ALERTS

NLRB Restricts Non-Disparagement and Confidentiality Clauses in Severance Agreements

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On February 21, the National Labor Relations Board ("NLRB") issued a decision in *McLaren Macomb,* restricting an employer's ability to include non-disparagement, confidentiality and nondisclosure clauses in severance agreements. By a 3-1 vote, the NLRB held that employers violate the National Labor Relations Act ("NLRA") when presenting a severance agreement with provisions that restrict an employee's exercise of their NLRA rights. Although the *McLaren* decision involved a unionized workforce, the NLRA applies to both unionized and non-unionized workforces. The *McLaren* decision, however, does not apply to individuals excluded from NLRA coverage, such as supervisors and managers, unless the employer has recognized a union as the representative of such individuals. Accordingly, the *McLaren* decision does not impact confidentiality or non-disparagement clauses contained within severance agreements with supervisory or managerial level employees.

The NLRB's ruling in *McLaren* reverses prior NLRB decisions issued during the Trump administration. The decision holds that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their NLRA Section 7 rights. These rights include an employee's right to self-organization, to bargain collectively and to engage in other concerted activities. The NLRB found that broad non-disparagement and confidentiality language in severance agreements prohibiting employees from discussing the terms of their severance agreement or their employment generally with any third person unlawfully restrain and coerce employees in the exercise

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of these rights. The NLRB held that such provisions have the effect of silencing and interfering with an employee's right to engage in concerted activity.

The NLRB decision means that simply offering agreements with overly restrictive language can be an unfair labor practice. The NLRB reasoned that asking employees to choose between receiving benefits and exercising their rights under the NLRA is unlawful and therefore an employer's offer of a severance agreement itself is considered an attempt to deter employees from exercising their statutory rights. According to the NLRB, the offer of such prohibitive agreements may cause employees to feel it is necessary to give up their rights to receive benefits provided in the agreement.

It should be noted that the *McLaren* decision does not address whether employers may avoid violating the NLRA by including "savings clauses" in their severance agreements (language which explicitly provides that the agreement does not interfere with an employee's rights to discuss the terms and conditions of their employment under Section 7 of the NLRA). The inclusion of such clauses in severance agreements in light of the *McClaren* decision may mitigate legal risk. Similarly, the inclusion of a severability clause in a severance agreement, which provides that any clause found to be unenforceable or unlawful is to be "severed" from the remainder of the agreement, is also advisable.

The NLRB's ruling in *McLaren* is part of a larger trend of the current NLRB striking down Trump-era precedents that had been protective of employers. We expect the NLRB will reverse a Trump NLRB decision on employee handbooks and revert to Obama NLRB decisions finding violative of the NLRA overbroad handbook policies concerning confidentiality, use of company logos and trademarks, photography, recordings and social media.

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