Employer Update

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NLRB Takes Aim at Non-Disparagement and Confidentiality Provisions For Union and Non-Union Employees

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On February 21, 2023, the National Labor Relations Board (NLRB or Board) issued a significant decision concerning the use of confidentiality and non-disparagement provisions in separation agreements with "non-supervisory" employees. In *McLaren Macomb and Local 40 RN Staff Council*, 372 N.L.R.B. No. 58 (2023), the Board found that an employer merely offering a non-supervisory employee a severance agreement containing a broad non-disparagement or confidentiality provision constitutes an unfair labor practice (ULP) in violation of the National Labor Relations Act (NLRA). The decision applies to both union and non-union employers, and requires immediate attention from all employers utilizing such provisions in agreements with rank-and-file employees.

The *McLaren* Decision

In June 2020, McLaren Macomb, a hospital in Michigan, permanently furloughed 11 unionized employees as a result of the COVID-19 pandemic. McLaren presented the 11 employees with severance agreements containing what the Board majority characterized as sweepingly broad confidentiality and non-disparagement provisions. These provisions prohibited the employees from disparaging their employer and disclosing the terms of the severance agreement without temporal or subject matter limitations, stating as follows:

> **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.
>
> **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 considering the lawfulness of the severance agreements, the NLRB reasoned that McLaren's conditioning the receipt of severance benefits on agreeing to non-disparagement and confidentiality provisions had a chilling effect on the former employees' rights under the NLRA. The Board was primarily concerned about Section 7 rights, which generally protect employees' right to discuss terms and conditions of employment and to engage in other conduct that is considered incident to 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[.]" Notably, this reliance on Section 7 made the decision squarely applicable to non-union employers, as Section 7 rights attach to all non-supervisory employees, regardless of union status.

The NLRB found that the non-disparagement provision prohibited public statements about the workplace which "are central to the exercise of employee rights under the [NLRA]" and a waiver of these rights via the severance agreement could prevent employees from discussing an employer's potential NLRA violations with both current or former employees, as well as the NLRB. A waiver, therefore, would undermine the purposes of the NLRA. Similarly, the Board held that confidentiality provisions impeded employees from sharing information and had the additional problematic risk of discouraging employees from filing ULP charges or assisting in NLRB investigations.

Importantly, according to the NLRB, employers commit an ULP by simply *offering* a severance agreement with these sorts of non-disparagement and confidentiality provisions. This is true even if an employer does not seek to enforce the provisions, even if the employee who the agreement is offered to does not sign the agreement, and even in the absence of other NLRA violations. Breaking from precedent, the NLRB held that the motive of the employer is not relevant to whether their actions are lawful where the actions are coercive or restrictive.

McLaren vs. *Baylor* & *IGT*

The *McLaren* decision is not entirely unexpected or unprecedented. Past Board decisions have reached a similar, or arguably the same, result. *McLaren* overruled a 2020 Trump-era rule, established in *Baylor Univ. Med. Ctr.*, 369 N.L.R.B. No. 43 (2020) and *IGT*, 370 N.L.R.B. No. 50 (2020), that required the NLRB to consider an employer's motive and the circumstances surrounding the presentation of confidentiality and non-disparagement provisions when determining whether these provisions are lawful. Under *Baylor* and *IGT*, an employer violated the NLRA when the proffered non-disparagement and confidentiality provisions were made to an unlawfully discharged employee or when the employer had discriminated against an employee. The *McLaren* rule states that an employer's proffer of these provisions is chilling even without motive and a concurrent ULP, in part, because it prevents former and current employees from discussing issues in the workplace. In so ruling, *McLaren* potentially goes farther than even pre-*Baylor* rulings, which primarily found these types of provisions to be problematic when there were other indicia of coercion or impropriety present.

Remedies

There is an open question of what precise consequences an employer that commits an ULP by offering these provisions will face. The NLRB and General Counsel of the NLRB seem poised and willing to utilize all of the remedial powers they have in furtherance of their goals in this arena. The NLRB has the authority to require employers to post a notice of violation in the workplace to notify its employees of the ULP and order them to cease and desist from using such provisions in future agreements. It also has the authority to order rescission of offending contractual provisions, and could potentially order rescission of entire severance agreements.

Takeaways for Employers

The *McLaren* decision left open a number of unanswered questions, and employers will hopefully have more information in the coming months as guidance may be issued from the Office of the NLRB's General Counsel or more decisions are

issued applying *McLaren's* holding. For the time being, however, employers should consider the following in light of the decision.

Determine Whether *McLaren* Applies to Your Agreement

By tying the use of nondisclosure and confidentiality clauses to Section 7 of the NLRA, *McLaren* applies to severance agreements between employers and both unionized and non-unionized employees. Still, it is important to remember that it does not apply to employees in supervisory level roles. The NLRA expressly excludes supervisory employees, whom it defines as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, 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.

Employers remain free to utilize non-disparagement provisions in agreements with supervisors.

Consider Whether Non-Disparagement and Confidentiality Provisions Could be Modified

While the NLRB deemed the provisions at issue in *McLaren* unlawful, it did not categorically prohibit non-disparagement and confidentiality provisions. In so doing, it theoretically left the door open to narrowly tailored non-disparagement and confidentiality provisions. It did not, however, provide any clear instruction on how to tailor these provisions in order to comply with its decision. Employers may want to consider constructing confidentiality and non-disparagement provisions with comprehensive carve-outs that explicitly allow employees to participate in Section 7 activity and assist others in doing so. It may be challenging, however, to craft a disclaimer that would both satisfy the NLRB rule and protect an employer's interests.

Employers might also consider safeguarding their severance agreements further by, for example, including a temporal limit on the provisions or allowing employees to discuss the terms of the agreement with only certain parties such as the government, labor unions, or other employees. Employers may also wish to consider including severability language in their severance agreements such that the remainder of the severance agreement remains enforceable, in the event that the nondisclosure or confidentiality clauses are deemed invalid.

Identify Non-Disparagement and Confidentiality Provisions in Other Agreements

Pursuant to the decision, *McLaren* is only directly applicable to severance agreements. With that said, its logic naturally applies to non-disparagement and confidentiality provisions in other contexts, such as employment agreements, settlement agreements, handbooks, and the like. While the Board is yet to rule on the propriety of confidentiality and non-disparagement provisions in these contexts, it may do so in the future. Additionally, the General Counsel of the NLRB, who acts as the agency's chief prosecutor, may rely on *McLaren's* logic to take the position that the use of these provisions constitutes an unfair labor practice. Thus, employers should be aware of where they are using these types of provisions and analyze their use.

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