

## Insights: Alerts

# A 180 Degree Decision: National Labor Relations Board Holds Broad Confidentiality and Non-Disparagement Provisions in Severance Agreement Illegal and Returns the Focus of the Legality of These Provisions Back to the Language Itself

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Tuesday's NLRB decision in *McLaren Macomb* explicitly overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020) and reversed the Trump-era decisions that had permitted employers to include broad confidentiality provisions and non-disparagement clauses in severance agreements.

## Background

McLaren Macomb is a unionized hospital in Mt. Clemens, Michigan. Following the outbreak of the COVID-19 pandemic, McLaren Macomb permanently furloughed 11 employees and presented each with a Severance Agreement, Waiver, and Release. All 11 employees signed these agreements. The agreements required the employee to release McLaren Macomb from any claims arising out of their employment or termination of employment and contained the following confidentiality and non-disclosure/non-disparagement provisions:

- 6. 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.
- 7. 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 Board's Ruling

The NLRB found that McLaren Macomb violated Section 8(a)(1) of the National Labor Relations Act by proffering the severance agreements to these 11 employees. The NLRB's ruling went through the legal landscape of this issue, highlighting that until *Baylor*, NLRB precedent was to look at “the language of the severance agreement to determine whether proffering the agreement had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 rights.” The NLRB discussed how the *Baylor* decision shifted focus from the language of the agreement itself to the circumstances under which the agreement was presented to employees.

In this case, the NLRB shifted its focus back to the language of the agreement itself. The Board wrote: “*Baylor* and the *IGT* majority ignore well-established precedent concerning waiver of employee rights. The Board does not write on a clean slate regarding employee waiver of Section 7 rights via a severance agreement. There is a backdrop of nearly a century of settled law that employees may not broadly waive their rights under the NLRA. Agreements between employers and employees that restrict employees from engaging in activity protected by the Act, or from filing unfair labor practice charges with the Board, assisting other employees in doing so, or assisting the Board's investigative process, have been consistently deemed unlawful.”

The NLRB also found that “[w]here an agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates the Act, because it has a reasonable tendency to interfere with or restrain the prospective exercise of Section 7 rights, both by the separating employee and those who remain employed. Whether the employee accepts the agreement is immaterial.”

The NLRB further determined that the language of the severance agreement interfered with, restrained, or coerced employees' exercise of Section 7 rights and because the agreement conditioned the receipt of severance benefits on the employees' acceptance of these unlawful provisions, the proffering of the agreement violated Section 8(a)(1) of the NLRA.

To support its ruling, the Board found that the non-disparagement provision on its face substantially interfered with employees' Section 7 rights for numerous reasons, including (1) that public statements by employees about the workplace are central to exercising employee rights under the NLRA and (2) that the provision prohibits any “statements to [the] Employer's employees or to the general public which could disparage or harm the image of [the] Employer”—including, it would seem, any statement asserting that the Respondent had violated the Act. The Board did note that the provision failed to limit to matters regarding past employment with McLaren Macomb, define the term “disparagement,” apply to only McLaren Macomb instead of it and its parents and affiliated entities, and include a temporal limitation.

The NLRB engaged in a similar analysis surrounding the confidentiality provision. As seen above, the provision prohibited the employee from disclosing the terms of the agreement to any third person. Therefore, this included any lawful or unlawful parts of the agreement. The Board also determined that this provision would reasonably tend to coerce an employee from filing an unfair labor practice charge or assisting with a Board investigation, and such a broad surrender of Section 7 rights contravenes public policy. The Board also emphasized that it prohibited an employee from communicating with their coworkers.

As a final note, this ruling is limited to those employees who have Section 7 rights, which excludes most supervisors and managers, among others.

## What do we know? What do we do now?

It is clear that the NLRB's ruling significantly altered the legal landscape surrounding confidentiality and non-disparagement provisions in severance agreements by shifting the focus back to the terms of the agreement itself and by determining that extremely broad provisions, like the ones included in the agreement in *McLaren Macomb*, are illegal. Employers should consider this decision when drafting and utilizing severance agreements going forward. Those wanting to be cautious could eliminate these terms altogether, while others may decide to include more limited provisions. While the decision does suggest that limited provisions, especially in relation to non-disparagement, could be legal going forward, it is tough to tell until the NLRB releases further guidance. Employers should expect a Memorandum from the NLRB's General Counsel in the near future, explaining the parameters of this decision.

Kilpatrick Townsend's Labor & Employment team are here to assist with any further questions and needs. Our team will continue to monitor any guidance put out by the NLRB and update this Legal Alert accordingly.

## Related People

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