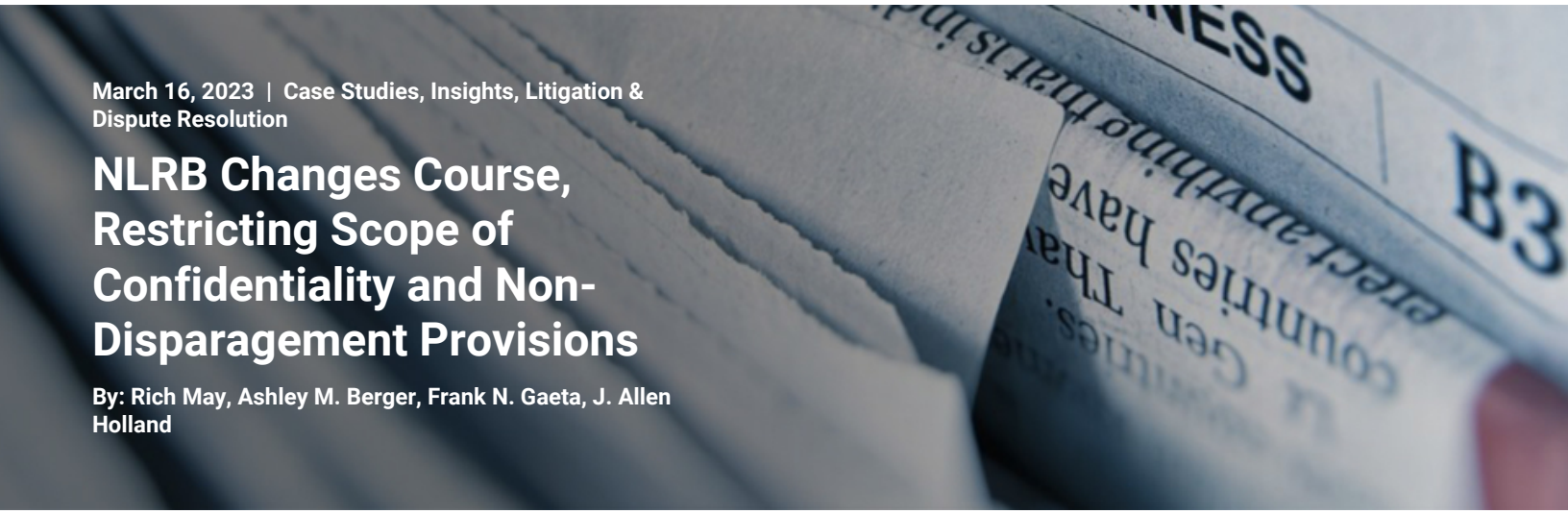

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NLRB Changes Course, Restricting Scope of Confidentiality and Non-Disparagement Provisions

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On February 21, 2023, in the case of *McLaren Macomb*, the National Labor Relations Board ruled that an employer violated the National Labor Relations Act (the "Act") by including broadly-framed confidentiality and non-disparagement provisions in severance agreements offered to furloughed employees.

The Offending Provisions

The provisions at issue read as follows:

Confidentiality Agreement. The 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.

Non-Disclosure. At 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. At 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 Board held that offering proposed severance agreements containing these provisions violated Section 8(a)(1) of the Act by "interfering with, restraining, and coercing" employees in the exercise of their rights under Section 7 of the Act. Under Section 7, employees have 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 …."

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Central to the Board's holding was its conclusion that the provisions interfered with the right of employees to "discuss the terms and conditions of their employment." The Board held that Section 7 rights are not limited to discussions with co-workers, that they extend to former employees, and protect "efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including through "social media." The Board further stated, "Public statements by employees about the workplace are central to the exercise of employee rights under the Act."

Does Not Apply to Supervisors

Notably, Section 7 confers rights on "employees" only, and the Act excludes "any individual employed as a supervisor" from the definition of employee. The term "supervisor," under the Act, means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Thus, *McLaren Macomb* does not restrict the use of confidentiality or non-disparagement provisions in agreements with supervisors.

Reversal of Recent Precedent

McLaren Macomb reversed two 2020 Board decisions — *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020). In Baylor, the Board held that the employer did not violate the Act by making a "mere proffer" of a severance agreement that required the signer to a keep a broad array of information confidential. Similarly, in *IGT*, the Board ruled that presenting a severance agreement with a broad non-disparagement provision did not violate the Act because the agreement was "entirely voluntary, does not affect pay or benefits that were established as terms of employment, and has not been proffered coercively."

What now?

An appeal of *McLaren Macomb* seems likely, and there is also the possibility that a future, newly-constituted Board may reverse the decision. In the meantime, however, to avoid a potential charge alleging a violation of the Act, employers should consider narrowing the terms of confidentiality and non-disparagement provisions in agreements with employees, whether severance agreements or otherwise.

The Board's concerns do not seem to be implicated by confidentiality agreements limited to protecting trade secrets. Also, as noted by the Board, the Act's protections do not extend to "public criticisms of an employer that … evidence a malicious motive … or are maliciously untrue, i.e., they are made with knowledge of their falsity or with reckless disregard for their truth or falsity." Accordingly, a non-disparagement provision limited to prohibiting malicious or maliciously untrue statements would seem to comply with the Act.

If you have specific questions about how your company's confidentiality and non-

disparagement provisions might be modified in light of *McLaren Macomb*, please contact Frank Gaeta, J. Allen Holland, or Ashley Berger.