

NLRB Limits Employers' Use of Non-Disparagement and Confidentiality Provisions in Employment-Related Agreements and Policies

Publications

May 2023

By: Katherine Funderburg, Emma Sullivan, Joseph Torres

Employers have historically used non-disparagement and confidentiality provisions when resolving threatened or actual claims employees may pursue. The logic of proposing such clauses flows from the reasonable desire to bring as much closure to disputes as is possible. However, recent legal decisions have questioned whether and when such provisions may be permissible.

In *McLaren Macomb*, 372 NLRB No. 58 (2023), the National Labor Relations Board (NLRB) held such provisions in severance agreements have a tendency to interfere with employees' rights under Section 7 of the National Labor Relations Act (NLRA). Section 7 rights include employees' rights to engage in concerted activities. Notably, NLRA Section 7 rights cover non-supervisory employees whether or not they are represented by a union.

The NLRB's General Counsel subsequently opined that confidentiality provisions are unlawful unless they are "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications." The General Counsel further suggested that non-disparagement clauses are prohibited unless "narrowly-tailored, justified," and "limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity." Notably, the General Counsel's opinion would broadly cover such clauses in other employment agreements, communications, and policies. While the General Counsel's views do not have the force of law, they signal other challenges employers may face.

Given these developments, employers should review their employment and severance agreements and related policies with their counsel to evaluate any litigation risk.

This article is available in the Jenner & Block Japan Newsletter. / この記事はJenner & Blockニュースレターに掲載されています。

Related Attorneys



Katherine Funderburg

Associate

kfunderburg@jenner.com

+1 312 840 7398



Emma Sullivan

Partner

esullivan@jenner.com

+1 312 840 8607



Joseph Torres

Partner

jtorres@jenner.com

+1 312 840 8685

Related Articles

Jenner & Block Japan Newsletter | May 2023

Related Capabilities

Japan Practice

Labor and Employment

© 2026 Jenner & Block LLP. Attorney Advertising. Jenner & Block LLP is an Illinois Limited Liability Partnership including professional corporations. This publication, presentation, or event is not intended to provide legal advice but to provide information on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact dataprotection@jenner.com.

Stay Informed

