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CLIENT ALERT

National Labor Relations Board: Offering Employees Severance Agreements With Broad Confidentiality and Non-Disparagement Language Violates the National Labor Relations Act

MARCH 9, 2023

On February 21, 2023, the National Labor Relations Board ("NLRB" or "Board") found that an employer violated the National Labor Relations Act ("NLRA") merely by offering its employees a severance agreement with broad confidentiality and non-disparagement language. *See McLaren Macomb*, 372 NLRB No. 58 (2023).

While the Board characterized *McLaren* as a "return" to "long-settled [NLRB] precedent," it created new uncertainties for private-sector employers: Does *McLaren* apply to existing confidentiality and non-disparagement provisions? Could *McLaren* extend beyond just severance agreements? And will *McLaren* even remain good law?

In the face of these questions, employers should remember that *McLaren* applies only to employees who have Section 7 rights under the NLRA and, further, there *may* be permissible adjustments to confidentiality and non-disparagement provisions for otherwise-protected employees. Taken together, these considerations should motivate employers to review their employment agreements.

I. Relevant NLRA Provisions

Section 7 of the NLRA affords statutory "employees" a host of rights—from self-organization to participation in unions, to collective bargaining, and other "concerted" activities. These rights are protected by Section 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. The NLRA supplies Section 7 rights to statutory employees regardless of unionization status. Certain types of workers, such as those meeting the NLRA's definition of a supervisor, are expressly excluded from the NLRA's definition of employee.

II. *McLaren* Decision

In *McLaren*, the Board considered a severance agreement a Michigan employer offered eleven of its employees. The agreement required each employee to release the employer from employment claims and contained broad confidentiality and non-disparagement provisions, with monetary and injunctive sanctions available to the employer if an employee breached either provision. Each employee signed the agreement.

The Board determined that the non-disparagement and confidentiality provisions violated Section 8(a)(1), and that the employer's *offer* of the agreement, regardless of acceptance, also violated Section 8(a)(1) because the severance agreement conditioned receiving severance benefits on accepting the unlawful provisions.

Non-disparagement. The Board took issue with the breadth of the non-disparagement provision, which extended beyond matters of employment, encompassing communications beyond the bounds of the "well-established NLRA definition" of "disparagement," and it applied to entities and individuals other than the immediate employer for an indefinite period of time. The Board reasoned these factors, along with the threatened sanctions for violation, created a "clear chilling tendency" on employees' exercise of Section 7 rights, including the employee's exercise of her own rights as well as her ability to assist other employees, cooperate with the Board, or advance complaints through third parties.

Confidentiality. The Board also took issue with the breadth of the confidentiality provision, which prohibited disclosure of the agreement terms "to *any* third person." The Board again reasoned that this language tended to "impermissibly chill" the exercise of Section 7 rights by prohibiting the disclosure of the unlawful agreement provision itself, as well as by barring the employee from assisting coworkers in similar positions or otherwise providing employment-related information to coworkers, the Board, or unions. As with the non-disparagement provision, the Board held that the offer of the severance agreement with this unlawful confidentiality language violated Section 8(a)(1) of the NLRA.

Of note, while suggesting that forfeitures of Section 7 rights in severance agreements might be "narrowly tailored" to remain lawful, the Board declined to provide any guidance on how to achieve such narrow tailoring and, instead, simply referenced previously approved severance agreements where employees waived only their right to pursue employment claims arising as of the date of the agreement.

III. Post-*McLaren* Considerations

Although the Board characterized *McLaren* as a "return" to established NLRB precedent, the decision is unsettling to employers that have long relied on confidentiality and non-disparagement provisions in employment-related agreements. Because *McLaren* applies only to NLRA-defined employees, employers may continue including such provisions in agreements with supervisors (as defined by the NLRA), as well as other categories of workers not covered by the statute.

Employers must consider *McLaren*'s impact on their employment-related agreements. Employers have options short of striking confidentiality and non-disparagement provisions, such as supplementing existing confidentiality and non-disparagement clauses with language confirming that the provisions are not intended to restrict an employee (or former employee) from exercising his or her Section 7 rights under the NLRA or including other limitations.

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