Concrete Steps Employers Should Consider When Drafting Severance Agreements in the Wake of McLaren Macomb

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As detailed in our prior client alert, the recent decision issued by the National Labor Relations Board (the "Board") in *McLaren Macomb* reverses Trump-era Board rulings that gave employers wide latitude to utilize broad confidentiality and non-disparagement language in severance agreements and held that simply offering an agreement with such provisions unlawfully restricted employees' exercise of their rights under the National Labor Relations Act (the "Act").

In the wake of this decision, and while we await further guidance from the Board, employers should review their standard confidentiality and non-disparagement provisions and weigh the risk of a potential unfair labor practice charge versus the benefits of retaining these provisions in broad form.

Moreover, employers may want to tailor their confidentiality and non-disparagement covenants in an effort to reduce their risk of violating the Act while still retaining some of the desired protections these clauses offer. Such strategies that employers may wish to consider include:

- Inserting robust disclaimer language in close proximity to the confidentiality and non-disparagement clauses that clarifies that these provisions are not intended to interfere with an employee's rights under the Act;
- Narrowly defining disparagement as disloyal, reckless or maliciously untrue statements (which are not protected by the Act);
- Limiting the non-disparagement requirement to matters involving past employment;
- Restricting the scope of the confidentiality provision to exclude the existence of an agreement and underlying facts relating to the terms and conditions of the employee's employment;
- Adding temporal limitations to the confidentiality and non-disparagement covenants;
- Making the covenants mutual to both the employee and employer;

- Reducing the applicability of the covenants to the direct employer as opposed to including the employer's parents, subsidiaries, and affiliates; and
- Ensuring strong severability language in the agreement to guard against the risk of either provision being held unenforceable.

Also, to the extent employers have a severance policy in place, they should make every effort to ensure that their severance policies and practices are implemented consistently across the board to all non-supervisory employees.

Employers should keep in mind that, although applicable to both unionized and non-unionized workplaces, there are some limits to the impact of this decision. In particular, severance agreements with supervisory employees, public-sector employees, agricultural and domestic workers, independent contractors, workers employed by their parent or spouse, and employees of air and rail carriers subject to the Railway Labor Act will not require changes because those workers are specifically excluded from coverage under the Act.

Employers with questions about this issue or who are considering adjustments to their confidentiality and non-disparagement provisions are encouraged to contact their Employment & Labor attorney at Bowditch to help them evaluate their options.