

# Employers Settling In One Year After NLRB Severance Ruling

By **Tim Ryan**

Law360 (February 21, 2024, 8:29 PM EST) -- In the year since the National Labor Relations Board held that employers violate federal labor law by offering severance agreements that restrict employees' ability to talk about the employer or the pact itself, experts say parties have generally found compromises on language that complies with the ruling, but some questions remain unanswered.



In the year since McLaren Macomb, attorneys who have handled cases involving severance agreements said it has not been hard to land on language that both meets the needs of employers and complies with the board's ruling. (AP Photo/Jon Elswick)

In a February 2023 decision, the NLRB ruled that nondisparagement and confidentiality language in severance agreements offered to furloughed employees by Michigan hospital McLaren Macomb **violated federal labor law**. The ruling overturned two Trump-era decisions involving Baylor University Medical Center and International Game Technology, restricting the types of provisions that employers can lawfully include in severance agreements.

Attorneys say that while the McLaren Macomb decision at **first left some open questions**, many of those have been answered in the year since the decision and employers and workers have landed on provisions that comply with the law.

Allison Belovin, a partner at Levy Ratner PC who represents unions, said the decision has been positive

for workers, who now have more ability to speak about their former employers than they did under earlier precedent.

"I think not having these kinds of gag orders is good for workers because it lets them feel like they can speak freely about their working conditions and their work lives to other workers and to the public generally," Belovin said.

The McLaren Macomb decision reinstated in large part the board precedent that existed before the Trump board changes, saying employers violate federal labor law with severance agreements with details that "would restrict employees' exercise of their [National Labor Relations Act] rights." The board majority said nondisparagement clauses limit workers' rights under the NLRA because their ability to speak publicly about their workplace "are central to the exercise of employee rights" and applied similar logic to restrictive confidentiality provisions.

The NLRB under President Donald Trump departed from the earlier standard in the Baylor and IGT cases, both of which were issued in 2020. In Baylor, the board ruled that the lawfulness of separation agreements must be evaluated based on the conditions under which they were offered, blessing agreements that were voluntary and focused on the post-employment activity of an employee whose firing didn't violate the law.

The IGT decision applied Baylor and clarified that it overruled previous decisions that could conflict.

The McLaren Macomb decision pushed past the pre-Trump precedent by applying to any severance agreement that is offered, regardless of whether an employee signs it. The majority said employers can violate the law by only offering agreements requiring workers to give up their NLRA rights because such deals that are offered can have a chilling effect on both the employee who is leaving and the workers who stay behind.

That is especially true, the majority said, because employers often present separation agreements, including severance payments, often on a "take-it-or-leave-it basis" when employees are highly vulnerable and unlikely to push back on the terms.

NLRB general counsel Jennifer Abruzzo **issued a memo** the month after the decision came out that provided her view of the ruling in response to questions her office received from employers, workers and unions. She said board prosecutors would seek to apply McLaren Macomb retroactively and that she believed the reasoning would also make noncompete and similar agreements in employment contracts unlawful under the NLRA.

In the year since McLaren Macomb, attorneys who have handled cases involving severance agreements said it has not been hard to land on language that both meets the needs of employers and complies with the board's ruling.

Daniel Schudroff, a principal at Jackson Lewis PC who represents employers, said the key point to complying with McLaren Macomb is that severance agreements with confidentiality clauses and nondisparagement language must be narrow. Generally, they should only restrict the employee from discussing the financial terms of a settlement and prohibit them from making defamatory comments, Schudroff said.

The decision has added a step for employers to comply with the NLRA when handling a situation that typically moves very quickly, Schudroff said.

"It's another point on the checklist that an employer has to consider before entering into a separation agreement," Schudroff said.

Reyburn Lominack III, a partner at Fisher Phillips LLP who represents employers, said he has been able to settle cases because employers are generally comfortable narrowing provisions to comply with McLaren Macomb and satisfy board prosecutors.

Union-side attorneys reported a similar experience dealing with employers. Belovin said the decision has not made employers less likely to settle cases with workers and offer severance agreements.

However, some employers are not following the same path as those who have accepted McLaren Macomb's limitations, said Dan Altchek, a partner at Saul Ewing LLP who represents employers. Those

employers have taken the chance that the language they included in pre-McLaren Macomb settlements will either go unchallenged or that the only remedy they will face is being required to excise the offending provisions, Altchek said.

Altchek said severance agreements that touch on the issues in the McLaren Macomb decision are more common in nonunion settings than in unionized workplaces, where the pacts are commonly negotiated with a worker's bargaining representative who will be aware of language that's a potential violation.

"In that context with represented employees, the union will usually pick up on any noncompliance with McLaren Macomb and point it out and propose modifications as compared to nonunion employees, where it's much less likely to happen," Altchek said.

The decision is **currently being challenged** in the Sixth Circuit, where McLaren Macomb has argued the decision "lacks common sense."

The impact on workers is increased transparency about workplaces, said Megan Shaw, an attorney at Cohen Weiss Simon LLP who has handled severance agreements, especially freeing up workers to talk about their experiences by changing the law surrounding nondisparagement agreements.

"Moving towards antidefamation as opposed to nondisparagement language in an agreement makes a big difference in terms of what people feel like they can say after their employment has ended," Shaw said.

Although many points of the decision have been sharpened over the year since the decision came out, there are still some issues that must be resolved.

One is Abruzzo's related and more recent initiative asking the board to find that noncompete and training repayment agreements violate federal labor law. Experts have said a settlement agreement board prosecutors reached with a medical spa last month showed that the **initiative continues to progress**, even though the board itself has not yet changed the law on the issue.

Another issue that remains to be fully resolved is how McLaren Macomb will interact with various state and local requirements covering severance agreements. For example, Schudroff noted New York law requires employers to take into account employee preference on confidentiality provisions in a severance agreement, which could create competing compliance questions for an employer if a worker insists upon certain confidentiality language.

Lominack said the biggest impact of the McLaren Macomb decision is not necessarily the difficulty of complying with its terms, but the number of new employers who must now consider labor law in a way they did not before.

"A lot of employers are affected, but if they consult with legal counsel, and they understand the issues and understand the implications of making the changes and what effect it would have on their legitimate interests, I haven't had too many issues or problems getting that done," Lominack said.

Looking to the future, Altchek said a lasting legacy from McLaren Macomb will not only be in the requirements the decision itself imposes, but where the law might go based on the underlying logic.

"In that sense, I think it is a very significant decision in that it signifies that the board and the general counsel will be focused on more areas of the employment relationship in the nonunion context than they really had been up until now," Altchek said.

--Editing by Amy Rowe and Emma Brauer.