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The NLRB Claims That It Is Returning to Prior Precedent Restricting the Use of Confidentiality and Non-Disparagement Clauses in Severance Agreements, but Is It Really?

By Lauren Smith

On February 21, 2023, the National Labor Relations Board issued an opinion holding that the mere proffer of "a severance agreement with provisions that would restrict [an] employee's exercise of [his or her] NLRB rights" violates Section 8(a)(1) of the National Labor Relations Act.[1] In so holding, the Board specifically analyzed confidentiality and non-disparagement clauses in a severance agreement before concluding that they were overly broad and, therefore, facially unlawful. The Board stated that, "[b]ecause the agreement conditioned the receipt of severance benefits on the employee's acceptance of the unlawful provisions," the employer's proffer of the agreement violated Section 8(a)(1) of the National Labor Relations Act.

In that case, a unionized teaching hospital in Michigan presented 11 union employees that were permanently furloughed with a severance agreement and general release that included the following provisions, among others:

"The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."

"At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

With respect to the confidentiality provision, the Board determined that it was overly broad because it prohibited employees from disclosing the terms of the agreement to "any third party," including a union, other employees, or former employees. Indeed, said the Board, the clause would prohibit employees from "disclosing even the existence of an unlawful provision contained in the agreement" and could deter employees from filing unfair labor practice charges or assisting the NLRB in an investigation.

Likewise, the non-disparagement provision was overly broad because it was "not even limited to matters regarding past employment with the [Hospital]" and "encompass[ed] employee conduct regarding any labor issue, dispute, or term and condition of employment of the Hospital." The provision additionally failed to include a temporal limitation and applied not only to the Hospital, but also to its parents, affiliated entities and their officers, directors, employees, agents and representatives. Notably,

[1] *McLaren Macomb & Local 40 Rn Staff Council, Office & Professional Employees, Internatl. Union (Opeiu), Afl-Cio,* 372 NLRB No. 58.

the severance agreement at issue did not contain a disclaimer regarding preservation of an employee's rights under the NLRA, and thus the effect of such a disclaimer in conjunction with the use of confidentiality and non-disparagement clauses was not addressed by the Board. It is, therefore, unclear whether such a disclaimer will be sufficient to ameliorate the effect of the confidentiality and non-disparagement clauses.

The opinion explicitly overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020), two decisions issued by the Board under the prior administration that broadly permitted employers to include confidentiality and non-disparagement provisions in severance agreements. In those cases, instead of examining the plain language of the severance agreement, the Board examined the circumstances under which the agreement was presented to employees. The mere proffer of a severance agreement that required the signer to agree not to "pursue, assist, or participate in any [c]laim" and to broadly maintain confidentiality surrounding the agreement did not violate the Act because a severance agreement was not mandatory and did not affect the terms and conditions of employment. Following *Baylor*, the Board in *IGT* determined that a non-disparagement provision in a severance agreement was lawful because the agreement was voluntary, did not affect pay or benefits that were established as terms of employment, and had not been proffered coercively. Though the Board claims that it is returning to pre-*Baylor* and *IGT* precedent in the interpretation of clauses within a severance agreement, the opinion appears to take it a step farther than prior precedent. It is arguably more broad than that of prior decisions. In this respect, the opinion is concerning for employers that utilize separation agreements when discharging employees. It is important to note that this holding will apply to both union and non-union employers.

To date, the Board's reasoning in the opinion (and of pre-*Baylor* precedent) has not been extended to settlement agreements. A pre-*Baylor* Board distinguished the use of a narrow confidentiality clause in the settlement agreement from the then existing precedent. But that case appears to have been overruled by the Board's recent opinion, so it is unclear what the current Board will do when confronted with these clauses in a settlement agreement.

Accordingly, employers should consult with their Roetzel attorney to review provisions within severance *and* settlement agreements to ensure they are narrowly tailored to the applicable situation and in order to avoid violations of the Act. At a minimum, employers should include specific disclaimer language in their severance and separation agreements stating that nothing in the agreement is intended to interfere with employee's rights to engage in concerted activity under the National Labor Relations Act, and to participate in NLRB investigations, and file unfair labor practice charges. Non-disparagement clauses should be revised to include a temporal limitation and to define not only what conduct is prohibited, but to make it clear that the non-disparagement provision is not intended to prevent an employee from filing a charge with the NLRB or participate in Board proceedings. This developing area of the law will impact severance agreements and may impact settlement agreements, so care will need to be taken so that an employer does not run afoul of these new requirements.

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