



NLRB REVERSES COURSE ON NON-DISPARAGEMENT AND CONFIDENTIALITY PROVISIONS

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An employer's use of severance agreements that contain sweeping non-disparagement and confidentiality provisions interferes with a laid-off employee's Section 7 rights.

In a groundbreaking decision, the NLRB shot down a severance agreement that contained what had been understood to be acceptable and enforceable non-disparagement and confidentiality provisions. In *McLaren Macomb*, Case 07-CA-263041, the NLRB ruled that an employer cannot demand that a laid-off employee refrain from publicly disparaging the company or otherwise keep confidential the terms of the employee's severance as part of a severance agreement. The NLRB decision overruled decisions of the Board issued just a few years prior.

How did we get here?

Employers have long conditioned post-employment severance payments on, among other things, employees' agreement to keep both the terms of the separation agreement confidential from third parties, excluding spouses or tax, legal or related financial advisors. In addition, employers have wanted the departing employees to refrain from disparaging their soon-to-be former employers.

The prior NLRB affirmed this position with two 2020 decisions, *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, which held severance agreements that prohibited a laid-off employee from publicly disparaging the former employer **did not** violate or interfere with workers' NLRA Section 7 rights (i.e., rights to collectively band together to address terms and conditions of employment).

What the NLRB took issue with in *McLaren*?

At issue in *McLaren* were provisions broadly prohibiting disparagement of the former employer and requiring confidentiality about the terms of the agreement. The employer, which operates a hospital in

Michigan, laid off 11 employees. In doing so, it presented the laid-off employees with a separation or severance agreement that contained 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.

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 took issue with what it viewed as broad sweeping language of both provisions, which the NLRB found interfered with the laid-off employees' Section 7 rights. The NLRB ruled that employers cannot require laid-off employees to avoid publicly disparaging the company as a term or condition of a severance agreement.

The NLRB also found the foregoing confidentiality provision *"preclude[d] an employee from assisting coworkers with workplace issues concerning their employer, and from communicating with others, including a union, and the [NLRB], about his employment."*

The NLRB further described the non-disclosure provision as a *"sweepingly broad bar that has a clear chilling tendency on the exercise"* of rights under Section 7 of the NLRA. Employees subject to the non-disclosure agreement could not, explained the NLRB, cooperate with an NLRB investigation or otherwise raise complaints about the former employer to coworkers, a union, the NLRB, a government agency, the media *"or almost anyone else."*

Notably, the NLRB did not rule that all confidentiality and non-disparagement provisions are *per se* illegal; the McLaren decision simply revived the *"traditional approach of viewing severance agreements requiring the forfeiture of Section 7 rights—whether accepted or merely proffered—as unlawful **unless narrowly tailored.**"* The provisions cited above allowed a laid-off employee to discuss the terms of the severance agreement with only a limited group of individuals. The employer did not, for example, carve out an exception for communicating with the NLRB or former coworkers. Thus, the NLRB held the provisions interfered with the exercise of the laid-off employee's Section 7 rights.

Why is this important?

While many employers employ workforces in what are traditionally low-union participating states, the NLRB has authority over the entire country and its mandates apply to most employers regardless of whether the employer is a union shop.

Who this does not include?

McLaren does not apply to “supervisors.” A “supervisor” means any individual having authority, in the interest of the employer to, among other things, hire, transfer, lay off, promote, discharge or discipline by use of independent judgment.

What do employers need to do moving forward?

Employers should review the confidentiality and non-disparagement provisions in their current severance or separation agreement to ensure that appropriate attention is given to a departed employee's Section 7 rights. Consider the balance between the importance of these provisions as applied to the agreement's terms with the possibility of an NLRB enforcement action.

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