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NLRB Prohibits Confidentiality and Non-Disparagement Provisions in Severance Agreements (and Handbooks and Other Work Rules?)

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On February 21, 2023, the National Labor Relations Board (NLRB) ruled that employers covered by the National Labor Relations Act violate Section 8(a)(1) of the Act by merely offering certain confidentiality and non-disparagement provisions in their severance agreements. *McLaren Macomb*, 372 NLRB No. 58 (2023).

Section 8(a)(1) broadly prohibits employer conduct that coerces employees or otherwise interferes with their statutory rights to engage in "protected concerted activity." Most private employers whose activities meet a minimum threshold of effect on commerce are covered by the Act.

The Confidentiality provision at issue in *McLaren* stated (emphasis added):

"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."

Despite the existence of a provision permitting the employee to consult with any necessary "professional advisers for the purposes of obtaining legal counsel," the NLRB in *McLaren* found that this confidentiality provision improperly restricts employees from being able to disclose "even the existence of an unlawful provision contained in the agreement," and would likewise "tend to coerce the employee from filing an unfair labor practice charge or

assisting a Board investigation into the [company's] use of the severance agreement, including the non-disparagement provision."

In addition, the Board found that the company's severance agreement prevents an employee "from assisting coworkers with workplace issues," including through discussions with coworkers "in a similar predicament" trying to determine "whether to accept a severance agreement" for themselves and, therefore, unlawfully restricts employees' Section 7 rights. As a result, and because an employer "can have no legitimate interest in maintaining a facially unlawful provision in a severance agreement," the Board found the mere offer of the confidentiality provision at issue in *McLaren* violative of Section 8(a)(1) of the Act.

The non-disclosure provision stated (emphasis added):

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 holding the non-disclosure provision unlawful, the Board in *McLaren* found its "far-reaching proscription" on statements to other employees and to the general public was "not even limited to matters regarding past employment" with the company. Moreover, because "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act," the non-disclosure would prohibit the disclosure of "any labor issue, dispute, or term and condition of employment." Finding the provision to constitute a "broad restriction on employee protected Section 7 conduct," the Board ruled that the mere offer of that provision violated Section 8(a)(1) of the Act.

Prior to the Board's ruling in *McLaren*, the Board previously ruled in *Baylor Univ. Med. Ctr.,* 369 NLRB No. 43 (2020), and again in *IGT*, 370 NLRB No. 50 (2020), that an employer may lawfully offer severance agreements containing such provisions, and employees may lawfully accept them, so long as the agreement is entered into knowingly and voluntarily (and subject to other contract law principles).

However, the NLRB in *McLaren* reversed both of those decisions, claiming they "ignore[d] well-established precedent concerning waiver of employee rights."

Instead, the *McLaren* Board ruled that "the mere proffer" of a severance agreement is *per se* unlawful if it "conditions receipt of severance benefits on the forfeiture of statutory rights," because such agreements have a "reasonable tendency to interfere with or restrain the prospective exercise of

Section 7 rights, both by the separating employee and those who remain employed." No actual showing of coercion is required for the Board to find a violation of the Act.

While *McLaren* only addressed these confidentiality and non-disclosure (and non-disparagement) provisions in the context of an offered severance agreement, the same or similar provisions that may be found in other agreements—or in employee handbooks or other work rules—are now ripe for the Board to find unlawful.

What this means to you

Severance agreements remain lawful to offer departing employees, though employers covered by the Act should be careful when crafting and including any confidentiality or non-disparagement provisions in light of *McLaren*.

In that regard, while employers should avoid broadly prohibiting "disparaging" remarks or similar statements that may offend or harm a company's image, employers may still prohibit comments that disparage an employer's product, *see NLRB v. IBEW Local 1229*, 346 U.S. 464 (1953); *see also Stephens Media, LLC*, 356 NLRB 661, 681 (2011). Employers may also prohibit comments that are made with "a malicious motive" or "made with knowledge of their falsity or with reckless disregard for their truth or falsity," consistent with *Triple Play Sports Bar & Grille*, 361 NLRB 308 (2014) and *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250 (2007).

However, meaningful confidentiality provisions are less likely to survive Board scrutiny after *McLaren*. While employers can and should continue to protect their confidentiality interests in their trade secrets and similar proprietary information, broader confidentiality provisions restricting employees' rights to discuss the terms of an offered severance agreement, or the circumstances underlying it, will be viewed by this NLRB as unlawfully interfering with employees' rights to collectively improve their working conditions.

The Board's decision in *McLaren* only applies to employers and employees covered by the Act. As a result, confidentiality and non-disparagement provisions contained in agreements with individuals not covered by the Act, such as independent contractors, or who work for entities not covered by the Act or the NLRB's jurisdiction, are not impacted by *McLaren*.

Because of how NLRB jurisprudence tends to shift depending on the political party elected to the Presidency, whether *McLaren* remains good law for another two years, six years, or longer remains to be seen.

Contact us

If you have questions concerning compliance with this rapidly-changing area of law, please contact a member of Husch Blackwell's Labor Relations Team.