Sills Cummis & Gross P.C.

Client Alert **Employment and Labor**

Recent NLRB and Supreme Court Decisions May Significantly Affect Severance Agreements and Compensation Practices

Two recent rulings will likely have a significant affect on common practices that companies have been following with respect to confidentiality agreements and payment of highly compensated employees. On February 21, 2023, the National Labor Relations Board ("NLRB") issued a decision that would largely prohibit confidentiality and non-disparagement agreements with departing non-supervisory, non-managerial employees. The next day, the United States Supreme Court issued a decision reinforcing the need to pay highly compensated employees on a salary basis to maintain their exemption from overtime. While the NLRB decision may be appealed, in the interim employers should be cautious.

Confidentiality and Non-disparagement Provisions Found to be Unlawful in Severance Agreements

Although employers routinely include both confidentiality provisions and non-disparagement provisions in severance agreements, a new ruling from the NLRB makes it unlawful to offer a departing employee an agreement containing these provisions, which will limit the ability of a company to require that severance agreement terms remain confidential or to preclude the departing employee from disparaging the company, respectively. In *McLaren Macomb*, 372 NLRB No. 58 (2023), the NLRB found that severance agreements containing broad confidentiality and non-disparagement provisions to be unlawful because the terms 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 ("NLRA"). Section 7 of the NLRA gives non-managerial, non-supervisory employees various rights, including the right

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of employees to speak publicly and with fellow employees about working conditions. Employers generally cannot prohibit or interfere with employees' ability to speak to others about working conditions during employment. These rights extend to both current and former employees.

McLaren Macomb involved 11 permanently furloughed union employees. Each of the employees were presented with a severance agreement and general release that included the following provisions:

> **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
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> **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

The NLRB found both of these provisions unlawful. Its decision expressly overruled two Trump-era decisions that had taken a more generous approach to confidentiality and non-disparagement provisions, looking at the circumstances surrounding the offer rather than the language of the provisions. Rejecting these precedents, the NLRB found that the non-disparagement provision violated the employees' rights because "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act." The NLRB's concern was that the broad language of the provision would encompass "employee conduct regarding any labor issue, dispute, or term and condition of employment," was a "far-reaching proscription" to chill the "efforts to assist fellow employees, which would include future cooperation with the Board's investigation."

The NLRB reached similar conclusions regarding the confidentiality provision, ruling it prohibited the employees from "disclosing even the existence of an unlawful provision contained in the agreement" to "any third person." The NLRB expressed concern that this proscription would "reasonably tend to coerce the employee from filing an unfair labor practice charge or assist[] a Board investigation into the Respondent's use of the severance agreement…"

Key Takeaways

The NRLB's decision is subject to appeal but will undoubtedly have a broad impact on severance agreements with departing employees. While the decision does not affect agreements with managerial or supervisory employees and does not affect an employer's ability to demand confidentiality with respect to trade secrets and non-working-condition-related issues, employers should carefully review the language of their severance agreements before making any new offers.

Company Was Required to Pay Overtime to a Highly Compensated Employee who was Paid by a Daily Rate

In *Helix Energy Solutions Group, Inc. v. Hewitt*, the Supreme Court examined the regulation creating the overtime exemption for highly compensated employees under the Fair Labor Standards Act ("FLSA"). The FLSA provides that employers generally must pay an overtime premium (time and a half) to non-salaried employees who work more than 40 hours in a workweek. The DOL has established guidelines to determine who is eligible for overtime pay. One common exemption from the overtime requirement is for highly compensation employees. In accordance with this exemption, an employee qualifies if he or she is paid at least $107,432 in total annual compensation, which must include a salary of at least $684 per week on a fee or *salary basis*. The exemption also requires that the employee customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

In *Helix Energy*, while the employer classified the worker as an executive, he did not meet the exemption requirements because he was paid a day rate and therefore failed the salary basis test. The salary basis test requires that the employee receives a predetermined amount of compensation each pay period that cannot be reduced because of variations in the quality or quantity of the employee's work. Here, the plaintiff was a supervisor on an offshore oil rig who was typically paid at a rate ranging between $963 and $1,341 *per day*. Although he was guaranteed to earn well over the $684 per week each week he worked and earned over $200,000 annually, the Supreme Court ruled that as a daily-rate worker he was not paid on a "salary basis." The Court cited the controlling regulation, 29 C.F.R. § 541.602(a), which states:

> An employee will be considered to be paid on a 'salary basis' … if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to [certain exceptions], an exempt employee must receive the full salary for

> any week in which the employee performs any work without regard to the number of days or hours worked.

Because the plaintiff's weekly pay fluctuated based on the number of days he worked, the Court ruled that his pay was not "a predetermined amount" paid "without regard to the number of days or hours worked." Thus, he was not paid on a salary basis as defined by Section 541.602(a). A separate regulation, Section 541.604(b) allows payment on an hourly, daily, or shift basis to satisfy the salary basis test, but only where the resulting earnings bear a "reasonable relationship" to the guaranteed weekly salary. Helix Energy admitted that the plaintiff's compensation did not satisfy these conditions because Helix Energy did not guarantee the plaintiff that he would receive a payment bearing a reasonable relationship to the typical weekly amount that he usually earned, so the Court did not do deeper analysis into this issue.

Key Takeaways

The Court's decision reinforces the importance of paying exempt employees, including highly compensated employees, on a salary basis and generally strictly complying with the regulations surrounding exemptions and other payment practices. Employers should carefully review their pay practices to ensure compliance, lest they face claims for allegedly unpaid overtime, the penalty for which often entails liquidated (double) damages.

Our Sills Cummis Employment and Labor Practice Group
can assist employers regarding the issues raised in this alert.

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