

Is it the End of Confidentiality and Non-Disparagement Provisions in Severance Agreements?

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On February 21, 2023, the National Labor Relations Board (“NLRB”), in [McLaren Macomb, Case 07-CA-26304](#), held that broad confidentiality and non-disparagement clauses may not be in severance agreements that are offered to employees who are not managers, supervisors, or otherwise exempt from the protections of the [National Labor Relations Act](#) (“NLRA”).

The following were the provisions that were reviewed:

Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than a 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.

Non-Disclosure. 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.

Please note that the Non-Disclosure provision also includes non-disparagement language. There was also a provision that provided for substantial monetary and injunctive sanctions against the employee should they breach the confidentiality or non-disclosure/non-disparagement provisions.

The NLRB held that severance agreements are unlawful if they “chill” former employees from cooperating with board investigations or discussing terms of their former employment with current employees. Specifically, the NLRB held that in “examining the language of the severance agreement..., we conclude that the non-disparagement and confidentiality provisions interfere with, restrain, or coerce employees’ exercise of Section 7 rights.” The Section 7 rights referred to in the decision are provided in the NLRA and allow all employees (union and non-union) to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,...”

The decision may be altered or reversed on appeal.

Takeaway: Employers wanting to use a severance agreement should consult with counsel regarding including confidentiality/non-disclosure, and non-disparagement provisions. Employers with questions can contact [Tracy Armstrong](#) or another member of the Wilentz [Employment Law](#) Team.

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