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Welcome to another edition of *The Work Week with Bassford Remele.* Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

Bassford Remele Employment Practice Group

Severance Agreements Under Scrutiny

Gillian L. Gilbert

Employers now have new guidance on extending severance agreements to departing employees. On March 22, 2023, the General Counsel of the National Labor Relations Board ("the Board") issued a memorandum on non-disparagement and confidentiality provisions in severance agreements. The NLRB issued this guidance in reaction to the Board's decision in *McLaren Macomb*, 372 NLRB No. 58.

In *McLaren Macomb*, the Board found that employers violate the National Labor Relations Act when employees are required to broadly waive their rights as part of a severance agreement. The case centered around a non-disclosure clause which contained a non-disparagement provision. The non-disparagement provision broadly prohibited the individual from making negative statements about "the employer, its parents or affiliates, and their officers, directors, employees, agents and representatives." Furthermore, the confidentiality clause prohibited the employee from disclosing the terms of the severance agreement to anyone other than a spouse or professional advisor. If the employee breached either of these provisions, the employer was entitled to monetary and injunctive relief.

The Board found these provisions to be unlawful. The Board reasoned that agreements between employers and employees cannot restrict employees from engaging in activities protected by the Act or from filing charges with the Agency, help other employees to do so, or assist the Agency during an investigatory process.

What effect does the Board's ruling have on future severance agreements?

Severance agreements are still permissible, and the Board has specifically approved severance agreements that waive an employee's right to pursue employment claims which arise as of the date of the agreement. However, the Board took issue with provisions that may be construed to limit the rights of employees to engage with one another to "improve their lot" as employees – including communications to the Board, unions, judicial or legislative forum, the media, and other third parties. In *McLaren Macomb*, the confidentiality provision that prevented employees from disclosing the terms of the severance agreement with anyone besides their spouse or professional advisor crossed the threshold of permissibility, in the Board's view.

Notably, the Board's guidance specifically states that an employee need not sign an offending severance agreement for it to violate the Act. Instead, simply presenting an employee with an offending agreement is now unlawful in the eyes of the Board.

What effect does the Board's ruling have on current or previously signed severance agreements?

The Board's decision in *McLaren Macomb* will apply retroactively on a limited basis. An unlawful proffer of a severance agreement may be subject to a six-month statute of limitations; any attempt to enforce an offending agreement will, however, be actionable.

An overly broad non-disclosure or non-disparagement agreement will not necessarily void an entire severance agreement that is already in effect. The Board recommends, however, that employers contact prior employees to notify them that the employer will not be enforcing those provisions.

What confidential and non-disparagement provisions are lawful?

The Board also noted that a confidentiality clause is appropriate when narrowly tailored to restrict sharing of proprietary or trade secret information for a limited period of time. But the Board cautioned that a confidentiality clause may have a "chilling effect" preventing employees from assisting others with workplace issues and/or communicating with the Agency, unions, legal forums, the media, and other third parties.

Similarly, a non-disparagement provision must also be narrowly tailored to pass the threshold set by the Board. A non-disparagement clause that prohibits only defamatory statements may be found lawful.

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At Bassford Remele, we regularly draft and advise our clients on severance and separation agreements with employees under a wide range of circumstances. We're here to help if you have any questions in light of the Board's recent ruling.

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