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New NLRB Decision Renders Previously Legal Severance Agreements Illegal

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The National Labor Relations Board (NLRB or Board) recently ruled that it is illegal for employers to offer severance agreements that include broad non-disparagement and confidentiality provisions to employees, even those without union representation.

The decision in *McLaren Macomb,* 372 NLRB No. 58 (2023)*,* held that overbroad confidentiality and non-disparagement clauses in severance agreements infringe on employees' basic rights under the National Labor Relations Act (NLRA) and, therefore, constitute a violation of Section (8)(a)(1) of the NLRA. In particular, the NLRB found that such provisions impermissibly limit an employee's ability to discuss their working conditions and wages, hinder them from seeking assistance from unions, the NLRB and/or other organizations, and prevent them from assisting other employees who may be seeking support on workplace issues.

The *McLaren Macomb* decision overturned two prior decisions issued by the Board during the Trump Administration, [*Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020)], which permitted employers to include broad confidentiality and non-disparagement provisions in severance agreements with employees.

What Was Previously Allowed By The NLRB?

Previously, as a result of the holdings in *Baylor University* and *IGT,* above, employers could lawfully include broad confidentiality and non-disparagement clauses in severance agreements. The Board's prior reasoning in support of these holdings was that, because the severance agreement exclusively pertained to post-employment activities and was not mandatory, severance agreements containing broad confidentiality and non-disparagement clauses did not necessarily infringe on the employees' Section 7 rights, including the right to or not to organize. Further, as long as the employer did not take coercive actions and the employee voluntarily signed the severance agreement, the employer could lawfully restrict post-employment activities. This all changes with the recent decision in *McLaren Macomb*.

What Did The NLRB Decide And Find At Issue In The Severance Agreement?

The severance agreement at issue in this case contained generic and standard confidentiality and non-disparagement clauses that prohibited employees from: (1) discussing any information or knowledge gained from their employment; (2) making statements that could harm the image or reputation of the employer; and (3) disclosing the terms of the severance agreement to anyone. Specifically, in *McLaren Macomb*, the employer requested employees not to disclose any information about the terms "to any third person, other than a spouse , 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;" and employees were instructed to not "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" -- language previously considered to be relatively standard in severance agreements regarding employment issues.

However, despite the relatively standard nature of the above-referenced confidentiality and non-disparagement provisions, in *McLaren Macomb,* the NLRB ordered the employer to immediately "cease and desist" from presenting employees with a severance agreement containing such provisions. In fact, here, the Board held that even the "mere proffer" of a severance agreement that conditions receipt of its benefits on the forfeiture of Section 7 rights by employees to be violative of the NLRA, even if the employee does not sign the agreement, because the scope of the provisions was so overbroad as to restrict an employee's right to make public statements about the workplace; and prohibit them from disclosing terms of the severance agreement, even including to those who may have received similar agreements. Further in this regard, the Board observed that such provisions might also deter employees from filing unfair labor practice charges, prevent employees from assisting with any investigation conducted by the NLRB or providing assistance to other employees.

Does This Decision Impact Every Employee?

The Board's ruling in *McLaren Macomb* applies only to employees covered by Section 2(3) of the NLRA, whether members of a labor organization or not, but does not apply to executives, managers, supervisors as defined in Section 2(11) of the NLRA, agricultural laborers, guards and or employees of other employers specifically exempted by Section 2(2), including, among others, federal and state government employees.

How Should Employers Respond?

It is important to note that, in *McLaren Macomb,* the Board did not hold that all confidentiality and non-disparagement clauses violated the NLRA. That said, before using any such provisions, they will need to be carefully drafted and narrowly tailored to mitigate the issues addressed by the Board in the case. As a result, employers should immediately review their existing severance agreement templates with their counsel of choice in light of this recent ruling, and exercise caution before seeking to enforce an existing confidentiality or non-disparagement provision against an individual who previously signed an agreement containing such provisions, including assessing whether this recent decision applies to the employee involved. Additionally, and although not specifically addressed in *McLaren Macomb*, employers should carefully evaluate with their counsel whether they should also add a disclaimer to their severance agreement template reassuring the employee that the intent of the agreement is not to restrict any of their rights under the NLRA, including specifically

Section 7.

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