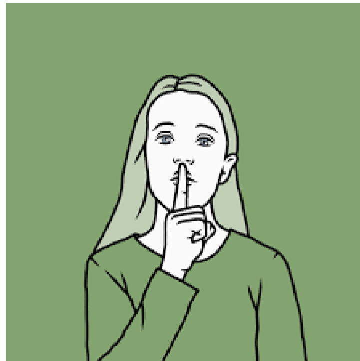
LAW OFFICE OF LORI A. GOLDSTEIN, LLC

SPECIAL BULLETIN February 24, 2023



NEW RESTRICTIONS ON SEVERANCE AGREEMENTS

Severance agreements must be promptly updated **to avoid claims of unfair labor practices.** Employers can no longer broadly restrict a worker's rights to talk about the agreement or speak negatively about the company. The *McLaren Macomb* decision issued by the National Labor Relations Board on February 21 is the latest swing by this administration's labor-friendly Board. While the Board will likely issue guidelines and examples in the coming months, the decision is **immediately effective for employers (unionized or not) across the nation**.

The NLRB ruled that **simply presenting a severance agreement** with terms that have "a reasonable tendency to **interfere** with, restrain, or coerce employees in the exercise of their Section 7 rights" under the National Labor Relations Act can constitute an **unfair labor practice**.

The Board focused specifically on the **confidentiality and non-disparagement** provisions, finding them so broad that they impaired employee rights. Employers must **narrowly tailor** these clauses with clarification and disclaimers that protect these rights.

In the *McLaren* case, the **confidentiality clause** (requiring confidentiality regarding the terms of the agreement) was found invalid because it precludes an employee from **assisting** coworkers with workplace issues concerning their employer, and from **communicating** with others, including the union and the Board, about employment.

The Board similarly determined that **the non-disparagement clause** was overbroad because it did not carve out assertions of **NLRA violations and cooperation** with the Board's investigation and litigation of unfair labor practices, and it did not have any **time limitation**.

There has been no indication that the ruling will apply retroactively to severance agreements that have already been signed, but stay tuned.

The stark reality is that **even if an employee accepts** and signs the agreement, and/or even if the **employer doesn't enforce** or intend to enforce the broad clauses, **simply offering the agreement is an unfair labor practice**.

What Should Employers Do Now? Should We Just Stop Offering Severance?

It is crucial to **review and update severance agreements** for future use (at least for employees covered by the NLRA. Managers and most supervisors are not.) Important **limitations and disclaimers** should be added to narrow the confidentiality and non-disparagement clauses.

You might ask if we're not "buying silence" on the severance terms/package and we can't stop former employees from disparaging us, why should we offer severance/agreements anymore? But **severance agreements remain important for several reasons**. They provide a **release** of claims, and they can include obligations not to disclose or use company or client confidential information, as well as non-solicitation/compete or other post-employment restrictions, if applicable. This can be crucial if the employee didn't sign such agreements at hire or during employment. Also, providing severance pay/benefits may **reduce the risk of disgruntled employees** disparaging the company, and provide employers with more peace of mind. Finally, these agreements contain other important clauses, including return of property, transition of duties, post-employment cooperation, and liability for employer's attorneys' fees and costs for breach.

Please feel free to contact me for assistance in reviewing and revising your severance agreements.

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