

## Alert: Many Employee Non-Disclosure and Non-Disparagement Settlement Terms are Now Illegal

By Nancy Richards-Stower and Debra Weiss Ford



Richards-Stower



Ford



This is the 22<sup>nd</sup> *New Hampshire Bar News* “debate” over the last 17 years between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here, they discuss the National Labor Relations Board (NLRB) decision *McLaren Macomb*, 372 NLRB No. 58 (2/21/23), and the NLRB general counsel’s Memorandum (guidance) a month later (3/23/23). *McLaren* involved severance agreements offered to furloughed employees which forbade them from disclosing the terms of the agreements and from disparaging the employer.

**Nancy:** Kool and the Gang’s “Celebration” rings in my ears. Gag Rules are dead! Severance and Settlement agreements can’t contain broad confidentiality or non-disparagement provisions. The NLRB rocks! And, to defense counsel,

with whom I have argued over these past four decades: I told you so. The NLRB decided that it’s pretty hard for gagged employees to discuss improving working conditions. Duh.

**Deb:** Slow down, Nancy. It may not be a great decision for employees either since it may deter employers from entering into settlement agreements. Let’s explain the decision. Section 7 of the National Labor Relations Act (NLRA) applies to *both* union and non-union employers and governs conduct for most non-management employees. The NLRA excludes government employees, agricultural workers, and interstate railroad and airline employees,

and, in most cases, management-level workers. Section 7 guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,**” as well as the right “to refrain from any or all such activities.” (Emphasis added)

**Nancy:** Supervisors, generally, are not affected by the decision: “‘Supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, dis-

charge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

**Deb:** *McLaren* makes it illegal for employers to even offer covered employees severance or settlement agreements containing common confidentiality and non-disclosure terms, even when the employee asks for them!

**Nancy:** The NLRB has not *yet* ruled whether the monetary amounts paid under agreements can be confidential, but there are strong arguments for the sums paid to be public.

**Deb:** And there are strong arguments for keeping the amounts paid confidential. Employers don’t want to inspire claims to be filed, and employees don’t want their privacy invaded and it may mean that employers will be less likely to settle.

**Nancy:** The huge impact of *McLaren* is that agreements offered to covered employees can no longer restrict their ability to talk about what happens at their workplace (aka underlying facts). The bottom line is a *fat* bottom line: no facts other than trade secrets can be gagged.

**Deb:** Nancy, you’ve argued that non-disclosure/confidentiality agreements create additional emotional harm for harassment victims by adding more stress to the experiences they suffered; and, that nego-

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tiating for, or even advising an employee to sign, an agreement with gag terms violates the Rules of Professional Conduct. I argue that when an employer pays money to resolve a dispute, it is to buy peace, avoiding the disruptive re-visiting of the disputed allegations of a terminated employee. It's probably time for a formal ethics decision.

**Nancy:** Yes, and my guess is that writing it will be challenging for the ethics deciders. It may be generational. Thanks to the #MeToo movement, sexual harassment and assault victims received significant public support for sharing their experiences, especially after press reports of tragedies following gag agreements with an assaulter's early victims. Gag agreements enabled powerful predators to escape public shame and scorn. With their reputations intact, they were free to groom, stalk, and assault new victims.

**Deb:** In her March 23, 2023 memo explaining her policy interpretation of *McLaren*, the NLRB's general counsel (GC) opined that *McLaren* was retroactive, and that even offering confidentiality and/or non-disparagement provisions (whether or not accepted) is illegal under the NLRA, as chilling employee communications. "Non-disparagement" is subjective, and problematic, so now, only defamatory statements can be prohibited. The GC's memo is only advisory. It is not legally binding or necessarily reflecting the views of the board.

**Nancy:** Yes, and defamation, itself, is limited to "public figure" First Amendment defamation standards, for statements "maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity."

**Deb:** At least the memo confirmed the logical: that employers can still require the employee to promise to keep trade secrets confidential.

**Nancy:** My favorite part of the GC's memo was that employers consider clawing back past agreements that gagged employees, and that each day the illegal terms "live" in an old agreement creates a new violation, apparently triggering a rolling 180-day statute of limitation for the employee to file a complaint with the NLRB, sort of a "continuing violation."

**Deb:** That does seem unrealistic, because many thousands of US employment settlement and severance agreements over the past decades have included confidentiality and/or non-disparagement provisions lasting "forever," and most judges "grew up" with such agreements.

**Nancy:** Prior to *McLaren*, my request to the federal court for an order requiring the employer to claw back such agreements failed. Today, my concern is that the

makeup of the NLRB changes with presidential administrations, so I don't foresee a rush by defense counsel to track down and claw back old agreements.

**Deb:** Plus, the Senate can delay NLRB nominations, leaving seats unfilled to gain political advantage. The full board has five members, each appointed by the president for five-year terms upon Senate consent, the term of one member expires each year, and three board members make a quorum. However, two members do not make a quorum (see *New Process Steel, L.P. v NLRB*, 560 U.S. 674 [2010]). Elections have consequences.

**Nancy:** The GC's memo is clear, and while "only" advisory to the board, it is predictive of what she will prosecute. She argues that in order for workers to join together and negotiate for improved working conditions, pay and benefits, they must be free to share their stories of what is actually happening, or has happened, in the workplace. NDA's cannot be enforced because they "have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties...."

**Deb:** The fallout will be massive. The GC created years of work for employment counsel when she wrote:

"[S]ome other provisions that...might interfere with employees' exercise of Section 7 rights [are] non-compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge."

**Nancy:** It's already happening. On May 30, 2023, citing *McLaren*, the GC issued a memo stating that "overbroad" non-competition agreements also violate Section 7.

**Deb:** Nance, that's another debate. ♦

*Nancy Richards-Stower advocates for New Hampshire and Massachusetts employees. She also invented/owns/operates Trytosettle.com@ a confidential bid, on-line settlement service.*

*Debra Weiss Ford is the managing principal at the Portsmouth offices of Jackson Lewis, PC.*

PLEADING

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ACROSS

- 1 Trivial quarrel
- 5 Foot part that may need support
- 9 Drug also known as Ecstasy or Molly
- 13 Keep the engine running
- 14 "Adios!"
- 15 Not securely fastened, perhaps
- 16 Start of a suit seeking damages for hearing loss?
- 19 Sparkling Christmas tree trimming
- 20 Robotic vacuum brand
- 21 Summer clock setting in NH
- 22 Voice box
- 24 "Fifth quarters:" Abbreviation
- 26 "But why \_\_\_ thou judge thy brother?" (Romans)
- 28 Mobile platform for Apple devices
- 29 "The Power of Love" rocker \_\_\_ Lewis
- 30 "Roll Tide" side, informally
- 32 Tried to get a rise out of
- 34 \*hands 16-Across to associate\* "Draft something in response?"
- 37 Skipped the fancy wedding
- 38 \_\_\_ mater
- 39 Court officials?
- 40 Long-running NBC comedy show
- 41 "Terrible" phase
- 45 Popular sushi tuna
- 46 Critical or flirtatious look, informally
- 49 Column counterpart
- 50 Radio genre that may now include music from the 90s
- 52 Spanish naval fleet
- 54 Follow-up to what the associate in 34-across drafted, in the form of an out-of-office message?
- 56 Word after "end" or before "friendly"
- 57 Innovative economic sector
- 58 Major Egyptian canal
- 59 Certain microorganism
- 60 Inflammation that may require a visit to the ophthalmologist
- 61 Rounded area in a cathedral behind the altar

DOWN


- 1 Like some car windows
- 2 Repetitive reply to "Who wants . . .?"
- 3 Fire-starting stones
- 4 Come clean, with "up"
- 5 Celebrated by many
- 6 "Christ the Redeemer" setting, informally
- 7 Mid-size Toyota sedans
- 8 Board quickly, as a bus
- 9 Polite way to address a lady
- 10 Small nation in the Horn of Africa
- 11 Sea cows
- 12 Uffizi display
- 17 Long, thin fish
- 18 Fish for a bagel
- 23 Sound of the ocean
- 25 Man's name that is also an Australian airport code
- 27 Baking amounts
- 29 Drum kit part consisting of two cymbals
- 31 Blown-away feeling
- 32 Kvetch
- 33 Something pressed for cash?
- 34 Beer garden relative
- 35 Common hashtag for an unedited Instagram photo
- 36 Hair on a horse's neck
- 37 Historical period that may be named after a president
- 40 Six-line stanza, in poetry
- 42 Bring to an end, as a meeting
- 43 Great gobs, quaintly
- 44 "Dirty Dancing" actor named "Sexiest Man Alive" in 1991
- 46 Tiny \_\_\_ (Dickens character)
- 47 Warms up
- 48 "To \_\_\_ is human . . ." (Pope)
- 51 College quarters
- 53 Flat-topped geological formation
- 54 Dog-days month
- 55 Treacherous, as winter sidewalks

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