Barley Snyder

NLRB General Counsel Issues Guidance on Confidentiality, Non-Disparagement and Other Terms in Severance Agreements

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As was posted in our February 23, 2023 news alert, the National Labor Relations Board ("NLRB") on February 21, 2023 issued its decision in ***McLaren Macomb***, 372 NLRB No. 58 in which it held that severance agreements that contain broad confidentiality and non-disparagement clauses are "facially unlawful" as interfering with employee's and former employee's rights under Section 7 of the National Labor Relations Act ("NLRA"). Although an appeal by the Employer is expected shortly, that prospect has not stopped the NLRB General Counsel from proceeding with formal guidance to Regional offices on prosecuting cases involving such agreements.

The Memo (GC 23-05) does not have the force of law of a Board decision but is a clear indication where the General Counsel plans to advocate and enforce the law.

In ***McLaren Macomb***, the Board found typically "standard" Confidentiality and Non-Disparagement language to be "overly broad" and facially unlawful, and the mere "proffer" of an agreement containing such verbiage constituted an unfair labor practice. The Board threw out the Severance Agreements, ordered the employees to be reinstated to their positions with back pay and other remedies. Employers now must now take some affirmative action to craft language that meets not only the Board decision, but that anticipates enforcement action based on the Memo. The highlights follow:

• **Confidentiality provisions need to be narrowed.** These provisions will need to be tailored to restrict the dissemination of "proprietary or trade secret information for a period of time based on legitimate business justifications." GC Abruzzo, however, left the door open to a case-by-case analysis by walking that statement back a bit by maintaining that *any* confidentiality clause that has a chilling effect that precludes employees from assisting others about workplace issues or communicating with the Agency, a union, legal forums, media, or other third parties, is still unlawful. GC Abruzzo noted that the Board has existing guidance, OM 07-27, which involves Board approval of confidentiality of the financial terms of a Non-Board Settlement of a pending unfair labor practice charge. While the Memo certainly points employers to where she will direct Regional Offices to focus their attention, GC Abruzzo did not clarify specifically what type of "narrowly tailored" language will pass compliance muster.

• **Non-Disparagement**: The Memo made clear that a "narrowly tailored, justified non-disparagement provision" that meets her definition of "defamation" *may* be lawful. These clauses *may* be valid if they

prohibit statements that are "maliciously false and made with knowledge of their falsity or with reckless disregard for their truth or falsity." Also, the scope of non-disparagement clauses need to be limited to "employer" and not include "parents, affiliates, officers, representatives, employees, directors and agents."

• **Other targeted provisions and agreements.** GC Abruzzo made clear that enforcement of ***McLaren Macomb*** will *not* be restricted to severance agreements, stating it applies "to any employer communication" that unnecessarily infringes on employee rights. GC Abruzzo took the opportunity in the Memo to also target other "standard" provisions that exist in severance and settlement agreements, stating that the following provisions *may also* interfere with employee's exercise of Section 7 rights, including:

- Non-compete clauses
- Non-solicitation clauses
- Non-poaching clauses
- Broad liability releases and covenants not to sue that go beyond the "employer" and the claims as well as matters beyond the date of the agreement
- Cooperation clauses that may affect an employee's right to refrain therefrom under Section 7

• **Severance Agreements involving Supervisors *could* be implicated.** While clarifying that the decision and the NLRA do NOT apply to supervisors, the Guidance Memo also states that the Board'sdecision *could* apply to severance agreements proffered to Supervisors who generally are not protected by the NLRA. GC Abruzzo advises that if a Supervisor refused to proffer a facially invalid agreement AND suffered retaliation therefore, the decision could apply, or under ANY circumstance where a Supervisor is proffered a severance in connection with conduct where the supervisor refused to act on employer's behalf in committing in an unfair labor practice.

• **Severability Clauses**: The GC telegraphed general approval of voiding only the unlawful provisions of an agreement, consistent with the purpose of a severability clause, noting that Regions are already advised to focus on the unlawful provisions, regardless of the existence of a severability clause.

• **Savings Clauses/Disclaimers:** It is the GC's view that specific "savings clauses" or "disclaimers" will not necessarily cure overly broad provisions in any agreement, stating that the employer *may* still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights.

• **Retroactivity**: The GC Memo makes clear that the decision applies retroactively from its date, February 21, 2023. Going forward, an unlawful proffer under this decision is subject to 6-month Statute of Limitations under Sec. 10(b) of the NLRA. However, GC Abruzzo states that "maintaining and/or enforcing a previously-entered severance agreement with unlawful protections that restrict Sec. 7 rights is a continuing violation and *not* time-barred." This is arguably the most critical point of the Memo. GC Abruzzo suggests that past settlements/separation agreements involving overly broad terms that chilled Section 7 rights should guide Employers to provide notices to former employees that the overbroad provisions no longer apply.

• **Guidance to Employers from the GC.** The Memo repeatedly suggests that employers should take affirmative steps to reach out to all existing and former employees who are parties to any agreement that contains the "overly broad" language invalidated by ***McLaren Macomb****,* and inform them that the unlawful provisions are null and void, will not be enforced. GC Abruzzo intimates, without a concrete promise, that an

employer's conduct in this regard *could* form the basis of the dismissal of a later charge focused solely on an "unlawful proffer."

Practical Takeaway for Employers:

• Absent judicial intervention, existing Severance/Separation Agreement forms will need to be reviewed and revised to meet the restrictions of the new decision.

• Savings/Disclaimers/Severability Clauses are NOT insurance against a finding of an unlawful agreement.

• The language of *other* Agreements, including Employment Contracts, Settlement Agreements, and even Offer Letters could be implicated.

• As to existing agreements, employers need to consult with qualified labor counsel to address the risk/reward of outreach to existing/former employees who are parties to such agreements.

If you have any questions regarding this recent NLRB Memo or any specific labor inquiries, please contact Kevin Moore or any member of Barley Snyder's Labor Law Team.

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