

Could Employers Soon Have More Flexibility in Severance Agreements?

October 16, 2026
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In 2023, the National Labor Relations Board issued its landmark decision in *McLaren Macomb*, fundamentally changing how employers draft severance agreements. The Board held that employers violate the National Labor Relations Act (NLRA) when they offer severance agreements containing overly broad confidentiality and non-disparagement provisions that could interfere with employees' rights under Section 7 of the Act. The Board further concluded that merely offering such an agreement may constitute an unfair labor practice, even if the employee never signs it.

What Did *McLaren Macomb* Hold?

The severance agreements at issue prohibited employees from disclosing the agreement's terms and from making statements that could disparage the employer. The Board found these provisions unlawful because employees could reasonably interpret them as restricting their ability to discuss workplace conditions, communicate with coworkers, cooperate with unions, or participate in NLRB proceedings.

Why Nonunion Employers Should Care

Although the case arose in a unionized workplace, the NLRA protects most private-sector employees, regardless of union status. As a result, *McLaren Macomb* affected employers with both unionized and nonunion workforces. Employers across industries revisited severance agreements and added carve-outs, preserving employees' rights to engage in protected concerted activity and communicate with government agencies.

The Decision's Reach Extended Beyond Confidentiality and Non-Disparagement Clauses

Shortly after the decision, then-General Counsel Jennifer Abruzzo issued guidance explaining that lawful severance agreements remain permissible but warning that *McLaren Macomb* may also impact other common provisions. The memorandum identified noncompete clauses, no-solicitation provisions, no-poach agreements, overly broad releases of claims, broad covenants not to sue, and certain cooperation requirements as provisions that could potentially interfere with employees' Section 7 rights.

The memorandum also emphasized that simple disclaimer language or "savings clauses" would not automatically cure otherwise overbroad restrictions.

A Potential Shift on the Horizon

The future of *McLaren Macomb* may be uncertain. In a recent memorandum outlining agency priorities, NLRB General Counsel Crystal Carey identified *McLaren Macomb* as a decision her office is seeking to have reconsidered and overruled. While that memorandum does not change existing law, it signals a significant policy shift within the agency and raises the

possibility that a future Board could restore greater flexibility for employers when drafting severance agreements.

The Bottom Line

For now, *McLaren Macomb* remains binding law. Employers should continue to ensure that severance agreements do not contain provisions that could be interpreted as restricting employees' NLRA rights. However, with the current General Counsel actively seeking reversal of the decision, employers should closely monitor developments that could once again reshape the rules governing severance agreements.