What to know about the new NLRB ruling on severance agreements

INSIGHTS TALENT MANAGEMENT

Image by Daniel Lee

By Tanzina Vega

Last week, the National Labor Relations Review Board announced that employers can no longer force employees to be silent about the terms of their severance agreement, nor can they require a non-disparagement clause as a condition of that agreement. “Every smart employer in the country is changing their handbooks and severance agreements,” says Mark Hanna, the vice president of public policy for the National Employment Lawyers Association and a founding partner at the labor law firm Murphy Anderson, who has represented workers in wage disputes and collective actions.

There are still plenty of unknowns about how the ruling will play out, chief among them whether past severance agreements will be retroactively affected and whether severance agreements for C-suite employees will be covered.

To unpack what we *do* know right now—and what HR professionals and their legal teams should be thinking about as they try to understand the new NLRB ruling—I reached out to Hanna, as well as a senior human resources executive who has written many of these agreements and requested anonymity so they could speak freely about their use.

Here’s what we know—and how to think about what's ahead:

1. **Non-disclosure language is everywhere.**

While non-disparagement clauses are often a normal part of severance agreements, especially for involuntary exits, they can also appear in employee handbooks, offer letters, and settlement agreements, notes the HR executive I interviewed.

📋 WHAT TO DO:

Coordinate with your legal team to perform a full audit of your employee communications for anywhere these clauses may appear, including handbooks, offer letters, and severance agreements. In January 2022, when news emerged that these changes could be coming, The National Law Review suggested “the most prudent strategy is to remove the following from employee severance, bonus and release agreements:

bonus and release agreements.

* Confidentiality covenants that prevent employees from disclosing the amount of their compensation, bonus or severance payments; and

* Nondisparagement covenants require a departing employee not to make statements that are detrimental to the employer's business or reputation."

2. This rule is part of a broader set of policy changes that protect worker rights.

"At best, [these agreements] are a way for companies to give employees a softer landing when transitioning, while insulating the company from risk by protecting it against lawsuits," says the executive. "At their worst, they're a tool to silence and intimidate employees, and they cover up bad behavior or illegal actions."

They add that historically, severance agreements have often included unfair demands: "In some exits I have been a part of, confidentiality and non-disparagement as part of a separation agreement are reasonable asks," they say, "but frankly, too often they're deployed to keep an employee quiet, and the tactics to coerce employees to sign them are disgusting."

Non-disparagement clauses are "next to the non-compete agreement. They're next to the arbitration clause. And together these non-disparagement clauses and confidentiality clause arbitration agreements limit employee freedom to speak, to access justice," agrees Hanna. "What this NLRB decision, along with other things that have happened very recently, is going to do is shine a light on the concept that this is the end of the time when employers can buy the silence of employees."

📋 WHAT TO DO:

Ask your legal team to help you understand the changing laws and proposals set forth by the federal government in recent years regarding worker rights and how that can affect your business. "One thing that this trend is saying, and what it should say to courts, is that these agreements violate all kinds of public policies," says Hanna. "And that's going to be something employers are going to think about when they try to enforce these agreements."

In addition to the NLRB ruling, here are some cases Hanna suggests paying close

In addition to the NLRB ruling, here are some cases Hanna suggests paying close attention to:

The Speak Out Act, passed into law in December 2022, which "prohibits the judicial enforceability of a nondisclosure clause or non-disparagement clause agreed to before a dispute arises involving sexual assault or sexual harassment in violation of federal, tribal, or state law."

The Federal Trade Commission's proposal from last month to ban non-compete agreements.

The Securities and Exchange Commission's recent $35 million fine against Activision for violating workplace misconduct rules and whistleblower protections.

3. Company responses are a work in progress, mostly dependent on risk tolerance.

"HR needs to work with labor counsel to land on an approach that works with their business and risk tolerance," says the HR executive. "Some employers will decide to remove all confidentiality and non-disparagement clauses from severance agreements going forward to avoid unlawful labor practices, and others will add a disclaimer clause or other written safeguard." Another approach: "I've heard from HR leaders who are keeping their severance agreements largely unchanged, but adding a clause that the agreement doesn't preclude the employee from providing truthful testimony if required as part of a legal process."

Hanna says that employees might still be able to include clauses that prevent an employee from suing the company in exchange for a severance package. "Saying, 'I'm not going to sue you'? That's perfectly fine in exchange for money. That's what the employers really should be buying," says Hanna. "What they shouldn't be buying is silence."

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