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NLRB Bans Confidentiality and Non-Disparagement Clauses in Severance Agreements

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Executive Summary

On February 21, 2023, the National Labor Relations Board ("NLRB") issued a decision (*McLaren Macomb*, 372 NLRB No. 58 (2023)), in which it held that confidentiality and non-disparagement clauses in severance agreements unlawfully violate employees' rights to engage in protected concerted activity. In doing so, the NLRB broadly concluded that such clauses restrict employees' rights to speak about wages, hours, and other such terms of employment. In response to the numerous inquiries raised about the *McLaren Macomb* decision, on March 22, 2023, the Office of the General Counsel issued Memorandum GC 23-05 ("Memorandum") with guidance on how to interpret the decision.

THE *MCLAREN MACOMB* DECISION

Under *McLaren Macomb*, the "mere proffer" of a severance agreement that conditions receipt of benefits on the "forfeiture of statutory rights violates Section 8(a)(1) of the National Labor Relations Act [('NLRA')]". In deciding *McLaren Macomb*, the NLRB overturned two decisions - *Baylor University Medical Center and IGT d/b/a International Game Technology* - that had permitted employers to include confidentiality and non-disparagement provisions in severance agreements. The *McLaren Macomb* decision returns the analysis of severance agreements under the NLRA to a pre-2020 test that focuses on the language of the restrictions within a severance agreement itself.

In *McLaren Macomb*, a unionized teaching hospital in Michigan permanently furloughed eleven union employees, presenting each with a severance agreement, waiver and general release, which, among other things, included confidentiality and non-disclosure provisions with no carve-out for engaging in protected activity. The "Confidentiality" provision provided that the employee "acknowledges that the terms of the [severance agreement] are confidential and agrees not to disclose them to any third person," except to a spouse or as necessary to legal or tax advisors or pursuant to a legal or administrative order. The "Non-Disclosure" provision provided that the employee "promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature" known to the employee due to employment. It also provided non-disparagement terms requiring that the employee "agrees not to make statements to

[Respondent's] employees or to the general public which could disparage or harm the image of [Respondent], its parent and affiliated entities and their officers, directors, employees, agents and representatives." Finally, the severance agreement provided the employer with the right to pursue, in the NLRB's words, "substantial monetary and injunctive sanctions" should an employee violate the severance agreement.

Despite being relatively standard severance agreement terms under prior precedent, the NLRB found the confidentiality and non-disparagement provisions unlawful and ordered McLaren to "cease and desist" from presenting employees with severance agreements including such language.

According to the NLRB, "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." Specifically, regarding the non-disparagement provision, the NLRB held that because "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act," the non-disparagement provision violated employees' Section 7 rights. Further, the NLRB objected to how broad the Hospital's non-disparagement provision was, noting that it was "not even limited to matters regarding past employment with the [Hospital]," and would ultimately "encompass employee conduct regarding any labor issue, dispute, or term and condition of employment of the Hospital." The NLRB also noted that the provision had no temporal limitation and applied not only to the Hospital, but also to its parents, affiliated entities and their officers, directors, employees, agents and representatives.

The NLRB likewise found the confidentiality provision overly broad because it prohibited employees from disclosing the terms of the agreement to "any third person." The NLRB determined that such a broad provision would prohibit employees from "disclosing even the existence of an unlawful provision contained in the agreement," which could deter employees from filing unfair labor practice charges or assisting the NLRB in an investigation. Additionally, the NLRB held that the confidentiality provision would, in practice, prohibit employees from discussing the existence or terms of the severance agreement with others, including union representatives or other employees who may have received similar agreements.

THE OFFICE OF THE GENERAL COUNSEL'S MEMORANDUM

On March 22, 2023, the NLRB's General Counsel, Jennifer A. Abruzzo, issued a Memorandum in response to numerous inquiries with guidance on *McLaren Macomb's* scope and intended impact. The guidance is specifically directed to the NLRB's regional offices to assist them in responding to inquiries from "workers, employers, labor organizations, and the public about implications stemming from [*McLaren Macomb*]." The Memorandum is also helpful in understanding the NLRB's enforcement efforts related to severance agreements. Below is a summary of the most important takeaways from the Memorandum:

- *McLaren Macomb* is *retroactive* in that it applies to severance agreements signed *prior* to the opinion's 2/21/23 date. While the NLRA has a six-month statute of limitations, this period may effectively be tolled such that the violation is not considered time-barred if the enforcement of an unlawful severance agreement is found to constitute a "continuing violation." Per *McLaren Macomb*, former employees are entitled to the same protections (as current employees) under the NLRA.
- Employers can violate the NLRA merely by *providing* an unlawful severance agreement to an employee; it is irrelevant whether the employee signs it or otherwise agrees to its terms.

- Even if an employee requests or approves a broadly worded confidentiality and/or non-disparagement clause within a severance agreement, it is still considered unlawful under *McLaren Macomb*.
- A disclaimer or "savings clause" may be useful to resolve ambiguity over vague terms but *will not necessarily cure* overbroad confidentiality and/or non-disparagement clauses.
- While the NLRA doesn't cover "supervisors," *McLaren Macomb* might cover them in the limited circumstances where the employer is retaliating against a supervisor for a refusal to commit an unfair labor practice. Such exception was not created under *McLaren Macomb* as it was already in effect pursuant to the *Parker-Robb Chevrolet* decision.
- *McLaren Macomb* may also apply to other types of agreements and even communications with employees, such as pre-employment or offer letters.
- *McLaren Macomb* could also apply to invalidate non-compete clauses, non-solicitation clauses, no poaching clauses, broad liability releases and post-employment cooperation requirements.
- The only confidentiality clause that may be considered lawful under *McLaren Macomb* is one that is narrowly tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications (i.e., a confidentiality clause that is indefinite in temporal scope will in most cases not be enforceable).
- The only non-disparagement clauses that may be considered lawful under *McLaren Macomb* is one that is narrowly tailored to unlawfully defamatory statements by the employee about the employer.

Whether *McLaren Macomb* will ultimately withstand scrutiny by the federal courts remains to be seen at this time. As such, there may be further direction from the courts on these issues, which may or may not support the Memorandum's guidance. Considering severance is not a right for most employees, the ability by employers to impose terms in exchange for providing severance pay is certainly considered a fundamental principle behind such agreements. In spite of the decision, employers may continue utilizing confidentiality and non-disparagement clauses within severance agreements with supervisors in most circumstances. As to non-supervisory employees, employers should use caution when drafting severance agreements for such employees and consult the Memorandum described herein until further notice.

Please contact Naureen Amjad or a member of the Employment, Labor and Benefit Group with any questions.