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NLRB Limits Non-Disparagement and Confidentiality Clauses in Severance/Settlement Agreements

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The National Labor Relations Board recently issued a sweeping decision that should prompt most companies with U.S. operations to review --- and, in all likelihood, modify --- their standard separation, settlement, and severance agreements. In *McLaren Macomb*, 372 NLRB No. 58 (2023), the Board held that both union and non-union employers violate the National Labor Relations Act by offering employees an agreement that includes broadly drafted non-disparagement and confidentiality provisions. (As discussed further below, *McLaren* does not apply to agreements with executives and management-level supervisors.) These provisions, which have been commonplace in agreements for many years, will now be unlawful if they can be reasonably interpreted as interfering with employees' rights to engage in various forms of protected activity under the NLRA. The fact that an employee declines to sign the agreement is no defense. The Board's decision makes clear that an employer still violates federal labor law by offering the agreement ("the mere proffer of the agreement itself violates the Act") even if an employee rejects it. So, too, if the employer offers not to enforce the provisions at issue.

This shift in the NLRB's interpretation of the Act is effective immediately. As a result, employers should closely examine severance and settlement packages presented to employees for any expansive restrictions pertaining to non-disparagement and confidentiality.

Background

The employer in *McLaren* was a Michigan hospital that permanently furloughed 11 union-represented employees in June 2020 due to the pandemic. Each employee received and accepted a severance agreement that, besides requiring a release of claims, contained broad language prohibiting the disparagement of the hospital and required confidentiality regarding the terms of the agreement. The provisions at issue stated (with notable language **emphasized** below):

> 6. **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.

> 7. **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**.

The McLaren Board's Ruling

The *McLaren* Board held that each of these two clauses unlawfully constrained the furloughed workers' ability to discuss their workplace, their working conditions, and the severance agreement offered to them with former coworkers, their union, the NLRB (or other government agencies), the media, or practically anyone else. The Board also found that the provisions unlawfully restricted employees from (a) filing unfair labor practice charges with the NLRB, (b) assisting others in doing so, or (c) cooperating with the NLRB's investigative process. More broadly, the Board found that the provisions impermissibly barred employees from making public statements criticizing the employer and the workplace.

Practical Advice for Clients in Light of *McLaren*

1. Determine What Protections Your Business Really Needs When Entering Agreements With Departing Employees Who Are Not Part of Management.

Employers must carefully consider what protections are actually necessary in a given context. That will vary by employee group. For instance, employers should not use the C-suite template agreement for rank-and-file clerical or production workers. While the Board's decision applies to most employees, *including white collar and professional employees*, it does not apply to those individuals who exercise true supervisory or managerial authority under Board law. Thus, the *McLaren* holding does not require any changes to agreements provided to executives and those who are part of management.[1] But for others, employers should evaluate whether these individuals have access to specific information that needs to be protected, or whether their "disparagement" of the company would really make any difference to the enterprise. After a diligent review, employers may realize they do not need confidentiality or non-disparagement language at all for most employees or, alternatively, could decide to narrow the scope of these provisions.

2. Analyze and Describe Confidentiality With Care.

For employees who have access to confidential and proprietary information that needs to be protected, employers should clearly identify what that information is. The confidentiality of nonpublic financial data, vendor and customer lists, marketing plans, business secrets, intellectual property, and the like can still be kept confidential (but these items should be spelled out). By contrast, wages, salaries, employee benefits, and workplace policies should not be listed as confidential. With regard to the details of the agreement itself, employers have long assumed they could require confidentiality as to the terms and the existence of the package being offered. That is no longer the case post-*McLaren* with regard to most employees. If there is a genuine concern about keeping a specific term of the package confidential, the company should discuss its options with labor counsel. But where there is, for example, a formulaic severance benefit (e.g., two weeks' pay for every year of service), there should be little, if any, need to keep the package private.

3. Appropriate Limitations on Disparagement.

Employers should take a hard look at what kinds of disparagement truly matter to the business. As a practical matter, most employers would not enforce non-disparagement clauses against non-management employees anyway. If non-disparagement language is deemed important, however, it should be carefully tailored with help from experienced labor counsel. Limited clauses that apply to disparagement of the company's products, or to services offered to customers, remain enforceable if drafted appropriately.

McLaren is one of many precedent-shifting Board decisions we expect in the near term. Stay tuned.

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[1] Employers should keep in mind that job titles are not determinative, and the NLRB's definition of supervisors and managerial employees is more restrictive than initially apparent. We are happy to assist with specific factual scenarios