Cahill

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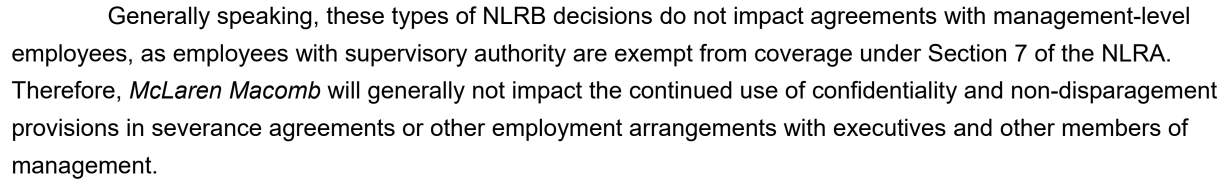
NLRB General Counsel Issues Guidance Regarding Confidentiality and Non-Disparagement Agreements With Non-Executives Following *McLaren Macomb* Decision

In March 2023, the General Counsel of the National Labor Relations Board ("NLRB") issued Memorandum GC 23-05, which provides guidance to NLRB Regions regarding how to apply the NLRB's February 21, 2023 decision in *McLaren Macomb*, 372 NLRB No. 58 (2023). In *McLaren Macomb*, the NLRB found that an employer offering a severance agreement to a non-management employee containing overly broad confidentiality and non-disparagement provisions violated the employee's rights under Section 7 of the National Labor Relations Act ("NLRA"). Section 7 rights under the NLRA generally encompass an employee's ability to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In issuing its ruling in *McLaren Macomb*, the NLRB overruled two prior decisions, *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020). *Baylor* and *IGT* permitted an employer to include broad confidentiality and non-disparagement clauses in a severance agreement as long as such agreement was not proffered coercively or otherwise under circumstances in violation of the NLRA. The NLRB, by overruling *Baylor* and *IGT*, determined that the inclusion of broad confidentiality and non-disparagement provisions in a severance agreement is sufficient to result in a violation of the NLRA regardless of the manner in which the agreement was presented to the employee. The General Counsel emphasized that the absence of other coercive conduct by the employer does not eliminate the potential chilling effect such an agreement could have on an employee's exercise of Section 7 rights.

The NLRB did not establish a bright-line rule prohibiting confidentiality and non-disparagement covenants in severance agreements with covered employees, and the General Counsel's guidance generally describes how narrowly-tailored provisions could still be found to be lawful. In the context of confidentiality clauses, the General Counsel noted that provisions designed to protect proprietary or trade secret information for a period of time based on a legitimate business interest may still be lawful. However, the General Counsel emphasized that language that has a chilling effect on an employee's ability to assist others with workplace issues would violate the NLRA. Similarly, the General Counsel emphasized the importance of public statements by employees as a means of exercising Section 7 rights, and implied that only a non-disparagement clause limited to statements that are "maliciously untrue" (*i.e.*, made with knowledge of their falsity or reckless disregard for their truth or falsity) may be deemed lawful under *McLaren Macomb*. While the *McLaren Macomb* decision did not address the impact of a general disclaimer reserving an employee's Section 7 rights, the General Counsel's guidance briefly noted that while such language may help resolve ambiguities, it may not necessarily cure overly broad confidentiality or non-disparagement clauses.



Generally speaking, these types of NLRB decisions do not impact agreements with management-level employees, as employees with supervisory authority are exempt from coverage under Section 7 of the NLRA. Therefore, *McLaren Macomb* will generally not impact the continued use of confidentiality and non-disparagement provisions in severance agreements or other employment arrangements with executives and other members of management.

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If If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; Mark Gelman (counsel) at 212.701.3061 or mgelman@cahill.com; or Eric Scher (senior attorney) at 212.701.3984 or escher@cahill.com; or email publications@cahill.com.

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