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Labor & Employment Alert
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NLRB MARKS RETURN TO HEIGHTENED SCRUTINY OF EMPLOYEE SEVERANCE AGREEMENTS

On February 21, 2023, the National Labor Relations Board ("NLRB" or "Board") issued a decision significantly limiting the use of general confidentiality and non-disparagement clauses in severance and similar agreements with employees. The Board, in McLaren Macomb, 372 N.L.R.B. No. 58, found that an employer violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") when it offered severance agreements to employees that contained broad non-disparagement and confidentiality provisions. In doing so, the NLRB overruled two 2020 decisions that had afforded employers greater leeway with the drafting, use, and offering of similar agreements.

Some brief factual background to anchor this discussion: McLaren Macomb is a hospital located in Mt. Clemens, Michigan. A union represented roughly 350 of its service employees. During the first wave of the COVID-19 pandemic, the hospital temporarily furloughed eleven of those service employees as nonessential. Later, the hospital permanently furloughed those employees and presented each with a severance agreement offering severance payments in exchange for their acceptance of the agreement's terms. Among the terms were broad non-disparagement and confidentiality provisions.

The severance agreements included the following language:

> **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.
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> **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 parents and affiliated entities and their officers, directors, employees, agents and representatives.

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The NLRB found that both provisions unlawfully restrained and coerced the furloughed employees' exercise of their Section 7 rights.[1] Before it could do so, however, it first had to dispense with two Trump-era NLRB decisions calling for a different analysis. As background, prior to 2020, the NLRB analyzed the language of potentially coercive severance agreements without regard to the circumstances surrounding the employer's proffer of them to its employees. The analysis focused on whether the severance agreements contained broad proscriptions on employee exercise of Section 7 rights; such agreements may violate the NLRA. However, in Baylor University Medical Center and IGT d/b/a International Game Technology, the Trump-era Board introduced a new two-prong test, focusing on the circumstances of the separation itself to determine: (1) whether the employer had otherwise discharged the employee in violation of the NLRA or otherwise committed an unfair labor practice ("ULP") discriminating against the employee; and (2) whether the employer displayed animus toward the exercise of Section 7 rights.

Finding that two-prong test arbitrary and in conflict with precedent, the NLRB in McLaren Macomb overruled Baylor and IGT. The Board reasoned that those decisions failed "to protect employees confronted with patently coercive severance agreements, if their employer has not otherwise violated the Act." Additionally, the NRLB found that "whether an employer harbors animus against Section 7 activity" to be an irrelevant consideration because all that matters is whether the employer's conduct tended to interfere with the employee's free exercise of their rights under the NRLA. With the above rationale in mind, the Board declared its return to pre-Baylor precedent and "[held] that an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights."

With regard to the non-disparagement provision, the Board concluded that the provision's "comprehensive ban" on employees making any statements to other employees, the union, or the general public amounted to a "sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights by the subject employee." The confidentiality provision fared little better. The NLRB found it unlawful as it would bar the employee from discussing the agreement's potentially unlawful provisions with other employees, the union, and even the NLRB itself. Accordingly, the Board found that the two clauses violated the Act and, importantly, even the proffer of the severance agreement with those provisions would have violated the Act even had no employee accepted the agreement. While the Board's decision focused on severance agreements offered to union employees, the Board's analysis is relevant to

[1] For context, Section 7 of the NLRA guarantees employees "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 . . . ."

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almost all private employers – whether having unions or not. It is important to note that the NLRA's protections do not apply to supervisors.

In short, the Board will now analyze potentially coercive provisions in severance agreements based on their language and whether such language impermissibly restricts the exercise of Section 7 rights. For employers, this of course necessitates additional care when drafting agreements that may implicate employee's Section 7 rights. Employers will have to consider whether to narrow the scope of non-disparagement and confidentiality provisions, whether to include broad disclaimers to communicate the preservation of Section 7 rights, or whether to simply not include such provisions at all in agreements with employees.

It is also important to note that McLaren Macomb's relevance is not limited to "severance agreements." While the Board's discussion focused on severance agreements in the instant case, the Board's analysis is applicable to all manner of agreements between employers and employees covered by the NLRA, such as settlement agreements regarding workplace disputes. Employers must be mindful that Section 7 rights in any employee agreement may be implicated and carefully draft these agreements to avoid potentially violating the law.

On a larger scale, McLaren Macomb represents yet another pendulum swing in the ongoing return to the policies of the Obama-era NLRB after the Trump-era NLRB ushered in a wave of employer-friendly changes. More such shifts will be forthcoming, so employers should take care to monitor further NLRB developments.

Although the Board's decision does not apply to public sector employers and employees under Massachusetts state law, public sector employers should nevertheless be aware that the state public employee labor laws contain similar prohibitions against interfering with, restraining, or coercing public sector employees in the exercise of their collective bargaining rights. Moreover, the state agency tasked with enforcing those laws often follows the lead of the NLRB.

This Client Alert was prepared by Joseph W. Proctor. This Alert was reviewed by Kier Wachterhauser, Sarah Spatafore, and Arthur Murphy. If you have any questions about this issue, please contact the attorney responsible for your account or call (617) 479-5000.

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