as those were drafted and executed under the Trump-era decisions that made them lawful, but you should seek out to your counsel for legal advice. However, new severance agreements need to carefully consider the McLaren Macomb decision.

The Labor & Employment team at Howard & Howard provides counsel to employers every day on employment agreements, proposed terminations, severance agreements, larger reductions in force, unionized labor and other issues. Our team offers practical advice and stands ready to address any questions you may have as you draft severance or employment agreements following the McLaren Macomb decision.

Jessica Chang
Associate
Chicago, IL
312.456.3660
jchang@howardandhoward.com

Emily Bennett
Managing Partner
Chicago, IL
312.456.3422
ebennett@howardandhoward.com