New NLRB Ruling Changes What Terms Private Sector Employers Can Include in Many Severance Agreements

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On February 21, 2023, the National Labor Relations Board ("Board") issued a decision that could have broad-ranging implications on what terms a private sector employer may include in a severance or separation agreement for non-supervisory employees regardless of whether they are represented by a union. McLaren Macomb, 372 NLRB No. 58 (2023). Unless struck down on appeal or read narrowly in the future, the Board's decision would appear to make it unlawful for most private sector employers to include standard confidentiality and non-disparagement language in severance agreements. The decision applies both to employees represented by a union and to those not so represented.

Appeals in the Board area are different than in ordinary cases. There is no specific time frame for when the employer must seek to overturn the decision. In fact, the employer can wait until the Board moves to enforce before seeking to overturn the case. Actions to enforce or vacate most commonly occur in the Circuit where the alleged unfair labor practice occurred. In this case, that would be the Sixth Circuit. Courts of Appeals tend to be very deferential to the Board's interpretation of the National Labor Relations Act ("Act"). While the Decision overturns certain cases by the Trump Board, it is not uncommon for the Board to switch course when the balance of power swings from Republican to Democrat or vice versa. As of this writing, neither the employee or the Board have taken the matter to any appeals court. Even if the employer were to get the Decision overturned, the Board would only honor that ruling as to them. The Board usually takes the position that it will follow its rulings until overturned by (a) legislation, (b) a Supreme Court ruling or (c) they change their mind.

The facts of the Decision are straight-forward. The employer decided to permanently lay off a group of union workers. It offered a severance agreement to these employees. The employer made a number of mistakes applicable to union employers. It: (a) laid off the employees without notifying or bargaining with the union; (b) set the amount of severance pay for each employee without bargaining with the union; and (c) drafted and offered the severance agreement to employees without negotiating its terms with the union. The Board held that in doing so, the employer violated its duty to bargain with the union about the employees' terms and conditions of employment.

If this was all the Board had said, the Decision would be of limited interest to non-union employers. But the vast bulk of the Board's ruling addressed standard language contained in the severance agreements using a rationale that would apply to any union or non-union worker who is not a statutory supervisor or otherwise exempt from the Act. Like many separation agreements, it contained a confidentiality clause prohibiting the employee from telling persons other than the employee's spouse, tax advisor, and attorney about the terms of the agreement, including the amount of the severance pay. It also contained a fairly standard non-disparagement provision prohibiting the employee from making statements that could harm the image of the employer. The Board found that merely offering such provisions to the employees would be unfair labor practices, theorizing these provisions could chill or coerce a reasonable employee into not exercising rights protected by Section 7 of the NLRA (regardless of whether any employee actually felt chilled or coerced).

Specifically, the Board reiterated and relied on past rulings holding that Section 7 protects the rights of employees to be highly critical of their employers and its employment practices. Although statements that are "maliciously false" are unprotected, statements such as the employer "is unfair" or has "lousy pay or benefits" will likely not be deemed "maliciously false." (The Board does tend to draw a line between comments about the employer and its terms and conditions of employment (protected) and those that disparage their products and services (unprotected)). Similarly, Section 7 gives employees the right to discuss terms and conditions of employment, such as wages and benefits, amongst themselves, which a confidentiality clause arguably limits.

Nothing in the Board's decision limits its reach to unionized employees. Its analysis would apply to all employees who enjoy Section 7 rights. This would include most private sector employees who do not meet the Act's definition of a supervisor or the Board's test for being a manager. Also excluded would be public employees, agricultural employees, and employees of railroads and airlines. Moreover, nothing in the decision limits its application to group layoffs.

It should be noted that the Board has its own test for determining whether an individual is a statutory supervisor or whether the person is what the Board considers a manager not covered by the Act. It is not as simple as what the employer calls the person or whether the employer considers the person a supervisor or manager. In fact, titles are given virtually no weight in the analysis of managerial or supervisory status. It is also important to note that simply because the person is exempt from Fair Labor Standards Act purposes, this will not automatically make them a statutory supervisor or what the Board considers a manager. The burden of proving someone is a statutory supervisor or manager normally falls on the employer (as the party asserting that status). The Board considers that burden to be a heavy one.

The Board's chief lawyer is known as the General Counsel ("GC"). The current GC is Jennifer Abruzzo who was appointed by President Joe Biden. GC Abruzzo has taken a broad view of union rights and individual employee rights under the Act. While not totally ignoring employer concerns, they definitely play a secondary role in the view of GC Abruzzo.

On March 22, 2023, GC Abruzzo issued a memorandum stating her views as to the meaning of the Decision. While this memorandum does not have the force of law (i.e., it is not binding on the Courts, the Board or Administrative Law Judges), it will be followed by the Region and the lawyers who work in those offices. Basically, if someone (say a union or employee) thinks the Act has been violated, they file a charge with the appropriate Region. For example, in St.

Louis, that would be Region 14. The Region will then investigate. If the Region believes an unfair labor practice has occurred, it will issue a Complaint. Failing settlement, the case will proceed to a trial before an administrative law judge. You can be sure the Region will very rigorously follow the GC's reviews on the meaning of the Decision.

In her memorandum, the GC makes clear that she thinks this Decision is retroactive. She did allow that if you proffered a release with an offensive provision more than six months ago that was rejected, an unfair labor practice is likely barred by 10(b) of the Act. That is the Act's statute of limitations. But she asserted it was a different proposition if you tried to enforce it (that would trigger a new six-month limitation period). She also implied that a signed agreement that had not been repudiated would not be subject to the six-month limitations period.

The GC also does not believe that if an employer requests the offending language that this means it is not an unfair labor practice. Basically, she is of the view that the Act protects public, not private rights. Generally, unions can waive certain Section 7 rights, so it is unclear what the results would be if they proffered the language.

She did agree that a release could prohibit the employee form making "maliciously untrue" statements about the employer, its supervisors and general terms and conditions of employment. You might consider using that term or one like it if you wish to have a non-disparagement clause. Note that there are Board decisions in different contexts that have held that "defamatory" is not always an acceptable substitute for "maliciously untrue" or "maliciously false." As stated, you do not need to limit statements about your products and services to statements that are "maliciously untrue."

The GC did acknowledge that the employer might have an interest in narrowly crafted confidentiality clauses. Basically, clauses that protect disclosure of information that might give a competitor a leg up in obtaining business. Something similar might be true as to information that would give a customer, vendor or supplier an advantage in contract negotiations. But, it is clear in the GC's memorandum (and the Decision) that you cannot restrict the employees' right to discuss wages and terms and conditions of employment enjoyed while employed. Note that a carveout that says “nothing in this confidentiality provision is intended to infringe on Section 7 rights” is unlikely to carry much weight with the Region (or the current Board). That is the GC’s view.

What about the amount of severance? First, you might ask yourself whether that is important in a group layoff situation. Often the severance is pursuant to a formula that everyone knows (especially if you negotiated the severance with a union or have a published severance plan). But in individual terminations, that can be a touchier subject. The Board has an Operations Memorandum that discusses what are called non-Board settlements. That is OM 07-27. The GC memorandum says that it is still in effect. OM 07-27 says that you can restrict the employee from revealing the amount paid. Perhaps the GC means only in a non-Board context does that exception apply. But you may wish to consult with counsel as to whether there are viable arguments as to whether that exception should apply in boarder contexts.

One significant note. The GC is of the view that the Decision might impart managers or statutory supervisors if they were fired for refusing to distribute a release with illegal language. Also, she raised concerns that it might unlawfully limit a former manager or supervisor from testifying at a hearing or cooperating during an investigation. You might consult with counsel on how to draft around these concerns

If you are considering offering a severance or settlement agreement to your employee(s), you should consider contacting a Thompson Coburn Labor and Employment attorney, or other counsel, before doing so. They can guide you through whether you are a covered employer, whether the person or persons being offered the agreement are covered by the Act, and discuss how to draft an agreement that will not run afoul of this new ruling.

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Tim Sarsfield is a Partner in Thompson Coburn's Labor & Employment group. Practicing in Thompson Coburn's St. Louis office, Tim provides practical, in-depth counsel to management during two of the most critical junctures in the employer-employee relationship: union organizing and employee terminations.

Tim has spent his 30-year career representing management in proceedings before the National Labor Relations Board and defeating union organizing efforts in industrial workplaces across the country. Tim has helped employers respond to OSHA claims at the federal and state level from Boston to Seattle. He knows the investigators, knows the law and can craft a response that speaks to the priorities of a specific OSHA region and tells a company's story in a clear, compelling manner. Over many years, Tim has developed a special focus on counseling federal contractors on affirmative action claims brought by the Office of Federal Contract Compliance Programs (OFCCP). When organizations face an investigation or audit, Tim reviews their hiring practices, analyzes workplace demographics and explains the figures to OFCCP investigators.