

Can employers require employees to accept confidentiality and non-disparagement obligations in exchange for severance pay?

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by Jack Sullivan and Victoria del Campo

Employee reductions and terminations are an unfortunate result of economic downturns. Even during good economic times, many companies face the need to reduce their workforce or terminate the employment of individual employees. In such circumstances, employers may seek to offer severance pay in exchange for certain releases and promises by the departing employee requiring a severance agreement. The drafting of severance agreements can be complex, given that there are various federal and state laws that prohibit or narrow the provisions that can be included in the severance agreement. The use of confidentiality and non-disparagement provisions has recently come under scrutiny again. This article summarizes the legal issues that an employer must consider when deciding whether to include such provisions in a severance agreement.

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1. ***What is the impact of the National Labor Relations Board's decision in McLaren***

On February 21, 2023, the National Labor Relations Board (“NLRB”) issued a decision, *McLaren Macomb*, 372 N.L.R.B. No. 58 (2023), finding that an employer violated Section 7 of the National Labor Relations Act (“NLRA”) by offering employees a severance agreement containing provisions stating that the terms of the agreement were confidential and prohibiting the employee from making any disparaging statements about the employer. Even if the employee ultimately did not sign the agreement, the NLRB found that the mere proffer of these terms to the employees as part of a severance package could be a violation of the NLRA. Communications by covered employees are protected by Section 7 even if they contain comments that would be considered “disparaging” towards the employer.

2. ***Does McLaren apply to non-union workplaces?***

Yes. Section 7 of the NLRA protects employees’ right to engage in concerted activity for “mutual aid and protection,” which includes discussing the terms and conditions of their employment. Section 7 applies in union and non-union workplaces.

3. Does McLaren apply to all severance or separation agreements??

No. Only individuals who meet the statutory definition of “employees” – which does not include executives, supervisors, and most managers – have rights under Section 7 of the NLRA.

4. Does the NLRB’s decision mean confidentiality and non-disparagement provisions can no longer be included in severance agreements?

Not necessarily. Employers will now, however, have to engage in a risk assessment in determining whether to include such provisions. For example, in reductions in force (“RIFs”) where the severance is formula-based, the need to include a confidentiality provision is diminished by the fact that there will be many departing employees. Therefore, prohibiting the departing employees from discussing their severance agreements with fellow co-workers who were selected for the RIF adds very little value to the employer. In contrast, where a severance agreement is presented to an individual employee as a compromise, employers may include a confidentiality provision with a definition of “Confidential Information” that is tailored to avoid implicating the terms and conditions of employment that are the core protections of Section 7 of the NLRA.

Similarly, following the *McLaren* decision, employers that want to continue to include non-disparagement provisions in severance agreements could do so only with specific language. Non-disparagement provisions should, for example, be narrowly tailored to prohibit defamatory statements in accordance with the defamation laws in the applicable jurisdiction to be permissible under *McLaren*.

5. Is this the first time a federal agency has taken action with regard to provisions in these types of agreements?

No. The Equal Employment Opportunity Commission (“EEOC”) is another federal agency keeping an eye on confidentiality and non-disparagement provisions in severance agreements. The EEOC has taken the position that no agreement between a departing employee and an employer can limit the departing employee’s right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC. In addition, the EEOC has stated that limiting an individual’s ability to file a charge or participate in an investigation constitutes retaliation in violation of federal employment law. Any confidentiality or non-disparagement provision in a severance agreement that attempts to waive these rights is subject to challenge by the EEOC.

Similarly, the Securities and Exchange Commission (“SEC”) prohibits employers from taking any action that impinges upon an employee’s ability to bring complaints to the SEC. SEC Rule 21F-17, enacted under the Dodd-Frank Act, prohibits any action that would “impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement. . .with respect to such communications.”

Indeed, the SEC has fined employers for using language that prohibits employees from speaking with the SEC without prior approval from the employer. Thus, employers may

not use severance agreements with departing employees that prohibit or discourage departing employees from reporting alleged violations to the SEC. It is important to include language in each severance agreement, even for employers that are not publically traded, that states that the departing employee may speak freely with federal agencies such as the SEC without first seeking approval from the employer.

6. ***Aren't there also restrictions related to settlements of claims involving sexual harassment?***

Yes. In response to #metoo, various states introduced or enacted legislation restricting the use of confidentiality provisions in agreements settling sexual harassment-related claims. Each piece of legislation has its own nuances regarding the types of language which are prohibited and the consequences of violating the restrictions.

These are just a few of the key issues to consider when drafting a severance or settlement agreement. It is always best practice to speak with an employment attorney when drafting severance agreements to ensure compliance with federal, state, and local laws.