Professional Perspective

NLRA Limits on Non-Disparagement & Confidentiality Provisions

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In a reversal of Trump-era National Labor Relations Board precedent, the Board found in *McLaren Macomb* that non-disparagement and confidentiality provisions in a severance agreement violate the National Labor Relations Act (NLRA) if those provisions have "a reasonable tendency" to interfere with an employee's NLRA Section 7 rights. The Board also held that merely offering an agreement with such provisions to an employee is unlawful, even if the employee does not sign it or the employer does not enforce it.

The *McLaren Macomb* decision does not outlaw all confidentiality and non-disparagement provisions, but instead finds that those provisions with employees covered by the NLRA are unlawful if they are not "narrowly tailored." Employers should revisit their use of non-disparagement and confidentiality provisions in severance and other employment agreements in light of this decision.

Depending on the employer's preferences, risk tolerance, and employees at issue, employers may want to consider removing those provisions or taking a more surgical approach to narrowing or limiting non-disparagement and confidentiality provisions in agreements with employees.

Reversal of Trump-Era Precedent

The NLRA generally applies to most private employers in the US, with limited exceptions. The NLRA also covers most employees of covered employers, but it does not apply to supervisors, executives, directors, and independent contractors.

Under Section 7 of the NLRA, covered employees have the right to engage in or refrain from concerted activities for the "purpose of collective bargaining or other mutual aid or protection." It is a violation of the NLRA "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." Prior to the Trump administration, the Board found that employers violate the NLRA if they require employees to enter non-disparagement or confidentiality agreements that could be "reasonably construed" by an employee to prohibit the exercise of these rights.

In two key Trump-era decisions, *Baylor University Medical Center*, 369 Board No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 Board No. 50 (2020), the Board ruled that an employer will not violate the NLRA by merely offering severance agreements with non-disparagement and confidentiality provisions unless the employer engages in some additional wrongdoing, such as firing an employee for supporting a union.

McLaren Macomb Decision

The *McLaren Macomb* decision involved a Michigan hospital, where approximately 350 of its service employees had decided to unionize in August 2019. A few months after the union was certified, with the onset of the Covid-19 pandemic, the employer decided to lay off 11 of the newly unionized employees. The employer offered the employees—without notifying the union—a severance agreement containing 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.
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> **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 severance agreements did not contain any disclaimers or limiting language to notify the employees that the confidentiality and non-disparagement clauses did not prohibit them from exercising their rights under the NLRA.

The Board found that these clauses were unlawful because they could infringe on the employees' protected Section 7 NLRA rights. Specifically, the Board found that the provisions were not "narrowly tailored" and could dissuade employees from exercising several Section 7 NLRA rights, including:

- Filing an unfair labor practice charge with the Board
- Assisting fellow employees with filing charges with the Board
- Cooperating with a Board investigation of an unfair labor practice charge
- Engaging in protected concerted activities, such as discussing terms and conditions of employment with their co-workers.

The Board also found that the non-disparagement provision was overbroad because it had no temporal limitation and failed to define defamation or limit its scope to communications that are so "disloyal, reckless or maliciously untrue as to lose the [NLRA's] protection." Instead, the agreements, according to the Board, could improperly prohibit employees from making any negative or potentially harmful or disparaging statements to their former coworkers or the general public about the hospital and numerous other entities, including the employer's parents and affiliates as well as each of their respective officers, directors, employees, agents and representatives. The Board found that the non-disparagement provision would have a tendency to chill the employees' efforts to assist their coworkers, including in connection with the Board's investigation and pursuit of unfair labor practice charges.

The Board similarly found that the confidentiality provision in the severance agreement unlawfully prohibited the employees from disclosing the existence and terms of the agreement "to any third person." In the Board's view, the confidentiality provision would reasonably tend to coerce the employee from filing an unfair labor practice charge, assisting the Board in an investigation, or even discussing the terms of the severance agreement with their union representatives and former coworkers. Noting that Board precedent has repeatedly found that Section 7 rights can apply to former employees, the Board found it irrelevant that the employees at issue would have been former employees at the time the severance agreement was presented to them.

In overturning Baylor and IGT, the Board held that employers could violate the NLRA by merely offering a severance agreement that conditions severance benefits on complying with non-disparagement and confidentiality terms that could forfeit NLRA rights, even if the employee refuses to sign it or the employer does not enforce the agreement. The Board also unanimously found that the employer violated the NLRA by laying off the employees without first notifying the union and giving it an opportunity to bargain about the layoff and its effects.

Key Considerations for Employers

Although the *McLaren Macomb* decision clearly reverts to a pre-Trump, employee-friendly standard, it does not outlaw confidentiality and non-disparagement provisions altogether. Rather, the Board indicates that those provisions can be lawful if "narrowly tailored," but it unfortunately declined to provide clear guidance for when such provisions could meet that standard. The Board's decision may be appealed. Pending such challenge, the *McLaren Macomb* decision will likely remain the law unless or until a new Board overturns it.

For now, employers should proceed cautiously when using confidentiality and non-disparagement provisions in severance agreements. Some risk averse employers may wish to remove non-disparagement and confidentiality provisions from their employment agreements. Other employers, however, may wish to take a more surgical approach to these provisions in consultation with experienced counsel.

The right approach for employers will likely depend on various factors, including the employer's preferences, risk tolerance, and the type of restricted employee at issue. The following are some key considerations for deciding how best to proceed in light of the *McLaren Macomb* decision.

- **The NLRA Only Protects Non-Supervisory Employees**: The NLRA does not apply to most supervisors and properly classified independent contractors. Under the NLRA, supervisors generally include any employees having the authority to hire, fire, discharge, direct, and exercise other responsibilities relating to employees. Because most managers, executives, directors, and independent contractors are excluded

from NLRA coverage, non-disparagement and confidentiality provisions with those individuals should not be affected by this ruling.

Employers, however, may want to include some carveout language in confidentiality and non-disparagement provisions with these individuals since it is possible that a broadly drafted provision might be interpreted to unlawfully prohibit them from aiding or assisting in the Board's processes and interfere with the rights of NLRA-covered employees seeking their assistance in unfair labor practice proceedings or investigations.

- **Consider Adding Carveouts of NLRA Rights**. Although the Board in *McLaren Macomb* did not expressly address the issue of whether a carveout of NLRA rights would be sufficient to save otherwise overbroad confidentiality and non-disparagement provisions, it left the door open for that possibility. Employers should consider adding such a carveout to—or updating existing carveouts in—their agreements containing non-disparagement and confidentiality provisions with employees.

  Although it is unclear whether the Board under the Biden administration would find a carveout sufficient to save those provisions, employers might consider adding language that makes clear that employees are not restricted from: engaging in rights protected by the NLRA—such as discussing terms and conditions employment with co-workers; filing unfair labor practice charges; assisting other employees in filing unfair labor practice charges; and assisting in the Board's investigation process.

- **Consider Limiting Confidentiality & Non-Disparagement Provisions.** There may be other ways to further narrowly tailor non-disparagement and confidentiality provisions. Employers could consider adding limitations to those provisions that the Board found were lacking in the agreements at issue in *McLaren Macomb*.

  Whether they would meet an employer's business objectives would need to be separately evaluated, but these limitations could include placing a temporal term on the non-disparagement—e.g., one year post-employment—and restricting non-disparagement provisions to the types of conduct found unlawful under Board precedent—e.g., maliciously false statements about the employer's products, services, or customers.

- **Include Severability Provisions:** Employers should include severability provisions in their severance and other employment agreements. A well-drafted severability provision will generally protect the entire agreement or other provisions of the agreement—e.g., release of claims—from being struck down if the non-disparagement or confidentiality provision is found to be unlawful.

- **Consider Impact on Prior Agreements:** The NLRA has a six-month statute of limitations for filing unfair labor practice charges. Any agreements with non-disparagement and confidentiality provisions entered into more than six months ago would not likely provide employees with a basis for timely filing unfair labor practice charges relating to those agreements. Employers should carefully consider and consult with counsel, however, before attempting to enforce non-disparagement or confidentiality provisions contained in prior agreements.

- **Unionized Employers Must Be Mindful of Their Bargaining Obligations.** Although the NLRA can apply to non-union employers, employers with unionized workforces are at a higher risk of potential Board enforcement actions. Unionized workers and their unions generally are more inclined to pursue unfair labor practice charges with the Board than non-unionized workers.

  Indeed, the employer in *McLaren Macomb* failed to notify the union about the decision to terminate 11 newly unionized employees, thereby depriving the union of the opportunity to bargain about the layoff and its effects, such as higher severance packages. Employers with unionized workers should generally provide notice to the union, and satisfy their statutory decision and effects bargaining obligations, when presenting severance agreements to union-represented employees.

- **Trend of Laws Restricting Confidentiality & Non-Disparagement Provisions.** Employers also should be mindful of the trend of federal and state laws restricting employers using confidentiality and non-disparagement provisions. Over the past several years, a growing chorus of states—e.g., New York and California—have passed laws restricting the use of confidentiality and non-disparagement provisions in employment agreements.

  Although these laws vary in their requirements, they generally prohibit those types of provisions if they could be interpreted to restrict employees from discussing various unlawful acts related to the workplace or other potential claims, such as discrimination, harassment, and retaliation. In December 2022, the federal Speak Out Act was signed into law prohibiting enforcement of pre-dispute non-disclosure and non-disparagement provisions in sexual harassment or sexual assault disputes.

McLaren Macomb also is the latest in a string of Trump-era precedent that NLRB's General Counsel Jennifer Abruzzo committed to overturning, as referenced in her August 2021 Mandatory Submissions to Advice Memorandum. Accordingly, it would be prudent for employers to review that Advice Memorandum for other Trump-era decisions that the Board may seek to overturn under the Biden administration.