Companies Can't Demand Silence for Severance, So Do This Before Signing

by Rebeca Piccardo
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Getting laid off feels something like that moment when (spoiler alert!) the characters in *The Good Place* realized they were actually in the bad place: Everything you thought you understood about where you are and what's coming next has been upended. The future feels ominous. Your situation feels unstable and scary and frankly, it's all taking a toll on your mental health.

So if, when you're in this vulnerable state, your soon-to-be-ex-employer offers you severance pay—some financial relief that might help get you through this setback—you'd be silly not to take it, right?

The problem is, to get this optional farewell package, companies have often required laid-off employees like you to sign paperwork that limits what you can say about your work experience at the company—or you'll be sued.

Well, companies can't just silence employees like that anymore, according to a new ruling by the National Labor Relations Board (NLRB). The decision issued on February 21, 2023 by the NLRB restricts companies from demanding silence from laid-off employees through confidentiality, non-disclosure, and non-disparagement provisions in their severance agreements.

In the case that prompted this decision, the NLRB found that the language McLaren Macomb Hospital in Michigan included in its severance agreements to prevent employees from disparaging their ex-employer and disclosing the terms of the agreement were too broad. These sections essentially forced the employees who signed to give up their rights under the National Labor Relations Act, which allows employees to unionize and seek better working conditions without fear of retaliation in the private sector. In short, the offer coerced employees into choosing between maintaining their rights and receiving severance pay.

To be clear, the NLRA and this ruling apply to both union and non-union workers. However, the NLRA doesn't protect workers in the public sector or those in management positions, so the new ruling wouldn't apply to their severance agreements.

If you were laid off and signed a separation agreement *before* the new ruling, it's not automatically invalidated—but your employer might have a hard time enforcing it, says Michael Schmidt, labor and employment attorney with Cozen O'Connor. It's also an open question whether companies will be able to get away with including confidentiality, non-disparagement, and non-disclosure clauses in their severance agreements if they use more specific wording, but it's safe to say that employers are on notice.

So what does this all mean for employees? Here are four tips to keep in mind if you're asked to sign a separation agreement in the wake of this ruling.

1. Look out for the right keywords and red flags.

When looking over a severance agreement, watch out for any sections that involve restrictions like confidentiality, non-disparagement, and non-disclosure—which were the specific provisions the NLRB called out in their recent ruling.

If there's any language in the agreement that sounds restrictive or seems like it only favors the employer, that could be a red flag to pay attention to, says Muse career coach Angela Smith, who's worked with both businesses and individuals in drafting and reviewing severance agreements.

Keep an eye out for legalese, or information that's confusing or hard to understand, so you can get clarification of what everything means in lay terms and know exactly what you're agreeing to, says Muse career coach Barb Girson, CEO and president of Beyond Sales Tactics.

2. Have someone else review the agreement.

Review the document yourself first. But "I would always, always, always recommend that they have a second set of eyes on a separation or severance agreement," Smith says. "Especially when you're going through a separation you didn't see coming or if it's a surprise, you might not be thinking super clearly."

Smith recommends asking someone you trust, whether it's a career coach, an attorney, a mentor, or a trusted colleague. And if you're part of a union, you should definitely check with your union rep. "The union will be able to help provide guidance that is specific to the contract, and they might have resources available to you that you might not have access to otherwise," Smith says.

But because this ruling is so new, chances are you'll want to check with an employment attorney if you or the person you asked to review the agreement find anything that's unclear or a potential red flag. Lawyers who focus on labor and employment are most likely to have up-to-date information and would be able to tell you if there's any specific language in the agreement that sounds like it violates the NLRB's ruling.

Some attorneys might even be willing to do a complimentary consultation, Smith says, and only start charging if you need them to take action, like drafting a letter to the employer. "I've worked with some attorneys who will do a free half-hour review of a separation agreement and give their opinion," she says. "So it's something that doesn't necessarily have to cost a lot of money."

3. Keep track of your deadline to sign.

"Make sure you're clear on what the deadlines are," says Smith, who's seen people lose out on severance pay because they didn't respond to the offer in time.

It's up to the company how much time you have to get back to them, but typically a week is a reasonable timeframe for employees to review the paperwork "without a time crunch or coercion," Smith says.

Depending on where you live, you might have a right to even more time than that, so check your state laws, Girson says. And if you're over the age of 40, you must be given 21 to 45 days to consider an employer's offer under the Age Discrimination in Employment Act.

If you're ever asked to sign something on the spot, that's definitely a red flag. It doesn't mean you should get confrontational or that you shouldn't sign it at all, Smith says, but you should ask for a week to review the document and have someone else look at it as well.

"The employer may push back and want a shorter time frame, but if you're starting with a week then at the worst you'd end up with a few days," Smith says. "If they push for you to sign on the spot even after you've asked for additional time, ask if you can get back to them by the end of the day."

4. Speak up if you want to make changes in the agreement.

If you or your attorney find something in the agreement that's in violation of the NLRB's ruling, bring it to your employer's attention.

If possible, start by speaking to your manager or HR rep directly to keep the conversation simple and amicable, Girson says. You can also lean on others from your support team if you need help organizing your speaking points and practicing how to say them. "You can do this without putting up a wall or throwing gasoline on a sensitive situation," Girson says. "Whatever is a proposed change in writing, you can go back and have your attorney review it."

Because this ruling is new, your employer may not be aware of it. So Girson recommends you start by asking, "Are you aware of this new ruling?" and offer to provide a copy of it. Then, you can describe what you need from them in order to sign. You could say something like, "Would you be willing to agree if I strike through this?" or, "I'm not comfortable signing it with that line or phrase included."

If the answer is "no," then you can explore other options, Girson says, whether it's having your attorney speak for you or contacting the NLRB to ensure your rights are respected as you move on to bigger and better opportunities.

Rebeca Piccardo is an associate editor at The Muse, where she produces branded content focused on company profiles and employee career stories. Before joining The Muse, she was an editorial assistant at Interval International, reported for the *Miami Herald*, and worked as a staff writer at the *South Florida Sun-Sentinel*, where her crime and courts beat reporting was recognized at the Society of Professional Journalists' 2017 Sunshine State Awards. Rebeca holds a bachelor's in journalism with a minor in international relations from Florida International University and is fluent in English and Spanish. Find Rebeca on LinkedIn or Twitter, or visit her website.

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