

Talking About The NLRB's New Rulings on Confidentiality, Non-Disparagement, and Severance Offers

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There's been another flip-flop at the National Labor Relations Board. The target this time? Severance agreements.

During the Trump administration, the NLRB issued a set of rulings that generally allowed employers to include confidentiality and non-disparagement clauses in severance agreements. These provisions are used to protect an employer's reputation from disgruntled former staff while safeguarding the more sensitive details of the agreement (such as compensation) from public view. Last week, the Board wiped the deck with these Trump-era decisions. Now, any such clause may be deemed unlawful if it too broadly restricts a worker's rights, including to speak out against their former employer.

What does this mean for severance agreements past and future? We take a look.

The highlights of the NLRB's recent decision in *McClaren Macomb*.

McClaren Macomb, a unionized teaching hospital, was forced to furlough eleven workers during the COVID pandemic. The employees' severance agreements included standard confidentiality and non-disclosure provisions used by almost all employers in this type of situation. Generally speaking, the workers were barred from disclosing the details of the agreement to others (including their coworkers) and from making public statements disparaging the hospital.

Under Trump-era NLRB rules, these provisions would have been on solid ground. The Board had given employers wide latitude in enacting severance agreements, essentially permitting them unless the employer had committed a separate unfair labor practice. However, when hospital workers filed charges, the new Board got an opportunity to change course. And, in keeping with recent Board trends, it did.

The *McClaren* ruling expressly overruled previous decisions in *Baylor University* and *International Game Technology*, which were handed down during the Trump administration. For their part, those decisions had *also* reversed longstanding precedent. Essentially, this new decision reverts back to an old standard. A severance agreement will violate the National Labor Relations Act if its terms have a "reasonable tendency" to interfere with, restrain, or coerce employees in exercising their Section 7 rights.

What does the NLRB's decision mean for employers?

Employers must proceed with caution. The NLRB used this decision to reinforce its view that an employee's right to speak about their employment covers a "wide range" of third parties, including judicial, legislative, and political forums as well as news and social media platforms. The boundary of that right? When the communication is "not so disloyal, reckless, or maliciously untrue as to lose" protection.

The Board here takes a decidedly pro-employee stance, describing its "duty to protect" the Act's "broad grant of rights" and reasoning that any such agreement has inherent coercive potential. To that end, the Board reasoned that *even offering* such an agreement may constitute an unfair labor practice, regardless of whether the employer seeks to enforce it.

Does this mean confidentiality and non-disparagement clauses are banned entirely?

No. The Board did not suggest that all confidentiality or non-disparagement clauses are *per se* unlawful. *McClaren* dealt with broadly drafted clauses restricting a wide range of activity. In striking down the employer's non-disparagement clause, the Board reasoned that the clause prohibited "any statement" that could include labor issues and disputes or the terms and conditions of employment. The language could also chill efforts to assist other employees, including cooperating with future Board investigations.

Similarly, the confidentiality provision at issue in *McClaren* was broad and prohibited even disclosures about the existence of the agreement, which the Board reasoned could also interfere with future charges or prevent the employee from assisting a future NLRB investigation. Even more, the Board cautioned that the clause would prohibit employees from discussing severance terms with former coworkers who may be offered similar agreements or with union representatives or others attempting to unionize. The severance agreement in *McClaren* did not include carve-out language stating that nothing in the agreement should be construed to interfere with or restrict the employees' Section 7 rights.

It is also worth noting that managers and supervisors are not afforded Section 7 rights under the NLRA. Therefore, the *McClaren* decision should not have any impact on provisions in separation agreements with managers and supervisors.

What should employers do now?

Employers should review and narrowly tailor any confidentiality and non-disparagement clauses in their existing agreements and ensure the employees' Section 7 rights are protected. This may include affirmative exemptions for participation in protected activities and for assisting others in doing so, including cooperating with any Board investigative process. It may be prudent to:

- **Scrutinize your agreements.** An employer relying on broad, sweeping clauses like those in the *McClaren* case should consider affirmative corrective steps discussed above.
- **Consult counsel.** If you have concerns about existing provisions, consult an attorney to ensure your agreements are lawful and you are protected from any future legal liability.
- **Stay tuned.** With an active and more progressive Board, there is more to come. We will keep you updated on all major NLRB actions in the days and months ahead.