

# Electronic Alert

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## **NLRB Further Restricts Non-Disclosure & Non-Disparagement Provisions in Severance Agreements**

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Private sector employers will want to ensure that their severance agreements are in compliance with the National Labor Relations Board's latest precedential decision. On February 21, 2023, the Board issued an opinion in *McLaren Macomb*, affecting releases of employees' Section 7 rights under the National Labor Relations Act (NLRA). In this decision, the Board held that because the non-disparagement and confidentiality provisions in the employer's release were unlawful, the employer offering the severance agreement to permanently furloughed employees was also unlawful.

The severance agreement language that the employer presented to 11 permanently furloughed employees in *McLaren Macomb* expressly restricted the employees from disclosing the terms of the agreement and other confidential information to third-parties. The agreements further required employees "not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer[.]" The agreement provided that the employer would be able to enforce those provisions with injunctive relief and seek substantial monetary damages against an employee in breach.

Importantly, the employer did not notify the employees' union that it was furloughing the 11 employees nor that it was offering them a severance agreement, meaning the union had no opportunity to bargain and that the employer was in violation of clear direct dealing principles. The Board indicated that "agreements ... that restrict employees from engaging in activity protected by the Act, or from filing unfair labor practices charges with the Board, assisting other employees in doing so, or assisting the Board's investigative process, have been consistently deemed unlawful."

In its opinion, the Board made it clear that the risk of unfair labor practice charges is twofold with employee severance packages. Entering into a severance agreement with an employee that unlawfully restricts an employee's NLRA Section 7 rights is one type of unfair labor practice. Additionally, the act of offering employees to enter into an agreement containing such unlawful provisions is itself another unfair labor practice.

The *McLaren Macomb* opinion comes amidst a nationwide trend to limit employers' ability to enter into confidentiality and non-disparagement agreements with current and former employees. Importantly, the NLRA's protections for employee conduct are not limited to unionized employees and apply to all "employees" as defined under the NLRA. Employers interested in entering into severance

agreements containing limitations on employee disclosures or disparagement should ensure that the terms they are offering comply with the restrictions imposed by the recent wave of laws limiting non-disparagement and confidentiality agreements.

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