

# Confidentiality & Non-Disparagement Provisions in Severance & Separation Agreements

*Impact of the NLRB's decision in McLaren Macomb*

On February 21, 2023, the National Labor Relations Board issued a decision that impacts employers' ability to include confidentiality and non-disparagement provisions in employment separation agreements nationwide. In *McLaren Macomb*, 372 NLRB No. 58 (2023), the Board held that it is an unfair labor practice for an employer to insist that a laid-off employee agree to standard non-disparagement and confidentiality provisions as a condition for receiving severance payments. According to the Board, even run-of-the-mill confidentiality agreements impinge on the right to discuss workplace conditions, and an employer that attempts to persuade an employee to forego those rights violates the National Labor Relations Act. This ruling could have far-reaching consequences regarding the enforceability of future and existing separation agreements and other agreements. As a result of *McLaren*, employers should assess their need for confidentiality and non-disparagement provisions when separating employees from the company, and determine the most precise, focused way to address those needs in the employer's severance or separation agreements. Until the Board issues additional guidance, employers may also use caution when it comes to their efforts to enforce existing confidentiality or non-disparagement provisions.

## Agenda

- Recent History of Board Decisions Regarding Confidentiality and Non-Disparagement Provisions, and Sections 7 and 8 of the National Labor Relations Act
- The *McLaren* Decision and the Specific Violations Found by the Board
- Potential Impact of *McLaren* on Current and Future Employment Separation Agreements and Negotiations, Including Which Employees Are Affected
- Does *McLaren* Apply Retroactively or Impact Agreements or Other Clauses in a Separation Agreement, Like Non-Cooperation Provisions?
- Strategies for Drafting Confidentiality and Non-Disparagement Provisions That May Comply with *McLaren*, Including Potential Carve-Outs and Workarounds
- Consequences and Penalties for Engaging in Unfair Labor Practices and Running Afoul of *McLaren*
- Challenges to Consider When Attempting to Enforce Existing Non-Disparagement and Confidentiality Provisions
- Potential Legal Challenges to *McLaren*, Including to Federal Appellate Courts

## Faculty

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### LIVE WEBCAST

Friday, April 28, 2023  
12:00 noon–2:00 pm  
Program Number: 2230292WBC

### REBROADCAST

Monday, May 8, 2023  
3:00 pm–5:00 pm  
Program Number: 2230292RBC

### REBROADCAST

Tuesday, May 16, 2023  
9:00 am–11:00 am  
Program Number: 2230292RB1

### ON DEMAND WEBCAST

View after Tuesday, May 16, 2023  
Program Number: 2230292WBA

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