MONACO COOPER LAMME & CARR PLLC

Client Advisory

ACCORDING TO THE NLRB, SEVERANCE DOES NOT EQUAL SILENCE: UPDATES ON SEVERANCE AGREEMENTS IN PRIVATE WORKPLACES

The Basics

In 1935, Congress passed the National Labor Relations Act ("NLRA") to encourage collective bargaining by protecting workers at private-sector workplaces. Also established was the National Labor Relations Board ("NLRB"), an independent federal agency that protects employees from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits and working conditions.

On February 21, 2023, the NLRB issued a decision in *McLaren Macomb*, holding that confidentiality and non-disparagement provisions in severance agreements were prohibited under the National Labor Relations Act. (see, *McLaren Macomb*, 372 NLRB No. 58(2023)).

Understanding the *McLaren Macomb* Decision

The employer in *McLaren Macomb* offered furloughed employees severance agreements that contained a confidentiality provision preventing the employees from discussing the terms of the severance agreements. The agreements also included a non-disparagement provision requiring the employees to refrain from disclosing the employer's confidential information and from disparaging the company to employees or the general public.

The National Labor Relations Act, Section 7, provides employees' broad rights relating to their ability to speak about their employers and the terms and conditions of employment with coworkers and the public. In fact, Section 7 specifically states that it is a violation for an employer to prohibit or interfere with employees' ability to speak about working conditions.

The decision in *McLaren Macomb* overturns two of the Board's prior decisions in *Baylor University Medical Center* and *IGT d/b/a International Game Technology* that permitted employers to include confidentiality and non-disparagement provisions in severance agreements. *McLaren Macomb* returns the Board to a longstanding precedent holding that employers cannot offer

employees severance agreements that require employees to broadly waive their rights under the NLRA.

Specifically, the decision explains that offering an employee a severance agreement that requires the employee to broadly abandon their legal rights under the NRLA violates Section 8(a)(1) of the Act. The NLRB observed that the employer's offer is an attempt to deter employees from exercising their statutory rights at a time when employees may feel they must give up their rights to get the benefits provided in the agreement.

What Does This Mean for Private-Sector Employers and Employees?

The *McLaren Macomb* decision holds that the "mere proffer" of a severance agreement containing unlawful confidentiality and non-disparagement provisions violates the NLRA because conditioning the receipt of benefits on the forfeiture of statutory rights tends to interfere with, restrain, or coerce the exercise of those rights.

The "proffering" language of the decision is critically important to pay attention to. Under *McLaren Macomb*, offering a severance agreement with unlawful terms to an employee, even if the employer has no intention of enforcing the unlawful terms, is enough to result in an unfair labor practice under Sections 7 and 8(a)(1) of the NLRA. The lack of intention to enforce will not be an acceptable defense.

Employers should review all agreements that contain confidentiality and non-disparagement language that they are or about to offer employees or potential employees, regardless of the name of the document in which the provisions are contained.

Although the Board did not address agreements in place prior to its decision, agreements that are pending should be reviewed to determine if they should be revised or rescinded, and those previously signed should be reviewed with legal counsel to determine what action should be taken.

Employers should keep in mind that the NLRA only covers employees, and not supervisors, independent contractors, agricultural laborers, and in-home domestic servants, among others. These excluded workers are not subject to the *McLaren Macomb* ruling.

We will follow the *McLaren Macomb* decision for any appeals and for clarification of the application of the decision retroactively. Stay tuned to Monaco Cooper Lamme & Carr, PLLC for updates.