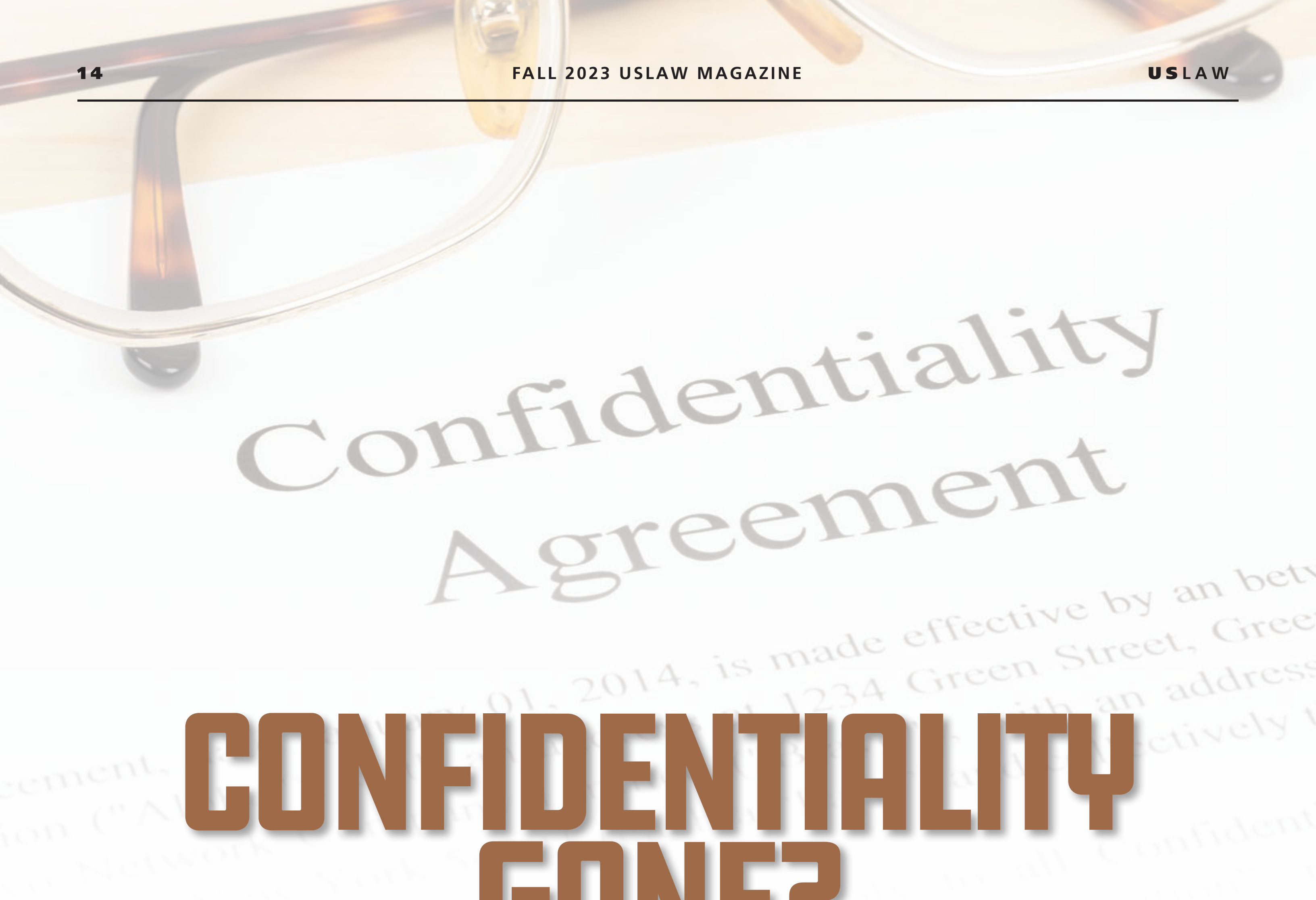

CONFIDENTIALITY GONE? Maybe under *McLaren Macomb!*

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On February 21, 2023, the National Labor Relations Board ("NLRB" or the "Board") issued a ground-shaking decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), effectively rewriting the enforceability of confidentiality and non-disparagement provisions in severance agreements for non-supervisory employees, regardless of union status. This article discusses the Board's ruling and its impact on current, past and future agreements.

In *McLaren Macomb*, the Board was asked to determine whether the Respondent, the operator of a hospital in Michigan, violated Section 8(a)(1) of the National Labor Relation Act (the "Act") when it offered severance agreements to employees it permanently furloughed as a result of the COVID-19 pandemic (the "Pandemic"). Pursuant to federal regulations passed during the Pandemic, Respondent could not have non-essential employees working within the hospital. As such, it permanently furloughed eleven employees. Each furloughed employee was presented with a severance agreement that included broad confidentiality and non-disparagement provisions. Ultimately, the *McLaren* Board determined the severance agreements at issue were unlawful because they restricted and had a reasonable tendency to interfere with, restrain, or coerce the exercise of the affected employees' rights under Section 7 of the Act.

Section 7 of the Act guarantees 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," as well as the right "to refrain from any or all such activities." 29 U.S.C.A. § 157.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. 29 U.S.C.A. § 158

In reaching its decision, the *McLaren* Board overturned its prior decisions in *Baylor University Medical Center* 369 NLRB No. 43 (2020) and *IGT d/b/a International Game Technology* 370 NLRB No. 50 (2020) and returned to the "well-established principle that a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, and that employers' proffer of such agreements to employees is unlawful." The *McLaren* Board concluded that its decision in *Baylor* was wrong because the *Baylor* Board deviated from long-established precedent and incorrectly changed the legal standard and analysis for determining whether severance agreements, and the employers who offer them, violate the Act. In *Baylor*, the Board held the test for whether an employer violated the Act or employees' rights under it must be based on a review of the employer's actions and the surrounding circumstances under which an employer offers a severance agreement to its employees. In fact, the *Baylor* board reasoned that employers could freely offer employees severance agreements that are unlawful on their face without violating the Act because the *Baylor* board viewed severance agreements and their terms as irrelevant and not dispositive for triggering employer violations of the Act. According to the *Baylor* Board, employers violate the Act when their actions are coercive or unduly influence employees into signing severance agreements. The *McLaren* Board concluded that this methodology was wrong and reasoned that the *Baylor* Board's line of thinking and approach went against long-established NLRB precedent and rules. It further concluded that the *Baylor* Board failed to justify or provide any public policy interests that supported its decision to consider an employer's actions and animus towards employees' Section 7 rights over the terms of severance agreements in determining employer liability under the Act.

Ultimately, the *McLaren* Board held that the mere act of offering a severance agreement with terms that have "a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights" under the Act can constitute an unfair labor practice – regardless of other employer conduct or external circumstances (e.g., employer motive, employer animus against Section 7 activity, or whether or not the employee accepts the agreement). It reasoned that employees should not have to choose between accepting benefits promised in a severance agreement and exercising their rights under the Act. Specifically, the *McLaren* Board concluded that the confidentiality provision in the separation agreements at issue was unlawful and violated the furloughed employees' Section 7 rights because they broadly prohibited each employee from disclosing the existence of the agreement or its terms to any third party, including even from disclosing the agreement to the NLRB. Lastly, the *McLaren* Board additionally concluded that the non-disparagement provision in the separation agreements was unlawful and violated the furloughed employees' Section 7 rights because it was not limited to a reasonable time period and broadly prohibited each employee from speaking to their former coworkers. The Board reasoned that "public statements by employees about the workplace are central to the exercise of employee rights under the Act."

So, what does this mean, and how does the Board's decision in *McLaren* affect severance agreements, and employer and employee rights going forward? The key takeaways from *McLaren* are as follows. First, confidentiality and non-disparagement provisions are still lawful and binding as long as they do not violate employees' rights under the Act and are reasonably limited in time and scope. This means employers can avoid violating the Act if they offer employees severance agreements with confidentiality provisions that permit employees to disclose the existence of the agreement and its terms to government agencies like the NLRB for lawful and legitimate purposes. For example, to permit the employee to file a claim with the NLRB to challenge the validity of the severance agreement itself. Or permitting disclosure of employer information to allow a terminated employee to assist the NLRB in an active investigation involving their former employer.

Second, the NLRB's decision in *McLaren* distinguishes the rights of managerial and supervisory employees versus non-managerial and non-supervisory employees. After *McLaren*, non-supervisory employees should be given the least amount of restrictions under the confidentiality and non-disparagement terms of a severance agreement. Consequently, severance agreements offered to non-supervisory employees should have non-disparagement provisions that allow those employees to make disparaging statements against their employer as long as they are not maliciously false or reckless. For example, the following language would be acceptable after *McLaren*: "Employee agrees not to make any statements that are maliciously or recklessly false." While employers can still place greater restrictions on the disparaging remarks supervisory employees can make against them post-*McLaren*, employers should tailor their non-disparagement provisions for supervisory and non-supervisory employees accordingly. Third, after *McLaren*, the "mere act" of offering a severance agreement with unlawful terms is an unfair labor practice that violates the Act and will subject employers who do so to liability and potential litigation.

In sum, although employers and employees have conflicting interests at the moment of an employee's separation from employment, employers can still protect themselves and their business interests by narrowly tailoring confidentiality and non-disparagement provisions in the severance agreements they offer their employees that permit employees to make reasonable disclosures for lawful and legitimate purposes and disparaging remarks that are not maliciously false.

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