

Time to Review Settlement and Severance Agreement Templates

March 23, 2023

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In a surprising decision that reveals the [National Labor Relations Board's \(NLRB\)](#) position on perceived threats to employees' right to organize under the [National Labor Relations Act \(NLRA\)](#), the Board held in [McLaren Macomb, 372 NLRB No. 58 \(2023\)](#), that even if an employer (with a unionized or non-unionized workplace) merely *offers* a severance agreement containing broad confidentiality and non-disparagement provisions, it is illegal.

Note: *The Board's ruling only applies to nonmanagerial, nonsupervisory employees with Section 7 rights under the NLRA.*

The current Board's view is that agreements are unlawful on their face if they contain terms with a "reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights" under the NLRA. As such, if an employee files a complaint, the NLRB will now review severance agreements for language that's too "broad or coercive."

In *McLaren Macomb*, the NLRB found that asking an employee to agree to keep terms of an agreement confidential (even with exceptions for spouses, lawyers, and tax advisors, and as ordered by a court or agency) violated the NLRA because the former employee would be unable to discuss it with current employees, who might want to organize. The Board also decided that a non-disparagement agreement was illegally overbroad when it required the employee not to make statements that could disparage or harm the image of the "employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives."

Note: *This restriction has no time limitation and covers other entities and persons, not just the employer.*

Courts don't have to follow the rulings of the NLRB. The courts always look to whether a non-disparagement agreement is "reasonable under the circumstances," and I believe that a non-disparagement clause limited to *the company* would be reasonable as long as the non-disparagement clause doesn't purport to last forever and cover too many entities. Would a court agree that it's illegal to promise not to disclose the agreement's terms? The ability to require confidentiality serves as the important public policy of encouraging settlements outside of court. That said, having your template severance and settlement agreements with employees reviewed for compliance with the Board's rationale and holding it is not very time-consuming. I'm recommending this to my clients — tweaks would not be difficult. If you have questions, please reach out.