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EMPLOYMENT LAW ALERT
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NLRB HOLDS THAT CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS ARE UNLAWFUL

When drafting severance agreements and other employment-related agreements, employers routinely include provisions that broadly require employees to keep the existence and terms of the agreement confidential and to refrain from disparaging the employer. However, in a recent decision, *McLaren Macomb*, the National Labor Relations Board held that the mere act of offering a severance agreement with such provisions – even if the employee never signs the agreement – violates the National Labor Relations Act because it interferes with employees' protected rights to organize, discuss their working conditions, and engage in collective bargaining. Specifically, the NLRB invalidated the following two provisions, which closely track the language that many employers use in their severance agreements:

- "The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than a 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."

- "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."

Importantly, the NLRB's ruling applies ***whether or not the employer is unionized.***

The full scope and impact of this new ruling is not yet known, and it is possible the ruling could be reversed on appeal. For now, though, *McLaren* is binding on employers nationwide, and employers should carefully review their severance agreements and other employment documents in light of *McLaren*. A number of issues remain unsettled even after the *McLaren* decision; for example:

- The ruling does not apply to supervisory employees, but whether an employee is a "supervisor" is highly fact specific. Attempts to draw a bright line between supervisory and non-supervisory employees in deciding what language to use in agreements will thus carry some risk.

- The ruling does not address whether or to what extent disclaimers (for example, "nothing herein prevents the employee from exercising rights under the NLRA") could be used to "save" a provision that otherwise would be impermissible.

- Although the ruling does not directly address documents other than severance agreements – for example, handbook provisions and non-disclosure agreements ("NDAs") – the NLRB's activism in this area could be a harbinger of future decisions impacting such documents. In addition, severance agreements often incorporate NDAs and similar documents, and certain terms in those incorporated documents may not be consistent with the *McLaren* holding.

Responding to *McLaren* will not be a one-size-fits-all approach. Employers that are more risk tolerant may choose to keep their current agreements and adopt a wait-and-see approach. Others may choose to keep some form of their current confidentiality and non-disparagement clauses, but with modifications. Yet others may decide that the risks of keeping these clauses outweigh the benefits and remove them entirely. Regardless, employers should consult with experienced employment counsel on these issues.

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