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LEGAL ALERT

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NLRB RESTRICTS EMPLOYEES CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS

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In a recent decision, *McLaren Macomb*, the National Labor Relations Board (NLRB) ruled that an employer's *offer* of a severance agreement which includes standard confidentiality and non-disparagement provisions violates the National Labor Relations Act (NLRA) because the offer of the severance agreement containing the offensive provisions has a reasonable tendency to interfere with or restrain the prospective exercise of the Section 7 rights of the separating employee and of the employees who remain employed. Importantly, whether or not the employee accepts and executes the agreement in return for the severance benefits is immaterial.

Notably, while the NLRB's decision applies to nearly all private sector employers regardless of whether they have a unionized or non-unionized workforce, only severance agreements presented to nonmanagerial employees are impacted by the decision.

The *McLaren* Decision

McLaren, a teaching hospital in Michigan, laid off a portion of its staff during the pandemic. In doing so, it included non-disparagement and confidentiality clauses in the severance agreements provided to at least 11 workers.

The severance agreements at issue contained the following provisions:

> 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.
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> 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.

In *McLaren Macomb*, the NLRB held that the inclusion of the non-disparagement and confidentiality clauses in the severance agreements alone constituted an independent unfair labor practice, regardless of discriminatory intent or union animus.

Specifically, the NLRB found the non-disparagement provision at issue violated employees' Section 7 rights because "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act." The NLRB further reasoned that the provision prohibited "any statement asserting that the [employer] had violated the Act," encompassed "employee conduct regarding any labor issue, dispute, or term and condition of employment," and chilled "efforts to assist fellow employees, which would include future cooperation with the Board's investigation."

The NLRB also took issue with the confidentiality provision, finding that it violated employees' Section 7 rights because it precluded employees from "disclosing even the existence of an unlawful provision contained in the agreement," and tended to coerce employees from filing unfair labor practice charges or assisting the NLRB in investigations. The NLRB also found the confidentiality provision unlawful because it prohibited employees from discussing the severance agreement with former coworkers who may receive similar agreements, as well as union representatives or other employees seeking to organize.

How Should Employers Respond?

Employers can breathe a little easier knowing that the NLRB's own procedural limitation rules effectively bar employees and unions from filing unfair labor practice charges that occurred beyond six months. Thus, severance agreements containing non-disparagement and confidentiality clauses provided to employees more than six months ago will likely remain in force (so long as the severance agreement is otherwise legally compliant). Further, for those agreements issued prior to *McLaren Macomb* but less than six months ago, employers may use as a defense the fact that at the time of issuance the law pre-*McLaren Macomb* did not prohibit non-disparagement and confidentiality clauses.

While there is no clear uniform approach to compliance with the NLRB's standard under *McLaren Macomb* moving forward, there are several avenues for employers' consideration:

1. Employers may consider including a carefully crafted disclaimer in their severance agreements, which would affirmatively allow employees to exercise their Section 7 rights. The NLRB's opinion did not suggest that a disclaimer alone would save the provisions but insinuated that disclaimers may be appropriate where they affirmatively allow employees to: (1) participate in Section 7 activity; (2) file ULP charges; (3) assist others in filing such ULP charges; and (4) otherwise assist in and cooperate with the NLRB's investigative process.

2. Employers may revise the non-disparagement and confidentiality provisions of their severance agreements. The NLRB hinted at several different potential revisions to salvage non-disparagement and confidentiality provisions.

- Narrow the scope of those to whom the employee cannot make potentially disparaging statements;
- Limit the reach of the provision to matters regarding past employment with the employer;
- Limit the provision to only the employer, not extended to its affiliated entities and representatives;
- Include a reasonable temporal limit; and
- Make clear that the employee may share the existence of the non-disparagement and confidentiality clauses within the severance agreement.

3. The most risk-averse employers may consider excluding non-disparagement and confidentiality clauses from severance agreements altogether.

This ruling creates an opportune time for employers to revisit their standard severance agreements, with particular attention to non-disparagement and confidentiality clauses. Employers may wish to consult legal counsel to fully assess the best approach to severance agreements in light of the *McLaren Macomb* decision as it applies to their business.

Hahn Loeser & Parks LLP's Labor and Employment Group routinely advises employers on preparation of severance agreements to ensure compliance with the NLRA, as well as other applicable state and federal laws.

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