

TYPES NOT MAPPED YET February 23, 2023 | TTR not mapped yet | Cliff A. Godiner, Chuck M. Poplstein

New NLRB ruling changes what terms private sector employers can include in many severance agreements

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.¹ 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.

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. 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 NLRA’s definition of a supervisor. 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.

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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1. [McLaren Macomb, 372 NLRB No. 58 \(2023\)](#). ↩



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