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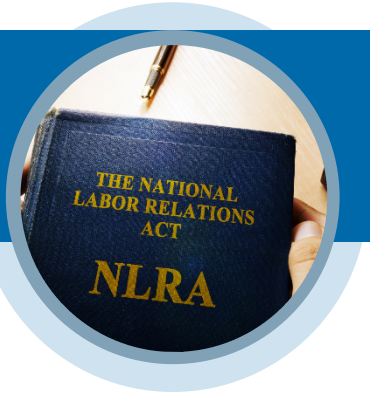

NLRB PROVIDES GUIDANCE ON NON-DISPARAGEMENT AND CONFIDENTIALITY PROVISIONS IN SEVERANCE AGREEMENTS IN LIGHT OF *MCLAREN MACOMB* DECISION

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The legal world has been reeling since the February 21, 2023 *McLaren Macomb* decision, in which the National Labor Relations Board ("NLRB" or the "Board") determined that standard non-disparagement and confidentiality provisions in severance agreements violate employees' rights under the National Labor Relations Act ("NLRA" or the "Act"). On March 8, 2023, attorneys Andrew J. Wolf and Brittany A. Mallow discussed the *McLaren Macomb* decision.

On March 22, 2023, the NLRB's General Counsel, Jennifer A. Abruzzo, issued guidance (the "Memo") regarding the *McLaren Macomb* decision, which expounds upon the Board's decision.

The Memo provides the following points to assist employers in recrafting their severance agreements:

- Releases should only waive the employee's rights to pursue employment claims and only as to claims arising as of the date of the agreement.
- Retaliating against supervisors, who generally are not protected by the NLRA, for refusing to proffer an overly broad severance agreement would violate the NLRA. Additionally, severance agreements with supervisors could also be unlawful if they prevent the supervisor from participating in Board proceedings.
- Maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions that restrict an employee's Section 7 rights constitutes a violation of the NLRA. A charge alleging such would not be time-bared by the Section 10(b) six-month statute of limitations. To guard against a potential charge, the Memo suggests that employers should contact former employees subject to overly broad non-disparagement and confidentiality provisions in previously entered severance agreements and advise them that the provisions are null and void and the employer will not seek to enforce these provisions.

- The origin of the request to include broad confidentiality and/or non-disparagement provisions in a severance agreement is irrelevant—an employee (or a union on behalf of an employee) cannot waive an employee's rights under the Act.

- Non-disparagement clauses may be lawful where they are limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.

- Carefully crafted confidentiality clauses that only restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful.

- Confidentiality clauses regarding the non-disclosure of financial terms is lawful under the *McLaren Macomb* decision.

- A disclaimer may not cure overly broad provisions. However, disclaimers which describe the activities that are of primary importance to fulfillment of the NLRA's purpose and are commonly engaged in by employees may mitigate the potential coercive impact of a severance agreement's overbroad provisions.

  These activities include the employee's right to engage in the following:

  (1) Organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment;

  (2) Forming, joining, or assisting a union, such as by sharing employee contact information;

  (3) Talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms;

  (4) Discussing wages and other working conditions with co-workers or a union representative;

  (5) Taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union;

  (6) Striking and picketing, depending on its purpose and means;

  (7) Taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present;

(8) Wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and

(9) Choosing not to engage in any of these activities.

- Other provisions commonly found in severance agreements may also interfere with the exercise of employee rights, including non-compete clauses, no solicitation clauses, no poaching clauses, broad liability releases and covenants not to sue, and cooperation requirements involving investigations or proceedings.

The *McLaren Macomb* decision, and subsequent guidance from the NLRB's General Counsel, clearly indicate that it is time for employers to revisit their standard severance agreements. Employers may wish to consult legal counsel to fully assess the best approach to tackle their severance agreements as it applies to their business.

Hahn Loeser & Parks LLP's Labor and Employment Group routinely advises employers on the preparation of severance agreements to ensure compliance with the NLRA, as well as other applicable state and federal laws.

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