Employers Beware: Severance Agreements Containing Broad "Gag Clauses" Are Unlawful

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Client Alert

Last week, in a 4-1 vote, the National Labor Relations Board ruled that agreements containing broad confidentiality and non-disparagement provisions are unlawful. Remarkably, this decision overruled three years of precedent upholding non-disclosure and non-disparagement provisions in severance agreements. The Board's decision not only reverted to the old standard -- pre-*Baylor University Medical Center*[1] and *IGT d/b/a International Game Technology*[2] -- but once again highlights the significance of the Board's political composition and the resultant indifference to *stare decisis*.

Historically, the Board upheld its long-standing precedent that severance agreements proscribing non-disparagement and confidentiality clauses are unlawful when they restrict the exercise of statutory rights, such as requiring employees to waive certain Section 7 rights to engage in concerted activities. Before 2020, the Board focused on the plain language of the severance agreement when determining whether such provisions were lawful. However, after over eight decades of precedent, the Board reversed itself in a case involving the presentment of a severance agreement containing a confidentiality provision and a "no participation in claims" clause to several employees. *See Baylor Univ. Med. Ctr.,* 369 NLRB No. 43, slip op. at 2 (2020). The *Baylor* Board, consisting of mostly Republicans, shifted focus from the specific language of the agreement to the coercive nature of the circumstances under which the agreement was presented. It reasoned that there was no statutory violation because the proffered severance agreement was not mandatory, did not affect the employee's pay or benefits, and was not offered coercively. *Baylor*, slip op. at 1; *see also*, *IGT d/b/a Int'l Game Tech.,* 370 NLRB No. 50, slip op. at 2 (2020) (a similar case involving a severance agreement proffered to departing employees). Thus, under the *Baylor* logic, an employer may offer unlawful provisions to an employee provided there are no coercive circumstances surrounding the presentation. In the time after the *Baylor* decision, employers were free to insert arguably objective provisions, such as broad confidentiality, non-disclosure and non-disparagement clauses, regardless of their legality. Now, only three years later, with a Democratic majority, the Board has overruled *Baylor* and *IGT*, and reverted back to the old standard, which held for years that an employer's mere presentment of a severance agreement containing broad proscription clauses is unlawful. *See McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, Intern'l Union,* 372 NLRB No. 58 (2023).

In the *Macomb* matter, Michigan hospital McLaren Macomb furloughed 11 of its bargaining unit employees and presented them with severance agreements containing non-disparagement and non-disclosure provisions. Seeking to protect employee interests and public rights, the mostly Democratic Board ruled that Macomb violated Section 7 of the National Labor Relations Act (NLRA) when it presented the furloughed employees with agreements that contained unlawful provisions. The Board asserted that the relevant inquiry is whether the language of the severance agreement has coerced, interfered with, or restrained an employee's Section 7 rights. *See Macomb*, slip op. at 7. After applying that inquiry and analyzing the *Baylor* and *IGT* cases, the Board ruled that confidentiality and non-disparagement clauses that restrict

employees' statutory rights are unlawful and, therefore, the presentment of such provisions in an agreement renders the agreement unlawful. The *Macomb* analysis found the confidentiality and non-disparagement provisions to be overly broad because they interfered with an employee's right to critique the employer, discuss labor disputes or terms of the agreement, engage co-worker assistance and support, or make statements to other employees, the union or the general public at large about such things as the employer's statutory violation. *Macomb,* at 8-9. The *Macomb* decision implies that carefully crafted confidentiality and non-disparagement provisions would be permissible, provided they are not overly broad as to create a chilling effect on the employee's exercise of Section 7 rights. It suggested that employers consider more narrowly tailored restrictions, such as limiting proscription to matters regarding past employment with the employer, or defining the types of impermissible disparaging statements, *e.g*., attacks unrelated to the employer's labor practices. *Macomb,* at 9*; see also, N.L.R.B. v. Local Union No. 1229, Intern. Broth. of Elec. Workers,* 346 U.S. 464, at 477 (1953). With the old standard revived, employers are forced to reconsider and possibly revert to pre-*Baylor* provisions used in the past.

One wonders whether this back-and-forth will persist with each change in the political composition of the Board. Regardless, the immediate ramifications of the Board's decision are clear: broad non-disclosure and non-disparagement provisions in separation agreements are unlawful. Thus, employers are encouraged to review past severance agreements, including those drafted merely a week ago, to ensure compliance with the new precedent and narrowly tailor restrictions to respect the range of an employee's statutory rights. Relying on the language in *Macomb*, for example, a broad non-disparagement clause should be replaced with language prohibiting an employee from making any statement about the company so "disloyal, reckless or maliciously untrue" as to lose the protections provided by law. Similarly, a broad confidentiality provision will not survive NLRB scrutiny; at the very least, an exception should be included to exempt restrictions on cooperation with any NLRB investigation or proceeding.

Further clarification as to this remarkable change in the law is anticipated. All employers and their counsel should remain wary.

[1]*Baylor Univ. Med. Ctr.*, 369 NLRB No. 43 (2020).
[2]*IGT d/b/a Int'l Game Tech*., 370 NLRB No. 50 (2020).