

# Locke Lord QuickStudy: NLRB Significantly Restricts Employers' Use of Confidentiality and Non-Disparagement Provisions in Non-Supervisory Severance Agreements

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Through a divided [decision](#) in the matter of *McLaren Macomb*, the National Labor Relations Board (“Board”) significantly restricted the use of confidentiality and non-disparagement provisions in severance agreements for non-supervisory employees. The Board held that if a severance agreement is challenged under the National Labor Relations Act (“Act”), the terms must be analyzed to determine if they impede upon an individual’s rights protected by the Act—namely, the right to self-organization; to form, join, or assist labor organizations; to engage in protected, concerted activity; or to bargain collectively. While this analysis will vary depending on whether a confidentiality and non-disparagement provision is at issue, the ultimate effect is an increase in potential unfair labor practice liability for employers.

## Confidentiality Provisions

The confidentiality provision at issue prohibited the employee from discussing the terms of the severance agreement with third parties, except in a few limited exceptions, such as with legal counsel. The Board concluded that the confidentiality provision at issue was impermissible because it would tend to coerce individuals from filing unfair labor practice charges or assisting in Board investigations into an employer’s use of severance agreements. Additionally, and more troublesome for many employers, the Board concluded that confidentiality agreements are impermissible to the extent they prohibit individuals from discussing their severance agreements with their former coworkers. The *McLaren Macomb* decision provides little guidance about what might constitute a permissible confidentiality provision, only saying that a confidentiality provision may be acceptable if it is narrowly tailored to respect the range of rights afforded employees under the Act.

## Non-Disparagement Provisions

The Board in *McLaren Macomb* also looked unfavorably on the severance agreement’s non-disparagement provision, concluding that it directly contradicted employees’ rights to make public statements about the workplace. The Board reasoned that an employee’s ability to make public statements about the workplace is central to their exercise of rights under the Act. Instead, the Board suggested that a non-disparagement provision

would only be permissible if its prohibitions are limited to communication that is “so disloyal, reckless, or maliciously untrue” that it loses the protection of the NLRA. It is unclear whether in future decisions the Board will limit non-disparagement provisions to only prohibiting defamation.

## **Enhanced Liability**

In another expansion of potential employer liability, the Board held that simply offering a severance agreement with an impermissible confidentiality and non-disparagement provision, whether or not the employee signs the agreement, constitutes its own, separate, violation of the Act. The Board reasoned that a severance agreement with impermissible terms has the potential to coerce individuals into surrendering rights under the Act in exchange for the benefits offered under that agreement. Therefore, the Board concluded that merely offering such an agreement is an unfair labor practice because it would have a tendency to restrain, coerce, or interfere with an individual’s rights under the Act.

## **Context of Decision**

The Board’s approach established in *McLaren Macomb* is not without precedent, but it is in stark contrast to the Board’s approach in recent years. Specifically, from 2020 until *McLaren Macomb*—based on decisions from the Board when it was comprised of a majority of Republican members—the content of severance agreements was only scrutinized where the underlying termination involved a violation of the Act. The *McLaren Macomb* decision, issued by a Democrat-controlled, labor-friendly Board, reverted to an analysis similar to its pre-2020 approach where the employer may commit an unfair labor practice by using impermissible severance agreement provisions even in a lawful termination scenario.

## **Practical Implications**

Importantly, the *McLaren Macomb* decision, and the enhanced scrutiny it imposes on severance agreements, only applies to employees covered by the NLRB—namely, non-managerial employees. However, employers must keep in mind that the protections of the Act extend to non-union workplaces.

The *McLaren Macomb* decision will require employers to be cautious with the content and scope of confidentiality and non-disparagement provisions in severance agreements used for non-supervisory employees. While the decision does not necessarily impose an outright ban on those provisions, they should be carefully tailored to avoid running afoul of the Act. Employers should also be particularly cautious in light of the NLRB’s recent push to impose consequential damages for violations of the Act, which will significantly increase the financial toll of any unfair labor practice finding.

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