Manufacturing Employers Should Pay Attention to Severance Agreement Restrictions Despite Booming Times

Insights
4.03.23

The recent pendulum-swinging NLRB decision that invalidated confidentiality and non-disparagement provisions in severance agreements will have far-reaching effects on employers that utilize them during layoffs or other involuntary terminations. But because manufacturing employers are enjoying robust economic times – with an industry unemployment rate of 3.6% and the number of workers exceeding pre-pandemic levels – you may not be focused on the language in your standard severance agreements. Since layoffs and other forms of involuntary terminations are an inevitable and cyclical part of the industry, however, it is important for manufacturers to pay heed to this significant decision *and* the Board's recent clarifying Memorandum to ensure that future severance agreements withstand scrutiny should they face legal challenge.

Board Decision Upends Severance Agreements

If you're unfamiliar with the February 21 decision from the National Labor Relations Board (NLRB) that changed the landscape when it comes to severance agreements, you can read a thorough review here. The upshot is that the *McLaren Macomb* decision overturned a pair of Board decisions issued during the prior presidential administration and fundamentally changed the way that employers deploy confidentiality and non-disparagement provisions in their severance agreements.

In *McLaren*, an employer laid off several employees during the pandemic. The company offered severance packages to the laid-off employees which included a release agreement with confidentiality and non-disparagement provisions. The employees challenged the breadth of the language in these provisions by filing an Unfair Labor Practices charge with the NLRB. In its defense, the employer argued that it was simply following precedent established by the Board during the prior presidential administration.

The Board rejected the employer's argument, holding that the confidentiality and non-disparagement provisions were overly broad and would "chill" the exercise of employee rights to collectively band together to improve the terms and conditions of employment. The Board further held that it was not a valid defense for an employer to contend that the provisions aren't actually enforced. Rather, the Board held that merely "proffering" a severance agreement with the overly broad provisions constitutes an unfair labor practice. In finding the release to be overbroad, the Board further noted that the term "disparagement" was not defined in the agreement and the scope

of claims released in the agreement was not limited to employment claims existing prior to the agreement.

The *McLaren* decision made clear that the Board would closely scrutinize severance agreements for overly broad language, but it also left many questions – such as whether all prior severance agreements were subject to legal challenge, and whether the Board would consider all such provisions invalid or whether provisions with far more narrow application might survive scrutiny.

Board's General Counsel Clarifies Scope of Ruling

On March 22, the Board's General Counsel issued a memorandum which provides further guidance regarding permissible severance provisions in the wake of the *McLaren* decision. Memorandum GC 23-05 appears to suggest that narrowly drafted release provisions may indeed withstand challenge. That said, future anticipated Board decisions may prompt employers to consider whether it is worth including such provisions at all.

The Memorandum provides the following guidance:

- A release should only waive an employee's right to pursue employment claims arising as of the effective date of the agreement. Release provisions that extend beyond this scope will be invalidated.
- Confidentiality clauses that are limited to disclosure of the financial terms are generally acceptable. So, for example, confidentiality language that prohibits disclosure of the existence of the agreement or any other aspect of the separation would typically fall outside the Board's guidance as to what is acceptable.
- Non-disparagement provisions limited to defamatory statements about the employer may be acceptable. That is, statements that are maliciously false – with knowledge of their falsity or with reckless disregard for their truth – should withstand challenge. The key appears to be defining "disparagement" consistent with the definition of defamation.
- A specific disclaimer in the agreement noting that that the release does not limit an employee's rights under Section 7 of the NLRA may be a sufficient protection against confidentiality or non-disparagement language the Board might otherwise strike as overly broad. That said, the Board may soon issue a ruling as to what a language a valid disclaimer should include. For example, the disclaimer must include language stating that employers have the right to form unions, discuss wages, take photographs and recordings in the workplace, and wear union hats and pins and apparel. Such required language would potentially render the disclaimer impractical for many employers, thus essentially gutting the confidentiality and non-disparagement provisions.
- Supervisors, though not generally protected by the NLRA, are protected from retaliation for refusing to participate in an unfair labor practice. The Memorandum made clear that this protection extends to a supervisor's refusal to proffer an unlawfully overbroad severance

agreement. Likewise, supervisors are protected against receiving a severance agreement that limits their right to participate in a Board proceeding.

- Finally, the General Counsel clarified that *McLaren* has retroactive application. Accordingly, any severance agreement with overbroad language signed within the past six months (the Board's procedural limitation period) is subject to employee challenge via an Unfair Labor Practice charge.

What This Means for Manufacturing-Sector Employers

Even if a manufacturing company is in hiring mode and you are not anticipating layoffs or involuntary terminations, now is the perfect time for you to review standard severance agreement language. As with most employment decisions, there is not always a one-size cookie-cutter approach.

You should consider adapting your agreements in four specific ways:

- limiting confidentiality provisions to the financial terms of the agreement;
- limiting non-disparagement provisions to defamatory statements;
- including a disclaimer that the confidentiality and non-disparagement provisions do not limit an employee's Section 7 rights under the NLRA; and
- scrutinizing the remainder of a standard severance agreement for other provisions that may face challenge, including non-compete, non-solicitation, global release, and future cooperation provisions.

Conclusion

The Board's shifting political composition and policy priorities have created a continuing pattern of uncertainty for employers. In addition to reviewing existing severance templates, manufacturing-sector employers should be on the lookout for future Board actions and consult with their labor and employment counsel for guidance as needed.

We will continue to monitor workplace law developments as they apply to manufacturers, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our Manufacturing Industry Team or Labor Relations Team.

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