BURR FORMAN LLP

NLRB Returns to Categorical Ban of Overbroad Confidentiality and Non-Disparagement Provisions in Severance Agreements

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On February 21, 2023, the National Labor Relations Board reversed two Trump-era decisions that permitted broad non-disparagement and confidentiality provisions in severance agreements. The Trump-era decisions considered surrounding circumstances (for instance, whether the employee had been terminated in violation of federal labor laws) when determining the lawfulness of severance agreements that contained restrictive language.

Now, the Board returns to a categorical ban on severance agreements containing such language and will only consider the language of the proffered severance agreements in determining their lawfulness. So, even if the employment relationship ends amicably and the employee does not even enter into the severance agreement, the employer can be liable under the National Labor Relations Act for merely proffering the severance agreement with a broad confidentiality, non-disparagement, or similar provision.

The Board's Decision

In the recent decision, the company offered eleven furloughed employees a severance agreement that contained the following two provisions:

> **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

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compelled to do so by a court or administrative agency of competent jurisdiction.

Non-Disclosure. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. 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 Board held the inclusion of any provisions (including those cited above) that restrict employees from engaging in protected concerted activity (like discussing terms and conditions of employment), from filing an unfair labor practice with the Board, assisting other employees in filing a charge, or assisting the Board in investigating a charge would make a proffered severance agreement unlawful.

The Board further reasoned that rights protected by the Act are not limited to discussions with coworkers. Rather, protected channels of communication to discuss labor disputes include administrative, judicial, legislative, and political forums, newspapers, the media, social media, and communications to the public—so long as the communication is not disloyal, reckless, or maliciously untrue about the company. Therefore, in the recent decision, the Board held the broad confidentiality and non-disparagement provisions on their face impermissibly chilled worker's rights under federal labor law.

Take Action

The National Labor Relations Act affects employers of both unionized and union-free workplace. And, while the Board's decision is subject to appeal, the results of the case are effective immediately. As a result, all employers should review their standard severance agreements to ensure they do not include language that restricts an individual's rights under section 7 of the Act (such as, assisting former coworkers with workplace issues or from communicating with others about their employment), like the confidentiality and non-disparagement provisions in the recent decision.