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# National Labor Relations Board Returns to Pre-Baylor Approach for Evaluating Severance Agreements

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On February 21, 2023, the National Labor Relations Board (the "Board") issued a decision in *McLaren Macomb* holding that employers cannot offer employees severance agreements that require employees to broadly waive their rights under the National Labor Relations Act (the "Act"). This decision overturns the previous Board's 2020 decisions in *Baylor University Medical Center* (369 NLRB No. 43 (2020)) and *IGT d/b/a International Game Technology (*370 NLRB No. 50 (2020)), which in turn had overruled longstanding precedent. As explained by the Board in the *McLaren* decision:

"[a]greements that contain broad proscriptions on employee exercise of Section 7 rights have long been held unlawful because they purport to create an enforceable legal obligation to forfeit those rights. Proffers of such agreements to employee[s] have also been held to be unlawfully coercive. The Board in *Baylor University Medical Center* and *IGT d/b/a International Game Technology* reversed this long-settled precedent and replaced it with a test that fails to recognize that unlawful provisions in a severance agreement proffered to employees have a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the Act. We accordingly overrule *Baylor* and *IGT*."

The *McLaren* decision addressed, among other things, whether an employer violated Section 8(a)(1) of the Act by offering a severance agreement to employees, whether unionized or not, that contained the following provisions:

6. **Confidentiality Agreement.** 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.
7. **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. 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.
8. **Injunctive Relief.** In the event that Employee violates the provisions of paragraphs 6 or 7, the Employer is hereby authorized and shall have the right to seek and obtain injunctive relief in any court of competent jurisdiction. If Employee individually or by his/her attorneys or representative(s) shall violate the provisions of paragraph 6 or 7, Employee shall pay Employer actual damages, and any costs and attorney fees that are

occasioned by the violation of these paragraphs.

In its decision, the Board reverted to the pre-*Baylor* analysis, holding that "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise" of their rights under the Act because "[s]uch an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances." The Board elaborated that, regardless of whether an employee ultimately accepted an offered severance agreement, if "an agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, **the mere proffer of the agreement itself violates the Act**." (Emphasis Added).

In applying this standard to the provisions at issue, the Board found that the employer's proffer of the non-disclosure and confidentiality provisions violated Section 8(a)(1) of the Act because both provisions "substantially interfere[d] with employees' Section 7 rights" and "the proffer of the severance agreements unlawfully threatened employees with the loss of the severance benefits by conditioning the receipt of those benefits on acceptance of unlawfully coercive terms."

**Key Takeaways**

- Before offering any employee, whether unionized or not, a severance agreement, consult with an attorney before including confidentiality, non-disclosure and/or injunctive relief provisions.
- When drafting a severance agreement, clearly outline the limitations of any provision that restricts speech of the current or former employee, including, but not limited to, any speech covered by Section 7 of the Act (defined herein).
- As is always the case, be careful to draft any such agreement without restrictions on union-related activities or governmental speech.

If you have questions regarding severance agreements or labor law generally, feel free to contact Jennifer A. McLaughlin at (516) 357-3889 or jmclaughlin@cullenllp.com, Brian B. Selchick at 518-788-9426 or bselchick@cullenllp.com, or Jennifer E. Seeba at (516) 296-9173 or jseeba@cullenllp.com.



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