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ALERT

CONFIDENTIAL
ATTORNEY CLIENT COMMUNICATION & WORK PRODUCT

March 2, 2023

Re: NLRB Restricts Employers' Use of Overly Broad Confidentiality and Non-Disparagement Clauses in Severance Agreements

On February 21, 2023, the National Labor Relations Board ('NLRB" or "Board") issued a decision, McLaren Macomb, 372 NLRB No. 58 (2023) ("Decision"),[1] finding that an employer committed an unfair labor practice when it offered severance agreements to employees which contained overly broad confidentiality and non-disparagement clauses, finding that such clauses infringed upon employees' rights under Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. 157. This is a significant Decision which will impact future settlement negotiations and agreements, as explained below.

NLRA Section 7 Rights

Section 7 of the NLRA provides employees at both unionized and non-unionized workplaces to self-organize, form, join, or assist labor organizations, bargain collectively, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection (or refrain from doing so). 29 U.S.C. 157. An employer who interferes with, restrains, or coerces employees from exercising these rights violates Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1). Examples of Section 8(a)(1) violations include (among many others) threatening, disciplining, and/or retaliating against an employee for: supporting a union organizing effort; participating in the grievance/arbitration process or an NLRB investigation; discussing wages, benefits, and other working conditions with co-workers; and incentivizing employees to reject a union.

[1] A copy of the Decision is attached hereto.

The McLaren Macomb Severance Agreements

In McLaren Macomb, an employer permanently furloughed 11 healthcare workers in March of 2020 due to operational changes relating to COVID-19 pandemic restrictions. The employer offered each employee a severance agreement (which each employee accepted) containing broad confidentiality and non-disclosure proposals. The confidentiality provision *prohibited employees from disclosing the terms of the settlement agreement to any third person*, aside from a spouse, professional advisor (such as an attorney or accountant for legal or tax advice), or when required by law. The non-disparagement provision prohibited employees from ever making statements to the employer's employees or the general public which could disparage or harm the reputation of the employer, affiliated companies, directors, and officers. One of the issues in the case was whether the employer's proposal interfered with Section 7 rights and violated Section 8(a)(1) of the Act.[2]

The Board's Analysis and Decision, Potential Application to Other Agreements

The Board found that the employer *violated Section 8(a)(1) of the Act by offering a settlement agreement which included these broad confidentiality and non-disparagement clauses, regardless of the employer's intent or whether the employee signed the agreement.* The Board found these clauses infringed upon employees' Section 7 rights, because they (among other things) prohibited employees from discussing terms and condition of employment with (former) co-workers, making public statements about the workplace and employer policies (which the Board found to be "central to the exercise of employee rights"), and reporting unlawful employer conduct to the NLRB.

Notably, the Board's decision was based upon the specific language included in the provisions at issue in this matter. The Board did not hold that all confidentiality and non-disparagement clauses would be prohibited, and suggested that a confidentiality or non-disparagement clause may be permissible if it is "narrowly-tailored," although the Board did not provide detailed analysis regarding that issue. While the Board will need to address that issue at a later time, this decision states that wide-sweeping, "boilerplate" confidentiality and non-disparagement clauses should be excluded from severance agreements going forward.

Although the Board's decision specifically addressed severance agreements, based upon the Board's reasoning and analysis it appears that similar provisions would be found overly broad and unlawful in other agreements, such as a settlement resolving a grievance or NLRB unfair labor practice charge (even if the grievant remained employed by the employer).

Impact on Unions

This Decision also has an impact on unions themselves. First, as an employer, the Decision will apply to any severance agreements which a union enters into with an employee of the Union. However, there is a second potential issue which was not directly addressed in the Decision. Under

[2] The employer was also found to have unlawfully refused to participate in effects bargaining and engaged in direct dealing with employees, but there was no change in current Board law in reaching those decisions.

Section 8(b)(1) of the NLRA, a union cannot engage in conduct which restrains or coerces employees in their ability to exercise Section 7 rights. 29 U.S.C. 158(b)(1). Therefore, a union which enters into a settlement agreement with an employer binding an employee to broad confidentiality or non-disparagement terms may be subject to an unfair labor practice charge under Section 8(b)(1) of the NLRA. Again, this matter was not directly addressed by the Board, but is a potential issue which may arise in a future case. We advise that you contact our office if you have concerns when negotiating a settlement containing such provisions.

Conclusion

In sum, the NLRB has found that overly broad confidentiality and non-disparagement agreements which infringe upon employees' Section 7 rights are unlawful, and an employer who includes such provisions in a severance proposal violates Section 8(a)(1) of the NLRA. Whether a proposed provision is overly broad will require a case-by-case analysis.

Unions should be careful when negotiating agreements containing such clauses, and we encourage all clients to contact our office with any questions or concerns which may arise when negotiating settlements in the future.

We will continue to closely monitor this matter and supplement this communication as necessary.

Very truly yours,

O'BRIEN, BELLAND & BUSHINSKY, LLC

/s/ Mark E. Belland
Mark E. Belland, Esquire