> Client Alert

# NLRB Prohibits Broad Confidentiality and Non-Disparagement Provisions in Severance Agreements for Certain Employees

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If you require any additional information regarding the drafting of separation agreements or any other matters associated with labor-management relations policies or practices, please feel free to contact any of the attorneys listed below.

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The recently reconstituted National Labor Relations Board's ("NLRB" or "Board") February 21, 2023 decision in the matter of *McLaren Macomb* (372 NLRB No. 58) held, among other things, that the non-disparagement and confidentiality provisions contained in an employer's severance agreements were unlawful because they "interfere[d] with, restrain[ed], and coerce[d]" employees in connection their protected rights under the National Labor Relations Act (the "Act"). Critically, the NLRB held that by merely conditioning receipt of severance benefits on acceptance of the non-disparagement and confidentiality provisions, the employer violated Section 7 and 8(a)(1) of the Act.

## Section 7 and Section 8(a)(1) Protections

As a threshold matter, Section 7 of the Act guarantees employees—regardless of union affiliation or membership—"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," as well as the right "to refrain from any or all such activities," including discussion surrounding their terms and conditions of employment. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

## The *McLaren Macomb* Decision

The issue before the Board in *McLaren Macomb* was whether an employer violated Sections 7 and 8(a)(1) of the Act by offering severance agreements to a group of permanently furloughed employees which, as an integral part thereof, contained terms prohibiting them from (i) making disparaging statements that could harm the employer's reputation and (ii) disclosing the terms of their severance agreements. Prior to this, well settled Board law permitted the use of non-disparagement and confidentiality provisions in severance agreements absent evidence of separate unlawful conduct on the part of the employer.

In overruling that precedent, the Board found that the non-disparagement provision at issue violated the employees' Section 7 rights on grounds that "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act." The Board also held that the non-disparagement provision at issue violated employees' rights because it prohibited

"any statement asserting that the [employer] had violated the Act," including "employee conduct regarding any labor issue, dispute, or term and condition of employment," and stifled "efforts to assist fellow employees, which would include future cooperation with the Board's investigation."

Separately, the Board concluded that the confidentiality provision in the agreement at issue violated employees' Section 7 rights because it prohibited employees from "disclosing even the existence of an unlawful provision contained in the agreement," which could dissuade employees from filing unfair labor practice charges or assisting former or current employees or the Board in an investigation. The Board also determined the confidentiality provision was unlawful because it prohibited employees from discussing their severance agreements with former coworkers who might receive similar agreements, as well as union representatives and employees seeking to organize.

## The New Prohibition Against Confidentiality and Non-Disparagement Provisions Does Not Apply to "Supervisory" Employees

The Board's pronouncements in *McLaren Macomb*, however, apply only to non-disparagement and confidentiality provisions presented to *non-managerial* employees covered by Section 7, and does not apply to employees considered to be "supervisors" under the Act. Section 2(11) of the Act defines who qualifies as a "supervisor" (*i.e.*, a manager):

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, supervisory employees[1] (including anyone who speaks for and can bind the employer) are exempt from the new prohibition. They are contrasted from an employer's hourly employees who are not exempt from overtime under the Fair Labor Standards Act or its state and local corollaries would not be deemed a "supervisor" under the Act. Therefore, prior to including non-disparagement and/or confidentiality provisions in an employee's severance agreement, employers should first consider whether these are supervisory employees.

## Employer Takeaways

The Board's momentous decision in *McLaren Macomb* impacts the manner in which almost every employer nationwide will be required to rethink and modify the provisions of its severance agreements, given that, in addition to an employee's waiver and release of claims, one of the major inducements for any employer to provide severance pay is to "buy" an employee's silence with respect to both (i) the publication of material which could be deemed disparaging to the employer, its management team or its products and services, and (ii) the terms and conditions of the severance agreement itself. As such, it appears a foregone conclusion

[1] For further context, supervisory employees, within the meaning of Section 2(11) of the Act, are those who by definition, may not be included in a bargaining unit of other employees for purposes of union representation or collective bargaining. But as previously noted, Section 7 rights more generally are afforded any employee whether or not a member of, or affiliated with, a labor organization or seeking to become such a member.

that this decision will be the subject of enforcement proceedings in the Circuit Court or legislative action to counteract its new prohibitions.

With that said, unless and until this occurs, employers should review and modify their forms of severance agreement prospectively to ensure compliance with decision's prohibition against confidentiality and non-disparagement provisions in severance agreements for non-supervisory employees. Whether non-disparagement and confidentiality provisions in such agreements, to the extent that they carve out any "intention to infringe upon an employee's Section 7 rights," may withstand Board or judicial scrutiny remains an open question. What is clear is that the ruling is intended to cover all non-supervisory employees irrespective of their union membership. Employers should thus exercise prudence in the form of any agreement provided to an individual or group to whom severance benefits are to be granted in consideration for a waiver and release of claims.

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The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice and consultation related to the drafting of separation agreements, as well as union avoidance, organizational campaigns, collective bargaining, unfair labor practices, grievance administration, other matters associated with labor-management relations, or any other labor and employment law questions you might have.