

NLRB reverses course to establish new restrictions on severance agreements

On February 21st, the National Labor Relations Board (“NLRB” and the “Board”) ruled that overbroad non-disparagement and non-disclosure provisions in severance agreements are an “unfair labor practice” in violation of Section 7 of the National Labor Relations Act (“NLRA” or the “Act”). This ruling, in McLaren Macomb is a reversal of its prior decisions in Baylor University Medical Center, 369 NLRB No. 43 (2020) and IGT d/b/a Inter-national Game Technology, 370 NLRB No. 50 (2020), which have been relied upon by employers for the past three years.



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What are Section 7 rights?

When most employers think of the NLRA they think of unions and union related activity. It is important to note, however, that the NLRA protects the rights of union and non-union workers alike when it comes to Section 7. Section 7 of the Act is a basic federal law that protects the rights of covered workers to engage in protected concerted activities, to form unions, and to engage in collective bargaining activities with their employers over the terms and conditions (e.g., wages, leave policies, etc.) of their employment.

Who are covered workers?

Not all workers are protected workers under Section 7. Section 7 does not apply to supervisors, managers, public sector workers or workers properly classified as independent contractors. The McLaren Macomb ruling only applies to those protected workers covered by Section 7.

What happened in the McLaren Macomb case?

In the McLaren Macomb case, a hospital offered a severance agreement in connection with its furlough of 11 employees. The severance agreement contained a non-disparagement and non-disclosure clause containing the following language:

- **Non-disparagement:** “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.”
- **Non-disclosure:** “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.”

In overruling its prior decisions, the Board held that the non-disparagement and non-disclosure clauses violated Section 7 of the NLRA by restricting these furloughed employees from exercising their rights to discuss their terms and conditions of employment with their former coworkers. The Board also affirmed that Section 7 rights extend to discussions with a wide range of third parties and are not just limited to coworkers.

What are the next steps?

Employers who are presenting severance agreements to departing employees should take several factors into consideration as to whether to include non-disparagement and non-disclosure provisions in these agreements. First, the employer should consider whether the departing employee receiving the severance agreement is a covered employee. If the departing employee is a covered employee, employers need to revise their non-disparagement and non-disclosure provisions to include cave outs and exceptions that would reduce the risk that the Board would find such provisions to be overbroad, as it did in McLaren Macomb.

We encourage employers who have specific questions about the NLRB's recent ruling on severance agreements or other related employment issues to contact Jodi Bohr at jrb@tblaw.com or (602) 255-6082, to ensure your workplace is in compliance with employment laws.

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