THE INCREDIBLE SHRINKING SEVERANCE AGREEMENT – HOW THE NLRB AND CALIFORNIA LEGISLATURE HAVE LIMITED THE USE OF CONFIDENTIALITY, NONDISCLOSURE, AND NON-DISPARAGEMENT PROVISIONS

by: Douglas J. Melton and Dale A. Bellitto

California employers have long relied on severance and separation agreements to ensure an amicable (at least in appearance) end to the employment relationship as well as to mitigate risk, protect confidentiality and limit unflattering chatter. Achieving these goals is harder following a recent ruling by the National Labor Relations Board ("NLRB"), which follows on the heels of California's "Silenced No More Act." As detailed below, these legal developments will require California employers to revise their severance and separation agreements and scale back their expectations of what those documents can achieve.

In February 2023, in a case called *McLaren Macomb*, the National Labor Relations Board ("NLRB") ruled that an employer violates the National Labor Relations Act ("NLRA") by offering a severance agreement to non-supervisor employees (regardless of whether they are members of a union) that:

1. precludes such employees from disclosing the terms of the severance agreement (i.e., that contains a standard **confidentiality provision**); and/or that
2. includes an overly broad prohibition on disclosing the employer's "confidential, privileged, or proprietary" information (i.e., a standard **nondisclosure provision**); and/or that
3. prevents such employees from disparaging or otherwise making statements that would harm the reputation of the employer (i.e., that contains a standard **non-disparagement provision**).

The *McLaren Macomb* ruling substantially reduces the legal protections most employers had come to expect from a standard severance agreement. Moreover, the NLRB's prohibition of such standard provisions applies to the mere act of *offering* the agreement itself, regardless of whether the employee ultimately accepts its terms.

The NLRB's decision comes in the wake of California's 2022 "Silenced No More Act," which also restricts the use of confidentiality and non-disparagement provisions in severance and certain settlement agreements and requires that disclosures about employee rights be included in such agreements.

The *McLaren Macomb* NLRB Decision

As noted, the NLRB's decision impacts severance agreements offered to non-supervisors regardless of whether they are members of a union. Under the NLRA, "supervisors" are employees who have the authority to use "independent judgment" in making decisions to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline, or direct other employees.

The severance agreement at issue in *McLaren Macomb* prohibited employees from disclosing any part of the severance agreement to anyone other than a spouse or professional advisor, disclosing the employer's information, knowledge, or materials of a confidential, privileged, or proprietary nature; and/or making statements to other employees or the general public which could "disparage or harm the image of" the employer. The NLRB held that these provisions unlawfully restricted employees' rights

under Section 7 of the NLRA, which guarantees non-supervisory employees the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Specifically, the **confidentiality provision** at issue stated, "[t]he Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction." The NLRB reasoned that, by prohibiting disclosure of the agreement's terms, employees were, in effect, unlawfully prevented from any future discussion of a possible "labor issue, dispute, or term and condition" found in or caused by the agreement.

The **non-disclosure provision** at issue stated, "[a]t all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment." The NLRB reasoned that this language would impermissibly preclude employees from cooperating with NLRB investigations and litigation of unfair labor practices, in violation of employees' Section 7 right to participate in the Board's investigative process. Notwithstanding this ruling, the NLRB's General Counsel subsequently issued a memorandum stating that nondisclosure provisions that are "*narrowly-tailored* to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful," so long as they do not effectively preclude employees from communicating and/or cooperating on workplace issues.

The non-disparagement provision at issue stated, "[a]t all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives." The NLRB reasoned that the provision created "a sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights." The NLRB concluded that the non-disparagement provision infringed on employees' Section 7 right to raise complaints about the employer with "their fellow coworkers, the Union, the Board, any other government agency, the media, or almost anyone else." Based on what the NLRB characterized as a "plain reading" of the NLRA, the Board held that an employer may not infringe on any employee's critique of "employer policy" as a general matter, so long as it is outside of the "disloyal, reckless, or maliciously untrue" exclusion in the statute. Notwithstanding this ruling, the NLRB's General Counsel also clarified in her subsequent memorandum that a "narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation" may be lawful.

The "Silenced No More Act"

California's Silenced No More Act, which took effect in January 2022, also expands restrictions on the use of confidentiality and non-disparagement provisions in employment-related settlement agreements, including severance and separation agreements. Specifically, the Act prohibits an employer from including in any severance or separation agreement any provision that prevents the disclosure of

"information about unlawful acts in the workplace" which includes, but is not limited to, information pertaining to harassment or discrimination or any other conduct that the employee has reasonable cause to believe is unlawful.

Moreover, any non-disparagement or other contractual provision that restricts an employee's ability to disclose information related to conditions in the workplace must include, in substantial form, the following language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful."

Finally, the Act also provides that any separation agreement related to an employee's separation that includes a release of claims must provide: (i) notice that the employee has the right to consult an attorney regarding the agreement; and (ii) a reasonable time period of at least five (5) business days during which to consult with an attorney. An employee may sign the agreement before the end of such reasonable time period so long as the employee's decision is "knowing and voluntary" and is not induced by the employer through fraud, misrepresentation, or a threat to withdraw or alter the offer prior to the expiration of such reasonable period of time or by providing different terms to the employees who sign such an agreement before the expiration of such time period. Notably, these requirements do not apply to a negotiated agreement to resolve an underlying claim filed by an employee in court, before an administrative agency, in arbitration, or through an employer's internal complaint process.

Conclusion

California employers should carefully review their severance and separation agreements to ensure compliance with the foregoing changes in the legal landscape. In particular, the *McLaren Macomb* ruling may cause employers to adopt different severance agreement templates for supervisor and non-supervisor employees.