

NLRB General Counsel Issues Guidance on the Board's Prohibition of Broad Confidentiality and Non-Disparagement Provisions in Severance Agreements

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As we explained in our [previous client alert](#), on February 21, 2023, the National Labor Relations Board (the "Board") ruled in *McLaren Macomb*, 372 NLRB No. 58 (2023), that confidentiality and non-disparagement provisions typically found in severance agreements are unlawful if they interfere with an employee's Section 7 rights under the National Labor Relations Act (the "Act") to organize, bargain collectively, and engage in concerted activities that affect terms and conditions of employment.

The *McLaren Macomb* decision left employers wondering whether and how to include confidentiality and non-disparagement provisions in their severance agreements. On March 22, 2023, the Board's General Counsel, Jennifer Abruzzo ("GC Abruzzo"), provided much-needed guidance in the form of [Memorandum GC 23-05](#). Below are the key takeaways from the Memorandum.

Severance Agreements Are Not Banned

Severance agreements are not per se banned post-*McLaren Macomb*. Employers may continue to proffer, maintain, and enforce severance agreements so long as the agreements do not contain overly broad provisions that infringe upon employees' Section 7 rights.

Narrow Confidentiality and Non-Disparagement Provisions May Be Lawful

Confidentiality clauses that are narrowly tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful. Moreover, an employer may still offer confidentiality provisions prohibiting an employee from disclosing the financial terms of a settlement agreement.

Similarly, non-disparagement provisions may still be considered lawful if they are narrowly tailored to only prohibit the employee from making defamatory statements. Employers may not proffer broader non-disparagement provisions that encompass "all disputes, terms and conditions, and issues, without a temporal limitation and with application to the employer's parents and affiliates and their officers, representatives, employees, directors, and agents."

McLaren Macomb Applies Retroactively

Significantly, the *McLaren Macomb* decision applies even to severance agreements entered into before the Board issued the February 21 decision. An unlawful proffer of a severance agreement is subject to the Act's six-month statute of limitation. However, employers may no longer maintain and/or enforce previously-entered into severance agreements with unlawfully broad provisions. Doing so is considered a violation of the Act, and a charge alleging such would not be time-barred. Perhaps suggesting how the Board may resolve these charges, GC Abruzzo notes that the Board has settled cases involving

unlawfully broad provisions in severance agreements by requiring the employer to notify its former employees that the overbroad provisions are no longer applicable.

GC Abruzzo suggests employers consider preemptively remedying violations now by notifying employees subject to severance agreements with overly broad provisions that: (1) the provisions are null and void; and (2) the employer will not seek to enforce the provisions in the event of a breach. According to GC Abruzzo, this preemptive action may form the basis for a dismissal if a charge is filed. We recommend employers consult with legal counsel to determine whether this extremely cautious approach is appropriate considering the employer's specific circumstances.

Savings Clauses or Disclaimers Will Not Cure Unlawfully Broad Provisions

While a savings clause or disclaimer may be useful to include to resolve ambiguity over a severance agreement's vague terms, such inclusions will not necessarily cure overly broad provisions. Still, GC Abruzzo recommends employers include a statement of rights in their and severance agreements and employee handbooks to simplify compliance and mitigate any potential infringement on employees' Section 7 rights. According to GC Abruzzo, such a statement of rights should set out employees' statutory rights and explain that no rule or provision should be interpreted as restricting those rights.

Unlawful Provisions Will Not Invalidate an Entire Severance Agreement

When reviewing a severance agreement, the Board will generally only seek to void the confidentiality and non-disparagement provisions it determines to be unlawful, as opposed to invalidating the entire agreement. The Board will take this approach even where a severance agreement does not contain a severability clause.

***McLaren Macomb* Applies to Other Provisions in Severance Agreements**

The *McLaren Macomb* decision applies to other provisions that are often included in severance agreements, such as:

- non-compete clauses;
- non-solicitation clauses;
- no-poaching clauses;
- broad liability releases and covenants not to sue; and
- cooperation requirements for any investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7.

***McLaren Macomb* is Not Limited to Severance Agreements**

The *McLaren Macomb* decision applies to more than just severance agreements and extends to "any employer communication" that unnecessarily infringes on employees' Section 7 rights. This may include, for example, separation or settlement agreements, or other employment documents such as pre-employment letters, offer letters, employee handbooks, and employment agreements. Accordingly, employers should ensure that all communications to employees are narrowly tailored to address the special circumstances justifying any infringement on the employees' Section 7 rights.

Supervisors May Be Protected Under *McLaren Macomb*

Supervisors are generally not protected under the Act. However, GC Abruzzo notes that the Act does protect supervisors to the extent that they are retaliated against based on their refusal to act on their employer's behalf in committing an unfair labor practice, such as refusing to offer an unlawful severance agreement to an employee. This is a well-established rule. However, GC Abruzzo expands upon this rule

to suggest that, under *McLaren Macomb*, it may now be unlawful for an employer to proffer a severance agreement to a supervisor in connection with the supervisor's refusal to violate the Act per the employer's directives.

Takeaways and Next Steps for Employers

GC Abruzzo's Memorandum indicates that the Board intends to closely review the language contained in severance agreements and other employer communications to determine whether employees' Section 7 rights are restricted. It is important to note, however, that the Memorandum is not binding law. Additionally, *McLaren Macomb* has yet to work its way through the appeal process, which may result in direction from the courts that differs from the Memorandum's guidance. Nevertheless, in the meantime, the Memorandum will guide how the Board's regional offices will pursue unfair labor practice charges against employers.

Accordingly, as we previously advised, we recommend employers seek legal review of every severance agreement before offering it to an employee. Additionally, in light of GC Abruzzo's opinion regarding the *McLaren Macomb* decision's extensive applicability, we recommend employers seek legal review of other communications to employees which may infringe upon their Section 7 rights. This may include separation or settlement agreements, or other employment documents such as pre-employment letters, offer letters, employee handbooks, and employment agreements.

Employers should also seek legal counsel to determine whether to take the cautious, preemptive remedial action of contacting former employees subject to severance agreements to notify them that overbroad provisions are void and will not be enforced. The most suitable approach will depend on the employer's specific circumstances and an assessment of the risks and benefits associated with any action or inaction, given that telling former employees that they are now free to disparage their former employer or disclose information that they previously agreed to keep confidential may create business risks that an employer may not want to incur.

The Seigfreid Bingham team will continue to monitor the latest developments and legal requirements in this area of law. If you have any questions concerning the Board's *McLaren Macomb* decision or GC Abruzzo's Memorandum, please do not hesitate to contact the firm's Employment Law attorneys for further information concerning compliance for your specific situation.

This article is general in nature and does not constitute legal advice. If you have legal questions, please consult the authors, Katie Conklin (kconklin@sb-kc.com) 816.265.4114 or Cody Weyhofen (CWeyhofen@sb-kc.com) 816.265.4163, or other attorneys in Seigfreid Bingham's Employment Law Group, including: John Vering (jvering@sb-kc.com) 816.265.4109, John Neyens (johnn@sb-kc.com) 816.265.4152, Mark Opara (mopara@sb-kc.com) 816.265.4140, Shannon Cohorst Johnson (sjohnson@sb-kc.com) 816.265.4139, Brenda Hamilton (bhamilton@sb-kc.com) 816.265.4103, Julie Parisi (jparisi@sb-kc.com) 816.265.4159, Christopher Tillery (ctillery@sb-kc.com) 816.265.4157, or your regular contact at Seigfreid Bingham at 816.421.4460.