NLRB BANS BROAD CONFIDENTIALITY AND NON-DISPARAGEMENT CLAUSES IN SEVERANCE AGREEMENTS

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The National Labor Relations Board ("NLRB" or the "Board") recently ruled that broad confidentiality and non-disparagement provisions in severance agreements violate Section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act"). In *McLaren Macomb*, 372 NLRB No. 58 (2023), the Board prohibited previously lawful severance agreement confidentiality and non-disparagement provisions where they have the "tendency to interfere with, restrain, or coerce the exercise of [NLRA] rights." This NLRB decision applies to all private sector employers, whether or not they are unionized. However, it does not apply to agreements with individuals who qualify as managers or supervisors under the Act.

Trump-Era Precedent.

Under Board precedent during the Trump administration, including *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020), employers could include standard confidentiality and non-disparagement provisions in separation agreements in exchange for severance payments. Further, employers also could require clauses prohibiting employees from participating in claims brought by any third party against the employer.

For example, in *Baylor*, the employer offered severance agreements with confidentiality and non-disparagement provisions to a group of employees. The NLRB reasoned that these provisions were permissible because they were not offered under any "circumstances" that infringed on the separating employees' NLRA rights. Accordingly, the NLRB found that merely offering the agreements alone was lawful. Likewise, in *IGT*, which relied on *Baylor*, the Board ruled that an offered severance agreement containing confidentiality and non-disparagement provisions was lawful because the agreement entirely was voluntary, did not affect pay or benefits, and had not been proffered coercively or in the context of a labor dispute. Again, the Board was concerned about the circumstances surrounding the provisions as opposed to the language of the provisions themselves.

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McLaren Macomb Returns to Earlier Precedent.

McLaren overturned the *Baylor* and *IGT* precedent. In *McLaren*, the employer, a unionized hospital in Michigan, furloughed eleven union employees during the COVID-19 pandemic because they were deemed nonessential employees. The employer presented each employee with a "Severance Agreement, Waiver and Release" that offered severance pay in exchange for signing the agreement. The agreements contained the following provisions, which broadly prohibited disparagement of the Respondent and required confidentiality about the terms of the agreement:

1. **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.
2. **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.

All eleven employees signed the agreements. Overruling *Baylor* and *IGT*, the NLRB in *McLaren* held that these agreements were unlawful because they "have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." In *McLaren*, the Board was more concerned about language of the provision themselves as opposed to the circumstances surrounding the provisions.

The Board in *McLaren* took issue with the lack of specificity, definition, and other characteristics that normally would limit the scope of the provisions. Specifically, the NLRB held that the confidentiality provision was "overly broad" because it went as far to prohibit employees from disclosing any of the terms of the agreement to "any third person." The Board reasoned that this language would prevent the employee from filing an unfair labor practice charge, assisting an NLRB investigation, and discussing the existence or terms of the agreement with others, including union representatives or other employees who may have received similar agreements. The Board accordingly determined that the provision had an "impermissible chilling tendency" with regard to the Section 7 rights of employees.

Likewise, the Board found the non-disparagement provision to be "overly broad." For example, the provision was not limited to matters regarding past employment with the employer and was broad enough to encompass employee conduct regarding any labor issue, dispute, or term and condition of employment. The language was impermissible, the NLRB held, because it prevented the employees from making virtually any statement about their employment. According to the Board, "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the [NLRA]."

Key Takeaways.

McLaren holds that merely "proffering" a severance agreement containing unlawful confidentiality and non-disparagement provisions violates the Act. Put another way, under *McLaren*, offering a severance agreement containing unlawful confidentiality and non-disparagement provision alone is enough to result in an unfair labor practice. While *McLaren* does

not prohibit employers from offering severance agreements with confidentiality or non-disparagement provisions, before providing such agreements to employees, employers must make sure that they do not contain any language that the Board will deem to be overly broad or to have the tendency to interfere with an employee's rights under the Act.

Further, this NLRB ruling leaves many unanswered questions, including:

- Does it apply to non-disparagement and confidentiality language in commission agreements, non-disclosure agreements, and employment agreements?
- Can disclaimer language in a severance agreement that exempts Section 7 rights cure problems with an agreement's confidentiality and non-disparagement provisions?
- Will more narrowly drafted non-disparagement and confidentiality language meet the Board's approval?

Employers need to review their existing and potential severance agreements, as well as other agreements with employees, who are not supervisors or managers, that include non-disparagement and confidentiality clauses, in light of the Board's *McLaren Macomb* ruling.

If you have any questions about this NLRB decision or other issues concerning the NLRA, please contact Peter C. Godfrey (716.848.1246), Glen P. Doherty (518.433.2433), Lura H. Bechtel (416.595.2693), Charles H. Kaplan (646.218.7513), Kinsey A. O'Brien (716.848.1287), or any other member of Hodgson Russ's Labor & Employment Practice.