



NLRB RULES THAT CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS IN SEVERANCE AGREEMENTS VIOLATE EMPLOYEES' SECTION 7 RIGHTS AND ARE UNLAWFUL

On February 21, 2023, the National Labor Relations Board (“NLRB”) issued its Decision and Order in *McLaren Macomb*, Case No 07-CA-263041, overruling Trump-Era precedent and holding that broad confidentiality and non-disparagement clauses in severance agreements for employees who are permanently furloughed are unlawful. The Board determined that, when faced with a question of whether a non-disparagement or confidentiality clause is unlawful, the proper inquiry is whether, on its face, the language of such clauses restricts the exercise of employees’ statutory rights under Section 7 of the National Labor Relations Act, which protects workers’ rights to engage in protected concerted activity to improve their working conditions.

Previously, in *Baylor University Medical Center*, 369 NLRB No. 43 (2020), the Board ruled that the language of severance agreements could only be considered unlawful if the decision to separate the employee itself was unlawful. Here, the Board overruled such precedent, finding it arbitrary to fail to consider the language of a severance offer in determining whether that offer was unlawful. The Board also found that no animus towards Section 7 activity is required to find that severance offers which restrict Section 7 activity are unlawful, and upheld long-standing Board precedent that “the test [for interference, restraint, and coercion under Section 8(a)(1) of the Act] is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.”

The Board further re-iterated that Section 7 rights are broad in scope and offer wide protection to employees. Such rights extend to former employees, are not limited to discussions with co-workers, and can be exercised in channels outside the immediate employer-employee relationship or expressed in public. While the Board did not hold that a severance agreement can never include a confidentiality or non-disclosure provision¹, it did find that the act of offering a severance agreement which conditions receipt of severance benefits on a forfeiture of statutory rights is unlawful 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.”

Specifically in this case, the Board found that the non-disparagement provisions in the severance offer at issue were unlawful on their face because they prohibited employees from making any statements which “could disparage or harm the image of the Employer.” This broad language prohibits the separated employees from speaking about their workplace – a central and fundamental right granted by Section 7 – and is therefore unlawful. The Board found that the lack of any time limitations on this prohibition and the further prohibition against disparagement of the Employer and its affiliates made the language impermissibly broad. Further, the

¹ The Board did acknowledge that these provisions could be lawful, as previously found by the Board, if “narrowly tailored,” though it declined to define what constitutes a narrowly tailored provision.

confidentiality provisions in the severance agreements at issue prohibited employees from sharing the terms of the agreement, even if they believed those terms were unlawful or if they wanted to assist other employees facing a decision of whether to sign such an agreement. The Board found that requiring employees to sign on to these agreements would have a tendency to chill their Section 7 rights, and therefore, the confidentiality and non-disparagement clauses were unlawful.

The Board's decision in *McLaren Macomb* will have wide-reaching impact for employees. Employers will no longer be able to condition the receipt of severance funds on an employee's silence. An employee's right to discuss their terms and conditions of work, including those terms and conditions offered at separation, is an important part of the rights guaranteed by the National Labor Relations Act. This decision ensures that this right will be protected for the benefit of all employees, even after the employment relationship has ended.

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