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# Employers Beware: The NLRB Limits Severance Agreements

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The National Labor Relations Board (NLRB or Board) is making waves yet again. This time the NLRB has held that certain confidentiality and non-disparagement clauses in severance agreements violate Section 7 rights under the National Labor Relations Act (NLRA or Act), which is another significant step in the NLRB's continued push to expand the protections offered to employees. While it is important to keep in mind that this decision only applies to employees that are covered by the NLRA, which is generally non-supervisory employees (even in a non-union setting), it is still a major development for all employers. Considering the NLRB's position, employers need to tread carefully in how they draft severance agreements, employment agreements, and employee handbooks moving forward.

## Background

Prior to 2020, confidentiality, non-disclosure and non-disparagement provisions in severance agreements were unlawful if they had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 organizing and bargaining rights. As a reminder, Section 7 of the NLRA guarantees employees numerous rights including the right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection. Because of this,

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employers generally could not offer severance pay in exchange for an employee agreeing to forego certain Section 7 rights, specifically if it prohibited them from pursuing charges under the NLRA.

However, in 2020, the Board changed course and found that the mere offer of these provisions contained in severance agreements, by themselves, were not unlawful. The Board limited holdings of prior precedent to cases where an employer offers such an agreement to one or more employees it had discharged in violation of the Act. Essentially, under the standard announced in 2020, the Board said that to find a violation, the employer had to commit a separate unfair labor practice.

Now, in a recent decision issued on February 22, 2023, the Board has overturned the precedent set in 2020, and found that simply offering employees a severance agreement containing provisions that may be interpreted as stifling the exercise of their Section 7 rights violates the NLRA. Specifically, the Board held that an employer violates Section 8(a)(1) of the NLRA if it merely offers employees a severance agreement with terms that would restrict employees' rights to, among other things, assist coworkers or former coworkers with workplace issues and communicate with others about their employment. The board observed that "the employer's offer is itself an attempt to deter employees from exercising their statutory rights, at a time when employees may feel they must give up their rights to get the benefits provided in the agreement." The Board reasoned that a broad non-disparagement provision in a severance agreement is unlawful because "public statements by employees about the workplace are central to the exercise of employee rights under the Act."

Further, the Board objected to how broad the employer's non-disparagement provision was, finding that it was "not even limited to matters regarding past employment with the [employer]," and would ultimately "encompass employee conduct regarding any labor issue, dispute, or term and

condition of employment of the [employer]." The Board also made a point to note that the provision expansively applied not only to the employer, but also to its parents, affiliated entities and their officers, directors, employees, agents and representatives, and had no temporal limitation, which would ultimately result in a "sweepingly broad bar" that has a "clear chilling tendency" on employees' Section 7 rights.

## What Now?

First, it is important for employers to remember that the protections afforded by the NLRA apply to issues beyond union activity, and also apply to non-unionized workplaces. Non-unionized employers who do not consider the impact of this decision could find themselves in the Board's crosshairs. With that being said, the recent decision does not apply to employees who are excluded from the NLRA's coverage, such as supervisors. Accordingly, for supervisory employees, the recent decision does not impact them, so severance agreements do not need to be changed for those employees.

For all other employees, the decision makes clear that the Board will closely scrutinize whether language in severance agreements restrict employees' NLRA rights. While we await guidance in future memorandums by the Board's general counsel, other pending cases, or federal court of appeals decisions, employers should ensure that severance agreements moving forward are narrowly tailored to make sure they do not restrict Section 7 rights. While many employers' severance agreements contain a disclaimer in the agreement, the Board generally views those with skepticism, particularly disclaimers that are very general and offer no explanation of an employee's rights. This means that disclaimers will not automatically protect employers, particularly if they are not in close proximity to the provisions at issue and don't explain in sufficient detail the employee's rights under the Act.

Considering the Board's recent decision discussed here, and prior decisions that continue to expand protections for employees, employers need to be very cautious when drafting and offering severance agreements, employment agreements, and employee handbooks to employees. As always, Akerman attorneys will continue to monitor changes in NLRB guidance and policies. For any labor or workforce concerns, contact your Akerman labor attorney for further information and guidance.

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