

U.S. National Labor Relations Board Restricts Confidentiality and Non-Disparagement Terms for Separation and Release Agreements

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Employers have frequently included confidentiality and non-disparagement terms in their separation and release agreements. Confidentiality terms help ensure that employees won't brag to coworkers about large payouts and encourage them to seek similar payouts. Such payouts can also give the impression that a company is looking to avoid exposure for wrongdoing, and confidentiality terms can help maintain the privacy of such payouts. Non-disparagement terms can help companies deter departing employee from publically trashing their former employers on their way out the door. Employees don't always leave on good terms and non-disparagement terms can help incent employees to keep their negative opinions to themselves.

U.S. employers, however, must re-evaluate their use of confidentiality and non-disparagement terms in their separation and release agreements given a recent U.S. National Labor Relations Board ("NLRB") decision and subsequent guidance.

On February 21, 2023, the NLRB issued a ruling in the *McLaren Macomb* matter strictly limiting confidentiality and non-disparagement terms in separation and release agreements for most non-management private sector employees. On March 22, 2023, the NLRB General Counsel issued a memorandum answering questions that have arisen from the NLRB's decision in *McLaren*. Companies with Employees in the U.S. should carefully review their separation and release agreements to make sure they comply with the NLRB's decision in *McLaren* and subsequent memorandum.

Confidentiality and non-disparagement have already been the subject of several laws at the state and local level designed to curb the abuses of such terms that came to light as part of the #metoo movement. Serial sexual harassers and sexual abusers would use such terms in the context of large settlements to buy the silence of victims. Many states have outlawed any terms in settlement or release agreements that restrict a victim's right to discuss his or her underlying claims or any other conduct that they reasonably believe to be illegal harassment or assault.

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In *McLaren*, the NLRB ruled that confidentiality provisions must be narrowly tailored to restrict the dissemination of proprietary or trade secret information for a period of time based upon legitimate business justifications to be considered lawful. Confidentiality provisions that could have the effect of precluding employees from assisting others about workplace issues or from communicating with the NLRB, a union, legal forums or the media are unlawful.

The NLRB further ruled that non-disparagement terms that encompass all disputes, terms and conditions and issues are unlawful. Instead, non-disparagement terms must be limited to statements that meet the definition of defamation—that is, maliciously untrue, such that they are made with knowledge of their falsity or with disregard for their truth or falsity, may be lawful.

The NLRB further ruled that savings clauses (*i.e.* clauses that state that nothing in the agreement is intended to impede the employee's rights under the National Labor Relations Act) will not cure overly broad provisions.

The NLRB also identified several other types of clauses that could be found to be illegal, including non-compete clauses, non-solicitation clauses, no poaching clauses, broad liability releases and covenants not to sue that go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement, cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing an unfair labor practices charge.

While these new restrictions may seem concerning at first blush, non-disparagement terms are frequently hard to enforce, even where legal as they often require employers to prove they were harmed by the statements in question, and the cost of litigating breaches of non-disclosure provisions is often substantial. Similarly, it is often not worth the legal expense for employers to enforce breach of confidentiality terms that don't involve the disclosure of proprietary or trade secret information. Perhaps most importantly, employers have increasingly faced public relations backlash for including confidentiality provisions that prevent former employees from discussing the employer's alleged wrongdoings.

Conclusion

Private sector employers with employees in the U.S. should carefully review their separation and release agreements with non-management employees to make sure they comply with the new requirements articulated by the NLRB. Employers can no longer rely on blanket confidentiality and non-disparagement provisions in their separation and release agreements to avoid reputational harm and information regarding severance payouts from becoming public.

