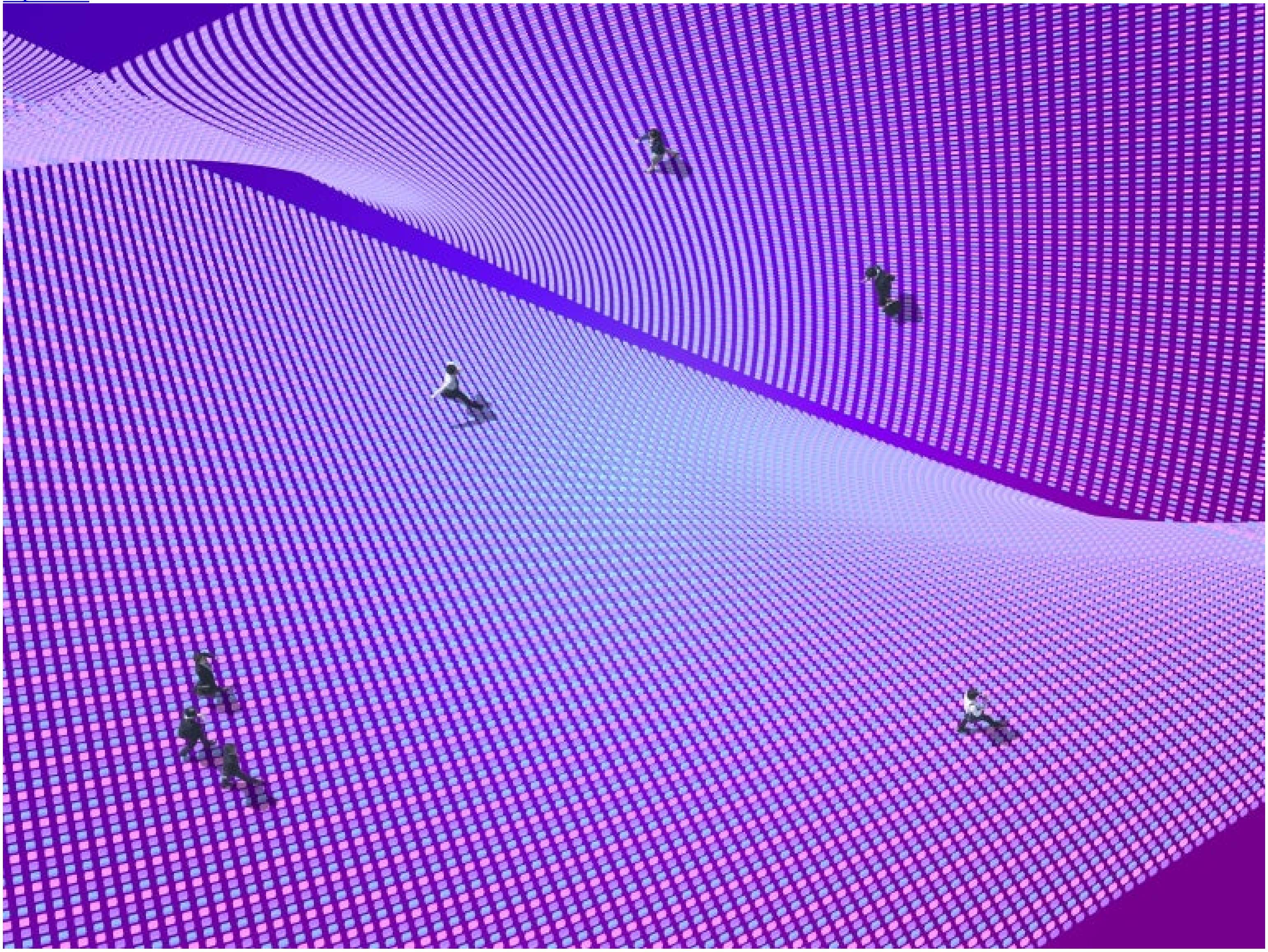
Updates



Under a newly issued decision by the National Labor Relations Board (NLRB or the Board), "an employer violates Section 8(a)(1) of the [National Labor Relations] Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights." *McLaren Macomb*, 372 NLRB No. 58, slip op. at 7 (2023). "Such an agreement," reasoned the Board, tends "to restrain, coerce, or interfere with the exercise of Section 7 rights by employees…" *Id.*

At issue in *McLaren Macomb* were 11 severance agreements offered by a Michigan hospital to a group of employees who were furloughed when COVID-19 rendered their jobs nonessential. (The employees greeted patients arriving at the hospital's surgery center, but during the height of the COVID-19 pandemic, the hospital stopped performing elective and outpatient surgeries and instead focused on trauma, emergency, and COVID-19 patients). The furloughed employees were all represented by a union.

Without consulting that union, the hospital offered each furloughed employee a severance agreement that provided in relevant parts:

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 [a] spouse, or as necessary to professional advisors."

Nondisclosure. "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."

The NLRB found these provisions—and, thus, any offer of the agreement containing them—impermissible under Section 8 of the National Labor Relations Act (NLRA). The Board's theory rests on the idea that such broad nondisparagement and confidentiality provisions have a chilling effect on employees' ability to engage in activity protected by Section 7 of the NLRA. Specifically, Section 7 protects employees' right to "discuss the terms and conditions of employment with coworkers," which can include discussions about wages. *Id.* at 6 (quoting *St. Margaret Mercy Healthcare Centers*, 350 N.L.R.B. 203, 205 (2007)). Section 7 protects not only employees' right to engage in collective bargaining, but also their right to improve the terms and conditions of employment through outside channels like reporting concerns to governmental agencies or the media.

Nondisparagement

Under the NLRA, employees have a right to critique employer policy so long as the communications are not so "disloyal, reckless, or maliciously untrue as to lose the Act's protection." *Emarco, Inc.*, 284 NLRB 832, 833 (1987). In finding this particular nondisparagement clause unlawful, the NLRB took issue with the provision's breadth. The agreement prohibited employees from making "any statements to the Employer's employees or to the general public which could disparage or harm the image of the Employer—including, it would seem, any statement asserting that the Respondent had violated the Act." *McLaren Macomb*, 372 NLRB slip op. at 8.

The agreement did not define disparagement. Under the NLRA, disparagement is limited to statements that are "disloyal, reckless, or maliciously untrue," but no such limiting principles appeared here. *Emarco, Inc.*, 284 NLRB at 833. Nor did the agreement meaningfully limit whom employees were prohibited from discussing; the clause protected not only the employer, but also "its parents and affiliated entities and their officers, directors, employees, agents, and representatives." Finally, there was no temporal limitation on the nondisparagement provision. In short, as drafted, the agreement prevented employees from saying virtually anything regarding anyone connected to the employer for all time. This, according to the NLRB, is impermissible.

Confidentiality

The agreement's confidentiality provision was similarly broad and, thus, similarly problematic. Because the agreement prohibited employees from disclosing the terms of the agreement to any third party, employees were effectively prohibited from sharing information about the existence of a potentially unlawful agreement with the NLRB. In light of this fact, the NLRB concluded "[t]he confidentiality provision has an impermissible chilling tendency on the Section 7 rights of all employees because it bars the subject employee from providing information to the Board concerning the Respondent's unlawful interference with other employees' statutory rights." *McLaren Macomb*, slip op. at 8 (citing *Metro Networks*, 336 NLRB 63, 67 (2001)). The NLRB also took issue with the confidentiality provision because its breadth "impairs the rights of the subject employee's former coworkers to call upon [the subject employee] for support in comparable circumstances." *Id.* at 9. As a result, the Board deemed the confidentiality provision unlawful.

Unlawful Offer

But more than rendering these individual provisions illegitimate, the NLRB decision is notable for its ultimate conclusion: An employer violates the NLRA when it *offers* an employee a severance agreement with offending provisions like those described above. It does not matter whether the employee accepts the agreement; simply offering an agreement with illegal provisions violates the law.

Overruling *Baylor* and *IGT*

This represents a change from precedent established just a few years ago. In 2020, the NLRB issued two decisions—*Baylor University Medical Center*, 369 NLRB 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020)—that set out a new approach to evaluating the legitimacy of these kinds of agreements.

Before 2020, the Board focused on the language of a severance agreement to determine whether offering the agreement interfered with, restrained, or coerced employees' exercise of their NLRA rights. Agreements that restricted employees from engaging in protected activity, filing unfair labor practice charges with the Board, assisting other employees in doing so, or assisting the Board investigative process, were consistently deemed unlawful. *See McLaren Macomb*, slip op. at 5-6.

But in 2020, under *Baylor*, the Board's focus shifted to the circumstances under which the agreement was presented to the employee. The Board looked not just at the text of an agreement, but also at whether the employer harbored any animus against Section 7 activity.

The *McLaren* decision overrules *Baylor* and represents a return to the pre-2020 framework. What mattered then, and matters again now, is "whether the agreement, on its face, restricted the exercise of statutory rights." *Id.* at 3. The Board no longer looks at whether employer animus infects the circumstances under which an agreement is offered; "[i]nherent in any proffered severance agreement requiring workers not to engage in protected activity is the coercive potential of the overly broad surrender of NLRA rights if they wish to receive the benefits of the agreement."

Who Is Affected?

This decision affects virtually all private sector employers (not just those with unionized workforces) but does not control agreements with every type of employee employed by a covered employer.

With a few specific exceptions (such as agricultural employers, airlines, and railroads), in general, the NLRA applies to all nonretail businesses that have at least $50,000 in direct or indirect inflows or outflows and all retail businesses with gross annual revenues of at least $500,000. *See Siemons Mailing Serv.*, 122 N.L.R.B. 81 (1958); *Carolina Supplies & Cement Co.*, 122 N.L.R.B. 88 (1958). It covers all such employers, not just ones with unionized workforces.

While many employers are subject to the decision, the ruling does not affect these employers' agreements with every single employee. Because the NLRB's decision is based on the theory that overbroad nondisparagement and confidentiality provisions impinge employees' Section 7 rights under the NLRA, the decision applies only to agreements between employers and nonsupervisory employees. That is, agreements employers intend to offer managers, independent contractors, or others who qualify as a supervisor under the NLRA can likely remain as is.

It's worth noting that *former* employees also enjoy Section 7 rights. *See McLaren Macomb* slip op. at 6 (citations omitted). So, employers offering agreements to former nonsupervisory employees (e.g., settlement agreements) should ensure such offers comply with *McLaren Macomb.*

Takeaways

This decision may be appealed to a federal court, and could be overruled. It is not clear at this time which circuit court might hear the case.

In the meantime, employers should review any template severance agreements, offer letters, proprietary information and invention assignment agreements, and other employment-related agreements with nonsupervisory employees to ensure the nondisparagement, nondisclosure, and confidentiality provisions are sufficiently narrowly tailored to avoid running afoul of the NLRA's protections.

Finally, employers should consult with experienced counsel to understand whether and how the recent NLRB decision interacts with any requirements state law imposes on confidentiality or nondisparagement provisions. A growing number of states have passed laws governing what employers can and cannot preclude employees from discussing. This decision may preempt such laws.

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