You May Need to Rewrite Your Severance Agreements after NLRB Ruling

The National Labor Relations Board has taken a big step in deciding that non-disparagement and confidentiality clauses in employee severance agreements are illegal, a move that will require most employers to rewrite theirs.

The board ruled that these provisions stifle employees' and ex-employees' rights under Title 7 of the National Labor Relations Act to discuss work and their employer with one another, among other things.

Since the NLRB's decision applies to both unionized and non-unionized workers, legal experts advise all employers to revisit their severance agreement templates. However, the decision only covers employees — and not severance agreements for supervisors or managers, who are not afforded rights under Title 7.

Decision is far-reaching

In the case before the NLRB, an employer decided to lay off a group of union workers and offered them a severance agreement that included them receiving additional months of pay and benefits depending on their tenure with the company.

It also included a standard confidentiality clause that is found in many severance agreements:

*"**Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."*

The disparagement provision was also fairly standard, prohibiting the laid-off workers from making statements that could harm the company's image:

"At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

The ruling

The board ruled that merely including non-disparagement and non-disclosure agreements in severance agreements constituted unfair labor practices, on the grounds that it could bar employees from exercising their rights under Section 7.

Section 7 guarantees employees:

"The right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all such activities."

Translation: Section 7 guarantees both union and most non-union workers the right to discuss their jobs and even complain about their employer and management to one another.

In its ruling, the NLRB cited its past rulings on Section 7, holding that employees can be highly critical of their employers and their employment practices.

The takeaway

The ruling may be appealed, but for now it stands and is not on hold.

The decision will affect employers in virtually every industry and regardless of whether they have union workers or not.

If you plan to continue using severance agreements going forward, you should consult your legal counsel, particularly if your current agreements contain the clauses that offended the NLRB.

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