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Labor & Employment Alert

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Strategies for severance agreements after NLRB's decision in *McLaren Macomb*

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The National Labor Relations Board ruled that offering severance agreements with certain confidentiality and/or non-disparagement prohibitions violates the National Labor Relations Act.

What's the Impact?

- In light of this decision, employers should assess separation strategies as they pertain to severance agreements with non-supervisory employees
- Don't panic—employers have many options available to address and accommodate this new development

The National Labor Relations Board (Board) has many employers on their heels after it issued a decision last week holding that an employer violates the National Labor Relations Act (NLRA) "when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights," including agreements containing broad confidentiality and/or non-disparagement prohibitions.

The Board in *McLaren Macomb* analyzed two provisions contained in separation agreements offered to 11 furloughed employees, one that prohibited the employees from making statements

that could disparage or harm the image of the employer and another that prohibited them from disclosing the terms of the agreement. Overturning its prior decisions (under the Trump Board) in *Baylor University Medical Center* and *IGT d/b/a International Game Technology* which analyzed the circumstances surrounding the proffer of the agreement, the Board in *McLaren Macomb* analyzed solely the plain language of these provisions and found that they had the potential to restrict employees from engaging in activity protected by the NLRA, including filing unfair labor practice charges with the Board and/or attempting to "improve their lot as employees through channels outside the immediate employee-employer relationship" (e.g., administrative, judicial, legislative, and political forums; newspapers, the media, social media, and communications to the public that are part of and related to an ongoing labor dispute). Because the provisions in the severance agreements could operate to restrain such conduct, even if the separating employees agreed to them willingly, the Board held the provisions were unlawful.

The *McLaren Macomb* decision requires employers to re-evaluate separation strategies pertaining to severance agreements with *non-supervisory* employees.[1] Specifically, employers must weigh the risk of a potential unfair labor practice charge against the benefits of confidentiality and/or non-disparagement provisions. On the one hand, the remedies typically imposed by the Board against an employer for violating the NLRA (i.e., striking of the provision and/or posting a notice agreeing not to engage in similar behavior) are generally not burdensome or overly disruptive to operations. On the other hand, employers rarely, if ever, seek to enforce confidentiality and non-disparagement clauses; such provisions often serve as more of a "deterrent" than meaningful legal protection.[2]

The implications of this decision, on its face, appear striking and far-reaching. However, employers need not overreact, as there are numerous ways to work within the *McLaren Macomb* framework and still obtain some form of contractual promises from separating employees. These strategies include, but are not limited to, narrowing the language of the provisions, adding sweeping disclaimers, eliminating the provisions altogether, or, in some cases, doing nothing.[3]

Employers are encouraged to engage counsel to evaluate all potential courses of action and select the approach most appropriate for their own situation.

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[1] As a reminder, supervisory employees do not enjoy the protections of Section 7 of the Act and severance agreements with them accordingly are unaffected by this decision.

[2] It is also material to the analysis that some states, including California, already have similar laws that limit or outright prohibit certain types of confidentiality provisions in severance agreements (See Cal. Civ. Code § 1001).

[3] And there is also the (very likely) possibility that this decision will be challenged and overturned by the federal courts, but as of the time of publication, no such challenge has been filed.

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