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CLIENT ALERT: NLRB Tightens Standards for Confidentiality and Nondisparagement Clauses in Severance Agreements

On February 21, 2023, the National Labor Relations Board (the "Board") ruled in *McLaren Macomb,* 372 NLRB No. 58 (2023) that an employer violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act") by proffering severance agreements to furloughed employees which contained broad confidentiality and non-disparagement clauses. Specifically, the Board examined the language of the severance agreements presented by the employer, and concluded that the clauses interfered with, restrained, or coerced employees' exercise of Section 7 rights. In so holding, the Board has put employers on notice of its distaste for these clauses, which are commonly found in severance agreements. *McLaren* explicitly overrules two 2020 Trump-era NLRB decisions, which provided a more relaxed standard governing the use of such clauses in severance agreements.

Section 7 of the NLRA guarantees certain employees – whether unionized or not – "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." It is unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7. (Note: these protections do not apply to statutory supervisors or managers who fall outside the reach of the Act). The Board is the federal agency charged with investigating violations of the NLRA and enforcing its terms.

In *McLaren*, the Board held that the language of a severance agreement alone, without the need for any additional evidence of coercive behavior by an employer, could potentially violate the Act. In reviewing the severance agreements at issue in *McLaren*, the Board found that their broad confidentiality and non-disparagement provisions were unlawful because they tended to interfere with the free exercise of employee rights under the Act. In so holding, the Board noted that "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act."

Notably, the Board did not hold that all confidentiality and non-disparagement provisions are *per se* violations of the Act, nor did it address the impact of the inclusion of express carve outs in severance agreements for the protection of an employee's rights under the Act. Nonetheless, the Board's language strongly suggests that it may not look kindly upon attempts to regulate employee communications about the workplace through severance agreements or otherwise.

Employers should proceed with caution in constructing future severance agreements and in enforcing existing severance agreements which are in conflict with the *McLaren* decision.

Employers are encouraged to contact their MBJ attorney with any questions regarding the effect of the *McLaren* decision on their severance agreements.

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