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# Employment Law Note

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# NLRB Rules that Employers May Not Silence Employees with Confidentiality and Non-Disparagement Provisions

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On February 21, 2023, the National Labor Relations Board (the "Board" or the "NLRB") issued a decision in *McLaren Macomb*, 371 NLRB No. 58 (2023), that could significantly alter the terms of severance agreements with departing employees. Under this decision, all employers are prohibited from including provisions that prohibit disparagement of the employer or prevent the employee from discussing the terms of the agreement.

The Board's decision in *McLaren* overruled two prior 2020 Board decisions, each of which focused on the circumstances in which the agreement was presented to the employees rather than on the specific language of the agreement. In *Baylor University Medical Center*, 369 NLRB No. 43 (2020), the Board found that the non-disparagement provision in a separation agreement between the employer and employee did not violate the NLRA. The Board reasoned that, despite its broad language, the agreement "was not mandatory, pertained exclusively to post-employment activities, and therefore, had no impact on terms and conditions of employment, and there was no allegation that anyone offered the agreement had been unlawfully discharged or that the agreement was proffered under circumstances that would tend to infringe on Section 7 rights." The Board reached a similar decision in *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020).

In overruling *Baylor* and *IGT,* the Board held that non-disparagement and confidentiality provisions in severance agreements must be narrowly tailored to ensure they do not impinge on employees' Section 7 rights. The Board's decision in *McLaren* is yet another example of a nationwide effort to limit an employer's power to require confidentiality in workplace disputes. Last year, the state of Washington made such an effort by enacting the "Silenced No More Act," which prohibits employers' use of non-disclosure agreements and non-disparagement agreements to prevent employees from speaking publicly about certain workplace disputes.

## Background

McLaren Macomb is a Michigan hospital that employs approximately 2,300 people. In response to a COVID-19-related reduction in certain medical procedures and government regulations prohibiting nonessential employees from working inside the hospital, McLaren permanently furloughed 11 employees who were represented by a local branch of the AFL-CIO Union. McLaren contemporaneously presented each of the furloughed employees with a "Severance Agreement, Waiver and Release" that offered to pay differing severance amounts to the employees in return for signing their respective agreements and thereby releasing the hospital from any claims arising out of their employment or termination of employment. Additionally, two provisions required confidentiality about the terms of the agreement and broadly prohibited disparagement of the hospital. If the employees were to breach either of the provisions, they could be liable for substantial monetary and injunctive sanctions.

## Legal Basis for the Decision

Section 7 of the National Labor Relations Act ("NLRA") guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Additionally, Section 8(a)(1) of the NLRA says it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Based on these rights, employers generally cannot interfere with employees' ability to speak to others about their working conditions during employment. Historically, the Board has generally found that any such rules contained in an employee handbook and applied to current employees violates the NLRA. With the *McLaren* decision, the Board has now expanded its rule prohibiting restrictions on employees' speech within the scope of severance agreements.

In applying Section 7, the Board found that McLaren Macomb violated Section 8(a)(1) of the NLRA by including confidentiality and non-disparagement provisions in severance agreements offered to a group of furloughed workers. Specifically, the NLRB found that the employer's mere offer of the severance agreements to employees containing the above-referenced provisions violated the NLRA, regardless of whether the employees agreed to sign the severance agreements or the employer attempted to actually enforce the agreements.

## Who is Impacted by the Decision?

Although the Board's decision affects union and non-union employees, it does not generally affect managers, supervisors, and other employees who are exempt from coverage of the NLRA. Such employees include government employees, agricultural laborers, independent contractors, and supervisors (with limited exceptions).

According to Section 2(11) of the NLRA, the term "supervisor" means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." Thus, as an example, employers may still offer a Chief Operating Officer or a Project Manager a severance package in exchange for their agreement to remain silent.

## Unanswered Questions

The Board's decision is rather broad in scope and there are some questions left unanswered. For example, *McLaren* did not discuss the effect of the severance agreements if the employers attempted to enforce the agreement or if the employees had actually signed them.

Additionally, in relation to the non-disparagement language of severance agreements, the Board noted that extreme statements contrary to the core interests of the employer fall outside the protection of the NLRA and may still be prohibited by employers.

The NLRB decision also did not address whether employers could continue to ask for the confidentiality of their trade secrets and proprietary business information.

The Board's decision is still subject to appeal.

## Takeaway for Employers

This case has significant implications for employers as it greatly restricts the rights of employers to present employees with or enforce severance packages and other agreements containing confidentiality and non-disparagement provisions that are overly broad. As a result, the ruling may require many employers to revise language in their standard severance agreements.

For questions about this case and its implications for employers, please contact us at Sebris Busto James.

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