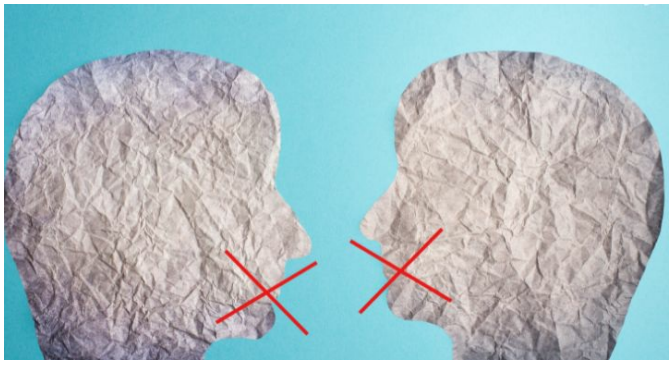
WARD AND SMITH, P.A.
ATTORNEYS AT LAW

Confidentiality and Non-Disparagement Agreements with Non-Supervisory Employees: New Limitations from the NLRB

Written By S. McKinley Gray, III (smg@wardandsmith.com) **and Grant B. Osborne** (gbo@wardandsmith.com)

March 1, 2023

The National Labor Relations Board ('NLRB') has recently declared a limit on parties' contractual rights that many private employers (and, for that matter many, of their *employees*) may find distressing.

Employers and employees routinely enter into written settlement agreements to resolve legal disputes of all kinds.

Such agreements, almost as routinely, include provisions that are designed to ensure that the parties, when the deal is done, won't disclose the terms of the agreement to third parties (with a few typical exceptions) and won't publicly trash one another: such provisions are so common that they're commonly known as "confidentiality" and "non-disparagement" provisions.

They're often a key part of the deal, at least to employers. If the employer is going to stroke a big check to an employee, then the employer understandably wants to discourage the payee from bragging about it (or from disparaging the employer) to others who might seek a similar arrangement (especially given the ease with which such information can be disseminated online without so much as getting up from the couch).

However, the recent decision of the NLRB in *McLaren Macomb*, 372 NLRB No. 58 (February 21, 2023) calls into question the *enforceability* of confidentiality and non-disparagement agreements between employers and employees.

Last week, the Board held that "confidentiality" and "non-disparagement" provisions in settlement agreements with most former employees, and thus agreements that include them, are ***unlawful***.

Section 7 Rights

The reasons behind the Board's alarming decision pertain to what are called employees' "Section 7 rights." They're called that because Section 7 of the Act says in part that "[e]mployees shall have the right to … engage in … concerted activities for the purpose of … mutual aid or protection."

The employer, in this case, "permanently furloughed" 11 employees and "presented each of them with a 'Severance Agreement, Waiver and Release' that offered to pay differing severance amounts to each

furloughed employee if they signed the agreement. … The agreement required the subject employee to release the Respondent from any claims [and] … contained … provisions broadly prohibiting disparagement of the [employer] … and requiring confidentiality about the terms of the agreement[.]"

The severance agreement in question included the following:

- a "confidentiality" provision saying that"[t]he Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person [with exceptions] … unless legally compelled to do so by a court or administrative agency of competent jurisdiction;"
- a "non-disclosure" provision saying in part that the "Employee promises and agrees not to disclose information, knowledge, or materials of a confidential, privileged, or proprietary nature" and not to "disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents, and representatives;"
- and a provision that also "provided for substantial monetary and injunctive sanctions against the employee in the event the non-disparagement and confidentiality proscriptions were breached."

The NLRB's Decision

The Board concluded that such language "interfere[s] with, restrain[s], or coerce[s] employees' exercise of Section 7 rights" and that the employer's *mere proposal* of an agreement that "conditioned the receipt of severance benefits on the employees' acceptance of "such "unlawful provisions" violated Section 8(a)(1) of the NLRA. (That section makes it an "unfair labor practice for an employer … to interfere with, restrain, or coerce employees in the exercise of" their Section 7 rights.)

The NLRB's Reasoning

The Board reached that conclusion for many reasons, such as:

- "The non-disparagement provision on its face substantially interferes with employees' Section 7 rights. Public statements by employees about the workplace are central to the exercise of employee rights under the Act. Yet the broad provision at issue here prohibits the employee from making any 'statements to [the] Employer's employees or to the general public which could disparage or harm the image of [the] Employer."
- The "confidentiality provision of the severance agreement leads to the same conclusion. The provision broadly prohibits the subject employee from disclosing the terms of the agreement 'to *any* third person.' … The employee is thus precluded from disclosing even the existence of an unlawful provision contained in the agreement. This proscription would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the [employer's] … use of the severance agreement, including the non-disparagement provision. Such a broad surrender of Section 7 rights contravenes established public policy … ."
- Moreover, the "confidentiality provision would … prohibit the subject employee from discussing the terms of the severance agreement with his former coworkers who could find themselves in a similar predicament facing the decision whether to accept a severance agreement."

A "severance agreement," according to the Board, "is unlawful if it precludes an employee from assisting coworkers with workplace issues concerning their employer, and from communicating with others, including … the Board, about his employment", and "[c]onditioning the benefits under a severance agreement on the forfeiture of statutory rights plainly has a reasonable tendency to interfere with, restrain, or coerce the exercise of those rights. *unless [sic] it is narrowly tailored to respect the range of those rights*."

The settlement agreements in question violated those rules and were thus held to be "unlawful"—meaning that they cannot be enforced, period.

What does this mean for Employers?

The National Labor Relations Act, like many employment-related laws, doesn’t apply to all employers, but it applies to the vast majority of private employers *regardless* of whether a labor union has ever darkened its doors.

It also applies to most of their employees, with the notable exception of supervisors, managers, certain kinds of "confidential employees," and agricultural laborers.

Therefore, this ruling will apply to most employers.

The Board's unsettling decision is so momentous that it may land before a United States Court of Appeals, which may take a different view.

But, unless and until that happens, the Board's decision remains the law of the land and will require employers and their counsel who hope to resolve legal disputes with non-supervisory and non-managerial employees on the Q.T., especially innovative work.

--