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NLRB Doubles Down on Restrictions on Confidentiality and Non-Disparagement Provisions in Severance Agreements, with Board and GC Weighing In

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On February 21, 2023, the National Labor Relations Board ("NLRB" or the "Board") issued a decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), regarding the enforceability of confidentiality and non-disparagement provisions in severance agreements for non-supervisory employees, irrespective of union status. The Board ruled that an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") by offering a severance agreement to employees that includes confidentiality and non-disparagement terms restricting the exercise of the employees' NLRA rights. On March 22, 2023, NLRB General Counsel ("GC") Jennifer Abruzzo issued a non-binding memorandum[1] expressing her position on the scope and application of the *McLaren Macomb* decision, including that it applies retroactively to severance agreements already in effect. In light of this ruling and the GC's memorandum, employers should carefully consider whether changes may be required to their severance agreements.

Impacted Severance Agreements

The Board's decision impacts severance agreements offered to both unionized and non-unionized employees who do not hold supervisory roles.[2] Under the NLRA, "supervisors" are those employees who exercise authority over other workers, using "independent judgment."[3] To "exercise authority" under the NLRA is, by way of example, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or direct other employees.[4]

Brief Summary of the *McLaren Macomb* Case

During the COVID-19 pandemic, a Michigan hospital furloughed unionized employees and offered them confidential release agreements in exchange for a severance payment. Those agreements prohibited employees from (i) disclosing any part of the severance agreement to anyone other than a spouse or professional advisor, and (ii) making statements to other employees or the general public which could "disparage or harm the image of" the hospital. The union filed a complaint with the NLRB against the hospital alleging unfair labor practices. Following a hearing in June 2021, an administrative law judge ("ALJ") held that the hospital did *not* violate Section 8(a)(1) merely by offering the severance agreement (with its confidentiality and non-disparagement provisions) to the employees.

The ALJ relied on the NLRB's 2020 decisions in *Baylor University Medical Center* ("*Baylor*") and *IGT d/b/a International Game Technology* ("*IGT*"). The *Baylor* and *IGT* cases had overturned prior precedent that focused on the language of the severance agreement at issue to determine if there was an unlawful infringement on an employee's NLRA Section 7 rights.[5] *Baylor* and *IGT* instead held that broad confidentiality and non-

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disparagement provisions were generally permissible absent additional circumstances such as a finding of wrongful termination or an employer harboring animus against Section 7 activity.[6]

The Board — in a three-to-one decision with its sole Republican member dissenting — reversed the ALJ's decision and overturned *Baylor* and *IGT*. The Board held that both the confidentiality and non-disparagement provisions in the severance agreement unlawfully restricted the employees' rights under Section 7 of the NLRA.[7] The Board ruled that an offer of severance in exchange for confidentiality and non-disparagement terms that would have the "reasonable tendency to restrain, coerce, or interfere" with Section 7 rights violates Section 8(a)(1) of the NLRA.

Analysis of Confidentiality Provision

The *McLaren Macomb* confidentiality provision provided: "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."

While such a provision may seem standard to many employers, the Board majority held that precluding employees from disclosing terms of the severance agreement — including those that may be unlawful — violated employees' Section 7 rights to assist coworkers and the NLRB. Specifically, the majority explained that by prohibiting any discussion of the agreement's terms, employees were in effect prevented from any future discussion of a possible "labor issue, dispute, or term and condition" found in or caused by the agreement.

In addition, the *McLaren Macomb* non-disclosure clause stated: "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."

The Board majority held that this language would impermissibly preclude employees from cooperating with NLRB investigations and litigation of unfair labor practices, in violation of the employees' Section 7 right to participate in the Board's investigative process.

The Board also provided reasoning that may assist employers as they craft severance agreements going forward. Specifically, the Board stated that severance agreements should not preclude an employee from "assisting coworkers with workplace issues concerning their employer"—"the heart of protected Section 7 activity."

Notwithstanding this result in *McLaren Macomb,* GC Abruzzo's recent memorandum acknowledges that confidentiality clauses that are "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful" so long as they do not effectively preclude employees from communicating and/or cooperating on workplace issues.

Analysis of Non-Disparagement Provision

The *McLaren Macomb* non-disparagement section stated: "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." Notably, the non-disparagement provision at issue did not include a definition of "disparagement" and contained no temporal limitation. Also absent from the severance agreement was any express statement making clear that nothing in the severance agreement limited employees' exercise of Section 7 rights.

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The Board majority held that the non-disparagement clause unlawfully created "a sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights." More specifically, the Board held that the agreement impermissibly infringed on the employees' Section 7 right to raise complaints about the employer with "their fellow coworkers, the Union, the Board, any other government agency, the media, or almost anyone else." Based on what the Board majority characterized as a plain reading of the NLRA, it held that an employer may not infringe on any employee's critique of "employer policy" as a general matter, so long as it is outside of the "disloyal, reckless, or maliciously untrue" exclusion in the statute.

The Board provided reasoning that may guide employers in revising severance agreements. Specifically, the Board cautioned against language that would effectively restrict future efforts by a worker "to assist fellow employees." Such assistance could include cooperating with an NLRB investigation, which the Board held extends to assistance of both current and former employees.

Again, notwithstanding the Board's broad holding, according to GC Abruzzo's recent interpretation of the Board's decision a "narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation" may be lawful.

Takeaways

The decision reflects continuing efforts by the current Board not only to reverse recent Trump-era NLRB precedent but also to move aggressively toward expanded union and employee protections. NLRB General Counsel Abruzzo has criticized the prior Board under President Trump and stated her intention to bring cases capable of reversing the Trump-era doctrinal "shifts [that] include[d] overruling many legal precedents which struck an appropriate balance between the rights of workers and the obligations of unions and employers."

With this decision, the Board has now prohibited offering severance agreements with broad confidentiality and non-disparagement provisions that may restrict non-supervisory employees' exercise of their NLRA rights. This prohibition applies to the act of offering the agreement itself, regardless of whether the employee ultimately accepts its terms. The motive of the employer or surrounding circumstances — which the *Baylor Medical* and *IGT* decisions found critical — do not impact the Board's analysis under *McLaren Macomb*, which examines the text of the agreement itself. The GC's memorandum makes clear her view that only narrowly tailored confidentiality and non-disparagement provisions are permitted under the NLRA.

The GC also identifies other provisions that could potentially draw the Board's scrutiny (i.e. broad restrictive covenants, broad releases that extend beyond employment claims, and broad cooperation clauses). Nonetheless, the GC notes that generally unlawful provisions can be voided without voiding an entire agreement, regardless of whether there is a severability clause. The Board encourages employers to take affirmative steps to address any agreements presently out of compliance.

The *McLaren Macomb* holding may face court challenges either in this case or in subsequent cases.

In the meantime, employers should consider whether broad non-disparagement and confidentiality provisions are necessary in severance agreements offered to non-supervisory employees. According to the GC, any disclaimer language should focus on "Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees and likely to be chilled by overbroad rules." Employers should consider including an express statement in the agreement that makes clear that nothing in the Agreement precludes employees from exercising Section 7 rights. Disclaimers of this nature would fit with many standard carveouts for other

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protected activity under state and federal law. Although GC Abruzzo takes the position in her recent memo that including disclaimer language in a severance agreement "would not necessarily cure overly broad provisions," she acknowledges that it nonetheless can be useful to "resolve ambiguity," and such carve-outs likely will strengthen employer arguments that the agreement does not violate the NLRA.

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[1] A GC's memorandum aims to provide policy guidance and is not legally binding or owed deference by courts. *See Bray Sheet Metal Co. v. Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers*, No. 21-2374, 2021 WL 6097517 (8th Cir. July 21, 2021).

[2] GC Abruzzo's memo explains that although supervisors are generally not protected by the NLRA, under existing Board precedent, supervisors may be protected from retaliation in certain circumstances for assisting non-supervisory employees in exercising rights protected by the NLRA. *Parker-Robb Chevrolet,* 262 NLRB 402 (1982), enfd. sub. nom. *Automobile Salesmen Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); For example, the GC asserts that it would be unlawful for an employer to retaliate against a supervisor for refusing to offer an unlawful severance agreement or to offer a severance agreement to a supervisor in order to prevent the supervisor from participating in a Board proceeding.

[3] *See* 29 U.S.C. § 152

[4] *Id.*

[5] *See*, *e.g.*, *Shamrock Foods Co.,* 366 NLRB No. 117 (2018), enfd. 779 F. App'x 752 (D.C. Cir. 2019); *Clark Distribution Systems*, 336 NLRB 747 (2001); *Metro Networks*, 336 NLRB 63 (2001); *Phillips Pipe Line Co*., 302 NLRB 732 (1991).

[6] *See Baylor University Medical Center* (369 NLRB No. 43 (2020)); *IGT d/b/a International Game Technology* (370 NLRB No. 50 (2020)).

[7] Section 7 guarantees non-supervisory 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." 29 U.S.C. § 157.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or Jason Schwartz and Katherine Smith.

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