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New York Law Journal

LABOR RELATIONS

Confidentiality Provisions Under Federal, State Scrutiny

Wednesday, April 12, 2023

In a February decision, the National Labor Relations Board (Board) imposed new limits on confidentiality and nondisparagement provisions in agreements between employees and employers. The Board's action represents a renewed federal law consideration for U.S. employers. New York employers are also subject to separate recent state legislation regulating confidentiality provisions with other employees.

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Section 7 Rights

Section 7 of the National Labor Relations Act (29 U.S.C. Section 157) (NLRA) provides nonsupervisory employees with the right to organize and "engage in ... concerted activities for the purpose of collective bargaining or other mutual and or protection," regardless of whether they are unionized. An employer commits an unfair labor practice (ULP) when it interferes with these rights. In *Mclaren Macomb*, 372 NLRB No. 58 (2023), the Board considered whether certain restrictive covenant provisions in a severance agreement, including confidentiality and nondisparagement provisions, violated employees' Section 7 rights. The employer, a hospital, furloughed 11 employees at the onset of the COVID-19 pandemic and offered each employee severance in exchange for executing a waiver and release of claims.

The severance agreement included a provision that prohibited the employees from disclosing the terms of the agreement to third parties, with limited exceptions for disclosure to the employee's spouses, legal counsel or accountant or as legally compelled by a court or administrative agency. The agreement also included a nondisparagement provision prohibiting the employee from making any statements that that "could disparage or harm the image" of the hospital or its "affiliated entities and their officers, directors, employees, agents and representatives." The Board found that these provisions interfered with the employees' exercise of Section 7 rights and thus the employer's proffering of the agreements with these provisions to the employees constituted a ULP.

In doing so, the Board overruled two prior decisions—*Baylor University Medical Center,* 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB 50 (2020)—in which it held that the "mere proffer" of a severance agreement with confidentiality, non-disparagement and similar provisions does not violate the NLRA. In *Baylor* and *IGT,* the Board examined the nature of the circumstances under which the

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agreements were proffered to the employees rather than the language in the severance agreements themselves in making this determination.

Specifically, the Board considered whether the agreements were voluntary, whether the agreements addressed only post-employment activities and thus did not relate to pay, benefits or terms and conditions of employment and whether the employer acted coercively. Under *Baylor* and *IGT*, absent unlawful coercion by the employer or other external circumstances that would tend to infringe on employees' exercise of Section 7 rights, confidentiality and nondisparagement provisions in a severance agreement were permissible—regardless of what the agreement itself requires.

In its *McLaren Macomb* decision, the Board stated that *Baylor* and *IGT* "arbitrarily" shifted the focus of the inquiry to the circumstances surrounding the proffer of the severance agreement rather than what activities the agreement itself restricted. In overruling *Baylor* and *IGT*, the Board shifted the focus of the inquiry back to the language of the severance agreement itself, rather than the surrounding circumstances. Under *McLaren Macomb*, if the severance agreement includes provisions that would restrict an employee's ability to exercise Section 7 rights, an employer's mere proffer of that agreement to an employee violates the NLRA. No additional coercion on the part of the employer is required.

> By carefully drafting confidentiality and similar nondisclosure provisions and explicitly carving out permitted disclosures from these provisions, employers can increase the likelihood of enforceability of such provisions.

In examining at the language of the severance agreements at issue in *McLaren Macomb*, the Board found that the nondisparagement provision interfered with employees' Section 7 rights because the provision prohibited even true statements regarding labor disputes with the employer, broadly applied not just to statements about the employer but also its parents and affiliates and their officers, directors, employees, agents and representatives, did not include a temporal limitation and did not even define "disparagement." Likewise, the Board found that the confidentiality provision, which barred employees from disclosing the terms of the agreement "to any third person," also interfered with employees' Section 7 rights. Specifically, the Board found that the provision was unlawful because it prohibited disclosing the existence of an unlawful provision in the agreement to any third party—including the Board—and more broadly prohibited discussing the agreement with former coworkers and the union, among others. Accordingly, the Board found that both provisions had a "chilling tendency" on the employees' Section 7 rights and held the employer's proffer of the severance agreement to employees was unlawful.

In a memorandum dated March 22, the Board's general counsel issued guidance in response to inquiries about the *McLaren Macomb* decision. Among other things, the general counsel indicated that the *McLaren Macomb* decision applies retroactively, and that enforcing a severance agreement with provisions that interfere with an employee's ability to exercise his or her Section 7 rights is unlawful. The general counsel also indicated that inclusion of an unlawful confidentiality or nondisparagement provision in an agreement does not usually provide grounds to void the entire agreement, but rather voids just the unlawful portions of the agreement. The general counsel's memo also clarified that certain "narrowly-tailored" confidentiality and nondisparagement provisions may be considered lawful, such as a confidentiality provision limited to the nondisclosure of proprietary and trade secret information or the financial terms of the separation for a period of time, or a non-disparagement provision prohibiting only defamatory statements.

Additional Limitations In New York

In addition to the new federal restrictions, New York employers are subject to state-level limits on confidentiality agreements with employees. In 2018, in the wake of the #MeToo movement, the New York State Legislature enacted section 5-336 of the General Obligations Law, titled "Nondisclosure agreements."

The statute has two main provisions. First, it requires employers to include specific notices in any contract or other agreement with an employee if the agreement "prevents the disclosure of factual information related to any future claim of discrimination." The agreement must notify the employee that it does not prohibit the employee from "speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, a local commission on human rights, or an attorney retained by the employee." Any confidentiality provision that does not include the notice is "void and unenforceable" under the statute. Second, General Obligations Law 5-336 (and a related provision, CPLR section 5003-b) prohibits including "any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action" in a settlement or other agreement, if the claim or action "involves discrimination," unless such a term is the employee's preference.

In such circumstances, the confidentiality term must be provided to the employee in "plain English" (or the employee's primary language) and must provide the employee with at least 21 days to consider the provision. Crucially, this 21-day consideration period cannot be shortened or waived, and it must be followed by a seven-day period during which the employee may revoke the agreement. On New York State's official website, the state has published Frequently Asked Questions about the statute. This website makes clear that the parties must enter into two separate agreements—one memorializing the employee's preference for the condition of confidentiality and one resolving the dispute that includes the condition of confidentiality.

Finally, any such agreement is void if it prevents an employee from participating in an investigation by a government agency or if it prohibits the employee from disclosing facts necessary to receive public benefits such as unemployment compensation or Medicaid.

As Justice Mark Dillon writes in the practice commentaries to CPLR 5003-b, the main impact of the statutory provisions regarding confidentiality provisions is to "slow the execution and enforceability of settlement agreements in a wide range of discrimination cases." The statute provides employees an opportunity to carefully consider whether confidentiality is their preference and requires employers to carefully abide by the terms of the statute for such confidentiality provision to be enforceable. To date, there have been no relevant judicial decisions interpreting the statutes, which creates an extra incentive for employers to closely follow the statutory text when considering including a condition of confidentiality or similar provision in an agreement with an employee.

Permitted Disclosures

The state legislature and the Board are far from alone in limiting the extent to which an employer may prohibit an employee from discussing issues related to their employment or otherwise. For example, Securities and Exchange Commission (SEC) Rule 21F-17 prohibits "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications." The SEC has interpreted this rule broadly and found that agreements with confidentiality obligations that do not include a carveout for reports to the SEC violate Rule 21F-17. In June 2022, the SEC announced a settlement pursuant to which a company paid a $400,000 because it did not include this carveout. The employer was also required to revise its employment agreements to comply with Rule 21F-17. In addition to New York, several other states including California and Illinois have similarly enacted statutes limiting the scope of nondisclosure obligations an employer may require of an employee.

Employers must be familiar with the increasingly complicated patchwork of laws regulating confidentiality agreements and other restrictive covenants. By carefully drafting confidentiality and similar nondisclosure provisions and explicitly carving out permitted disclosures from these provisions, employers can increase the likelihood of enforceability of such provisions.