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Client Alert Commentary

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NLRB Limits the Scope of Confidentiality and Non-Disparagement Covenants

Employers should review and tailor their confidentiality and non-disparagement covenants to mitigate risk of a finding that such covenants are unlawful.

On February 21, 2023, the National Labor Relations Board (the NLRB) ruled that the proffer of confidentiality and non-disparagement clauses in severance agreements violate Section 8(a)(1) of the National Labor Relations Act (the NLRA) if they restrict workers from engaging in protected activity. Such protected activity includes criticizing employer policies with coworkers and former coworkers; discussing severance, wages, and other terms and conditions of employment; and cooperating in NLRB investigations. The decision in *McLaren Macomb* reverses NLRB positions taken under the last administration. The decision, which takes effect immediately and applies to existing agreements, carries practical implications for employers, many of whom regularly enter into and rely upon severance agreements containing broad confidentiality and non-disparagement covenants, once sanctioned by the NLRB.

The McLaren Decision

McLaren Macomb (McLaren), a hospital in Michigan, laid off 11 employees and presented each of them with a severance agreement (the Severance Agreement). In addition to a release of claims, the Severance Agreement included (1) a prohibition on sharing the terms of the Severance Agreement with anyone other than a spouse or professional advisors, or unless compelled to do so by a court or administrative agency (the Confidentiality Provision), and (2) a non-disparagement clause that prohibited the employee from disparaging McLaren or its affiliated persons or entities, whether to McLaren's current employees or to the general public (the Non-Disparagement Provision, together with the Confidentiality Provision, the Provisions). Importantly, the Provisions were broad and did not include any other limiting language.

The NLRB ruled that the proffer of the Severance Agreement violated the NLRA because it conditioned the employees' receipt of severance on employees agreeing to unlawful restrictions — i.e., the Provisions. The NLRB found the Provisions to be unlawful because they interfered with the employees' rights under Section 7 of the NLRA. Under Section 7, non-supervisory employees have the right to join together to advance their interests as employees and engage in "concerted activity," which is not limited to unionizing activities and could include discussing wages or other workplace concerns or opposing unlawful conduct in the workplace. The NLRB stressed that Section 7 rights are broad and cover the ability (even as a former employee) to criticize employer policies and actions with one's current and

former colleagues. According to the NLRB, the Non-Disparagement Provision was impermissible, in part, because it prohibited *any* critique of McLaren, which would include statements that McLaren had violated employee rights under the NLRA. Similarly, the NLRB found that the Confidentiality Provision, as broadly drafted, unlawfully prevented employees from providing information or otherwise cooperating with an NLRB investigation.

McLaren may petition the US Court of Appeals for the Sixth Circuit for a review of the NLRB's decision; however, the decision will not be stayed pending appeal and will take effect immediately regardless of whether McLaren appeals.

McLaren overrules NLRB decisions in 2020, Baylor University Medical Center (Baylor) and IGT d/b/a International Game Technology (IGT). The McLaren decision criticized Baylor and IGT for not focusing on the terms of the agreement and refocuses the analysis on the terms themselves.

FAQs and Guidance for Employers

1. **Does the NLRB ruling apply to employers without unionized employees?**
   Yes. While McLaren involved unionized employees, the ruling affects any employee with rights under the NLRA, which is not limited to unionized employees. Section 7 of the NLRA protects the rights of all employees, whether or not unionized, to engage in concerted activity to address or improve working conditions, and, thus, all employers are bound. That said, the NLRA does not cover certain classes of workers, including government employees, properly classified independent contractors and, with limited exceptions, supervisors.

2. **Do employers need to change their forms of severance and other agreements containing non-disclosure, confidentiality, and non-disparagement provisions moving forward?**
   Potentially. In light of McLaren, employers are encouraged to review their agreements to ensure the covenants are not drafted so broadly that they could be interpreted to prevent an employee from cooperating with the NLRB, discussing severance or wages, or exercising any other rights to engage in activity protected by Section 7 of the NLRA. Employers may be well-advised to tailor such restrictions and include appropriate disclaimers or carve-outs to better ensure enforceability and withstand NLRB scrutiny. Employers may also wish to consider the extent to which the limitations imposed by the McLaren decision impact other business terms in their severance agreements, including the amount of severance provided.

3. **Are supervisors excluded from the protections of the NLRA and, if so, do the concerns raised in McLaren not apply to agreements with supervisors?**
   Supervisors are generally excluded from the protections of the NLRA, which defines "supervisors" as individuals with authority to hire, discharge, direct, or take certain other actions with respect to other employees, through the use of independent judgment. However, whether an individual constitutes a supervisor under the NLRA is a fact-intensive inquiry and thus employers should consider drafting covenants for supervisors and non-supervisory employees alike that do not encroach on their rights, if any, under Section 7 of the NLRA. Employers should be mindful of other restrictions imposed by other federal and state laws that may apply, which may require tailored terms and/or express disclaimers in similar agreements.

4. **Is the McLaren decision limited to severance agreements? What about confidentiality and non-disparagement provisions in offer letters, employment agreements, or other restrictive covenant agreements?**
   The McLaren decision concerns severance agreements. However, the NLRB's holding and

reasoning on how the Provisions chilled Section 7 rights would apply to similar restrictions in other employment agreements, including those entered into at the start of or during employment. As a result, employers should consider ensuring any confidentiality and non-disparagement provisions comport with McLaren.

5. **When does the McLaren decision take effect and does it apply to existing agreements?** The McLaren decision takes effect immediately and applies to existing agreements. Employers may wish to take inventory of their existing agreements containing confidentiality and non-disparagement provisions and assess whether, in light of McLaren, such provisions could be deemed unlawful. Employers may also wish to immediately carve out rights or modify existing agreements, or enter into new superseding agreements with appropriate terms.

Bottom Line for Employers

Employers are encouraged to work with counsel to:

- review and update their templates containing confidentiality and/or non-disparagement covenants as needed to ensure that future agreements do not overreach in light of McLaren — i.e., ensure the covenants do not encroach on employees' rights to report to the NLRB, to discuss severance or wages, or to engage in other concerted activities protected by Section 7 of the NLRA;
- review existing agreements to determine if they should be rescinded, amended, or superseded as necessary; and
- consider not only the takeaways from McLaren but other federal and state laws that may require tailored covenants and/or express disclaimers, to better ensure enforceability.

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