Employers Must Draft Severance Agreements with Caution After NLRB Renders Critical Provisions Unlawful: 9 Crucial Questions Answered

Insights
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A pendulum-swinging decision from the National Labor Relations Board yesterday means that severance agreements – in both unionized and non-union workplaces – could once again be deemed unlawful if they could be construed to broadly restrict a worker's rights to speak about the agreement or otherwise talk negatively about their former employer, among other things. While several Trump-era rulings permitted employers to include confidentiality provisions and non-disparagement clauses in severance pacts, yesterday's ruling in *McLaren Macomb* wiped those decisions off the books – thereby jeopardizing any agreements including them. How should you change your standard severance agreement practices thanks to this setback, what should you do about existing agreements, and what does this decision signal for the future? Here are the answers to your nine most important questions.

1. What Happened in Yesterday's Decision?

McLaren Macomb, a unionized teaching hospital in Michigan, was forced into laying off a portion of its staff during the pandemic. The employer included standard confidentiality and non-disparagement provisions in the severance agreements for at least 11 of the workers it released.

Once called into question by the workers, the company justified these provisions by pointing out it was merely following the standard set by the Trump-era NLRB, which essentially permitted employers wide latitude in crafting agreements with departing workers. Under that standard, employers would only violate the National Labor Relations Act (NLRA) by entering into such provisions if they committed a separate unfair labor practice discriminating against workers by implementing them against the backdrop of union organizing or other protected activity.

But after the workers filed Unfair Labor Practice (ULP) charges about these provisions, the NLRB held they were unlawful because they were deemed too broad and tended to "chill" the exercise of employees' rights to collectively band together in an effort to improve the workplace (also known as NLRA Section 7 rights). The Board essentially resurrected an old standard that concluded a severance agreement violates the NLRA if its terms tend to interfere with workers' organizing rights. **Note: not <u>all</u> workers have Section 7 rights. For instance, independent contractors, managers, most supervisors, public sector employees, and some agricultural workers are not covered by these NLRA protections.**

2. Was Yesterday's Decision All That Surprising?

Not really – we saw this one coming. For a while now, we've heard rumblings that the NLRB has been interested in revisiting the two 2020 Trump-era decisions that had given parties the right to include these types of provisions in severance agreements. In fact, the NLRB's General Counsel telegraphed her intent to take on these kinds of cases two years ago in GC Memo 21-04. In other words, this decision has been a foregone conclusion for some time now. It was not a question of "if," but only "when."

3. What if We Enter Into Such Agreements But Don't Enforce Them?

It will no longer be a sufficient defense to point out to the NLRB that you haven't sought to enforce a non-disparagement or confidentiality provision. Yesterday's decision is significant because the Board held that that the mere "proffering" of a severance agreement containing the two problematic provisions amounted to an independent unlawful labor practice. That's because the act of conditioning receipt of benefits on the acceptance of what it considered to be unlawful terms waiving Section 7 rights was deemed coercive in and of itself.

Some may see this as a stretch – but according to the Biden NLRB, doing so could be seen as a way to bar departing employees from cooperating in government investigations related to possible workplace wrongdoing. This represents a key departure from Trump-era decisions that required an additional showing of additional unlawful conduct on the part of the employer.

In other words: under the newly resurrected rule, you may be found to have committed an unfair labor practice simply by offering your workers severance agreements with overly restrictive language even if you don't seek to enforce them.

4. Could a Disclaimer Serve as a Workaround?

Maybe. It's important to note that both covenants in the *McClaren* case were drafted broadly, and neither were accompanied by a comprehensive disclaimer (such as, "these provisions do not prevent you from enforcing your Section 7 rights," etc.). And while the Board members who wrote the opinion stop short of suggesting that any disclaimer could have saved these provisions, they do insinuate that – at the very least – any such disclaimer would need to affirmatively allow employees to:

- participate in Section 7 activity;
- file ULP charges;
- assist others in doing so; and
- otherwise cooperate with the Board's investigative process.

In other words, there may be a chance that a finely crafted and very broad disclaimer contained in a severance agreement could allow you to also include non-disparagement and confidentiality provisions. Of course, the disclaimers might need to be so broad that they would be rendered almost useless in practice.

5. Are There are Other Safeguards We Could Put in Place to Salvage Severance Agreements?

It's possible.

- Again, the Board members who wrote yesterday's decision specifically deemed the employer's non-disparagement covenant unlawful due in part to the fact that it was not limited to matters regarding past employment, contained no temporal restriction, and otherwise failed to offer any definition for "disparagement" (such as, "so disloyal, reckless or maliciously untrue as to forfeit the Act's protection"). This would seem to indicate that the Board is opening the door to lawful non-disparagement provisions to the extent they are accompanied by these kinds of safeguards.
- By the same token, the Board scrutinized the confidentiality provision at issue only to quickly invalidate it for similar reasons, including a finding that it purported to prohibit disclosure to any third party – including a labor union – and with one's own co-workers.

If the past is any indication, this decision will be followed in the coming months by General Counsel advisory memos offering more concrete examples of lawful severance covenants. Stay tuned for those.

6. What About Existing Severance Agreements with Confidentiality and Non-Disparagement Provisions? Are Those Still Valid? Do We Need to Affirmatively Rescind Them or Risk a ULP?

This is the million-dollar question. What does this all this mean for the countless numbers of severance agreements you already have in place with departed employees over the past several decades? Surely many of them contain similar provisions that would be deemed inherently coercive under this standard. Does yesterday's decision mean all of them are now immediately invalid and can be safely disregarded without fear of disgorging severance benefits?

Not exactly. For one thing, the Board's own procedural limitation rules effectively bar workers from bringing charges that fail to relate back to a violation that occurred within the past six months.

Further, if you drafted the severance agreement at a time when the law allowed such provisions, this could serve as a potential defense to any complaint seeking retroactive application of the newly revived rule.

If the past is any predictor of the future, it stands to reason that the vast majority of concerns you may have after reading this Insight will rarely make their way to the agency. Which means your response to any previous severance agreements that you entered into in the past is now in the

classic "risk tolerance" zone – leaving risk-averse employers to weigh the benefits of retroactive compliance against the dangers that may come from these old skeletons in your closet.

7. What Can Employers Expect?

For many of you, this shift will not be an unfamiliar one. After all, most employers became adept at operating under the Board's tight scrutiny of company policies during the Obama era. While the 2017 *Boeing* decision introduced common-sense scrutiny of employer policies that employers have enjoyed for the better part of five years, most have expected the pendulum to swing back to the pre-2017 state of affairs now that the NLRB is governed by a majority of Biden appointees.

8. What Should We Do?

We obviously would not advise employers to disregard compliance obligations when it comes to this new standard – particularly when the standard comes from an agency that regulates conduct of virtually every workplace in the country. But unfortunately there is no "one-size fits all" approach when it comes to the best way to comply with this new standard.

For some risk-averse employers, it might make sense to immediately cease from including confidentiality and non-disparagement clauses in your severance agreements. For others, a healthy disclaimer clause or other written safeguards will be the best approach. Still others may decide to take a business-as-usual approach.

In order to decide which approach is right for your organization, you should coordinate with your labor counsel. The kinds of factors you should take into account include your risk tolerance level, the backdrop of the Board's remedial authority when it comes to your organization and industry, the potential vulnerability of the decision on appeal, and the deterrent value that any disclaimer or safeguard language will bring you in the interim.

9. What Does the Future Hold?

We expect that this decision will be just the first step in a full shift back to a landscape where you can expect all of your workplace policies to be closely scrutinized by the NLRB, regardless of whether you are unionized. In this way, you should view yesterday's *McLaren* decision as a harbinger for an even bigger decision that we expect in the coming months that will fully wipe away the freedom granted to employers in the 2017 *Boeing* case.

Stay tuned for a decision in the *Stericycle* case that will revert the nation's law to a standard that renders unlawful any policy seen as "inherently coercive" by a more progressive Labor Board. In a very real way, yesterday's decision can be seen as the agency simply getting a leg up on things by applying that standard to confidentiality and non-disparagement handbook provisions – which could soon be deemed facially unlawful once the Board issues its *Stericycle* decision.

When that day comes, employers will once again need to evaluate handbook policies much like we now must evaluate severance agreement provisions – particularly as extended to current (rather than previously severed) employees who continue to enjoy rights under the NLRA.

Conclusion

We'll continue to monitor NLRB and other agency decisions that impact your day-to-day operations and provide updates as necessary, so you should sign up for the Fisher Phillips Insight Service to ensure you receive updates directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the author(s) of this Insight, or any member of our Labor Relations Practice Group for further information.

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