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National Labor Relationship Board Rules Against Severance Agreements that Include Confidentiality and Non-Disclosure Provisions

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On February 21, 2023, the National Labor Relations Board ("NLRB") in *McLaren Macomb* held that severance agreements requiring employees to broadly waive their rights through confidentiality and non-disparagement provisions violate Section 8(a)(1) of the National Labor Relations Act ("NLRA").

This decision overturns NLRB precedent that had held such provisions were not considered inherently unlawful, but rather were subject to an analysis of whether the circumstances under which a severance agreement is presented are coercive or indicative of employer prejudice against employees' Section 7 rights. These include the right to self-organize; to form, join, or assist labor organizations; to bargain collectively; and to engage in concerted activities for collective bargaining or other mutual aid or protection. In *McLaren Macomb*, however, the NLRB rejected this test and did not view the employer's attitude towards Section 7 rights relevant to the analysis.

The severance agreement in *McLaren Macomb* included a provision broadly and indefinitely prohibiting the employees from making statements that could disparage or harm the image of the employer, its parents, subsidiaries, affiliated entities, officers, directors, employees, agents, and representatives. The agreement also prohibited the disclosure of the terms of the agreement. The NLRB found that such provisions have a chilling effect on the Section 7 rights of employees and their ability to make public statements about employers, raise complaints, and cooperate with NLRB investigations in the future. The NLRB further noted that offering severance agreements that include broad confidentiality and non-disparagement provisions is unlawful because it forces employees to choose between their statutory rights and the benefits provided in the agreements. The *McLaren Macomb* decision, however, does not address circumstances in which the employee and employer have negotiated the terms of the agreement in advance of signing it.

These prohibitions, however, do not apply to *statutory* supervisors and managers. Notably, a statutory supervisor or manager under the NLRA is an employee with the independent discretion and authority to perform any one of the following job functions: hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or direct them, adjust their grievances, or recommend such actions. An employee is not necessarily considered a statutory supervisor for the purposes of the NLRA simply by having "supervisor" or "manager" in his or her job title—he or she must have the authority to perform one of the job functions listed above while using independent judgment to make such decisions in order to be excluded from the *McLaren Macomb* protections.

Moving forward, employers must be careful to ensure that the confidentiality and non-disparagement clauses of their severance agreements do not unlawfully restrict employees' Section 7

rights under the NLRA, regardless of the circumstances under which such agreements are presented to employees.

A link to the full decision follows: https://www.nlrb.gov/case/07-CA-263041.

If you have any questions, please contact an RLF employment attorney.