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National Labor Relations Board Administrative Law Judge Decision Gives Insight on Impact of McLaren Macomb Decision and Related Guidance

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As discussed in our previous client alert, available here, on February 21, 2023, the National Labor Relations Board (the "Board") issued a decision in *McLaren Macomb* that held that employers cannot offer employees severance agreements that require employees to broadly waive their rights under the National Labor Relations Act (the "Act"). Specifically, the Board held that "an employer violates Section 8(a)(1) of the Act **when it proffers** a severance agreement with provisions that would restrict employees' exercise" of their rights under the Act because "[s]uch an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances." (Emphasis Added).

Additionally, as discussed in another previous client alert, available here, on March 22, 2023, the Board's General Counsel issued a guidance memorandum regarding the implications of the *McLaren Macomb* decision (the "Guidance"). Among other things, the Guidance clarified that the holding in the *McLaren Macomb* decision is not limited to just severance agreements and is applicable to other employer communications with employees. As explained by the Guidance, "overly broad provisions in any employer communication to employees," including pre-employment or offer letters, "that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights would be unlawful if not narrowly tailored to address a special circumstance justifying the impingement on workers' rights."

On April 10, 2023, a decision was issued by Administrative Law Judge Locke of the Board's Division of Judges regarding Case 07-CA-286573 (the "Decision"), which involved allegations that the employer, Challenge Mfg. Holdings, Inc., had (1) discharged an employee, Kahdeijra Lashay Gee, in violation of the Act and (2) conditioned that employee's reinstatement on her signing a "last chance agreement" that included a non-disparagement provision that violated the Act. After an extensive analysis, ALJ Locke concluded that the employer did not violate the Act when it discharged Ms. Gee. However, relying on *McLaren Macomb,* ALJ Locke concluded that the employer had violated the Act in relation to the "last chance agreement."

The complaint alleged, and the employer admitted, that the employer offered to reinstate Ms. Gee if she signed a "last chance agreement" that included, among others, the following provision: "Ms. Gee must also agree not to

disparage Challenge Manufacturing, its employees and/or customers on any social media platform." Notably, the Decision held that, although the *McLaren Macomb* decision "concerned a no-disparagement provision in a severance agreement which terminated employees had to sign to receive certain benefits" and this case involved a provision in a "last chance agreement," "the principle remains the same."

In analyzing the provision in question, the Decision held that the prohibition "affects a wide range of activity protected by Section 7" of the Act because "a reasonable person would understand the prohibition to extend not only to complaints to the public about working conditions but also to discussions with other employees, when those discussions occurred on Twitter or Facebook or other similar platforms." Thus, because "[t]he language in the Last Chance Agreement prohibiting disparagement of the [employer] on social meeting did not define 'disparage,'" "nothing cabins the term 'disparage' to its well-established NLRA definition under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*," and "the Last Chance Agreement included no exception to allow criticism about terms and conditions of employment," this provision violated the Act. Moreover, "[t]he violative condition was unlawful from the moment announced" and the employee's "acceptance of it did not make it lawful." Ultimately, "by requiring [the employee] to sign an agreement prohibiting her from disparaging the [employer] on social media, the [employer] violated Section 8(a)(1) of the Act."

The Decision also supplied a remedy for the violation: the employer "should be ordered to correct the language in any existing agreements and in future last chance agreements either by removing the prohibition on disparagement from such agreements or by adding language which makes clear that the prohibition does not apply to criticisms, complaints or other statement concerning the [employer's] labor relations policies and practices, or concerning wages, hours, and/or other terms and conditions of employment." Additionally, the employer "must post, in the manner specified [in the Decision], and abide by the terms of the Notice to Employees attached as an appendix" to the Decision. This notice must be posted for "60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if [the employer] customarily communicates with its members by such means."

Although the Decision has not yet been adopted by the Board and therefore could be modified, it gives insight to employers regarding the impact of the *McLaren Macomb* decision and the related Guidance. The Decision makes clear that "[a] rule prohibiting employees from 'disparaging' the employer is unlawful if it fails to make clear that it does not apply to statements about terms and conditions of employment" regardless of the type of document it is contained in. Thus, employers, whether they have a unionized workforce or not, should review with counsel current or form agreements with employees to determine what, if any, specific changes should be made to decrease the potentiality that any provision, or the agreement in full, may be invalidated by the Board.

If you have questions regarding employee agreements or labor law generally, feel free to contact Jennifer A. McLaughlin at (516) 357-3889 or **jmclaughlin@cullenllp.com**, Brian B. Selchick at 518-788-9426 or **bselchick@cullenllp.com**, or Jennifer E. Seeba at (516) 296-9173 or **jseeba@cullenllp.com**.

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