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Do You Include Non-Disparagement and Confidentiality Provisions in Severance Agreements? The NLRB Says, 'Not So Fast, My Friend.'

In what is likely to be seen as a landmark decision, on Tuesday, the National Labor Relations Board ("NLRB") issued a decision in *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023) that will immediately change the legal landscape for severance agreements in the United States. The NLRB overturned two Trump-era cases and held that severance agreements offered to non-supervisory employees are unlawful if they contain broad non-disparagement or confidentiality provisions that restrict a worker's (or former worker's) Section 7 rights to discuss the terms and conditions of their employment or to speak negatively regarding their former employer. Under *McLaren*, the mere offer of a severance agreement including a broad confidentiality or non-disparagement provision can now be found to be a violation of the National Labor Relations Act ("NLRA").

The *McLaren* decision (available for download here) will significantly impact most employers' standard practice of including broad confidentiality and non-disparagement provisions in severance agreements. Employers should familiarize themselves with the NLRB's new standard and work with counsel to determine necessary modifications to their severance agreements and when the *McLaren* standard will apply.

How did we get here?

The *McLaren* case involved a unionized hospital that offered a severance agreement to eleven bargaining unit employees. The severance agreement in question contained a relatively standard confidentiality provision that prohibited the employees from disclosing the terms of the severance agreement to third parties

and a non-disparagement provision prohibiting statements that "could disparage or harm the image of" the employer and its related entities/employees.

The employees filed Unfair Labor Practice (ULP) charges against the hospital, asserting that the prohibitions in the severance agreement were too broad and, as a result, unreasonably restricted their exercise of their Section 7 rights to engage in concerted protected activity by discussing the terms and conditions of their employment with others. In finding for the employees, the NLRB reversed its recent decisions in *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT d/b/a Inter-national Game Technology*, 370 NLRB No. 50 (2020) that upheld similar confidentiality and non-disparagement provisions in severance agreements.

In overturning *Baylor* and *IGT*, the Board stated: "broad proscriptions on employee exercise of Section 7 rights have long been held unlawful because they purport to create an enforceable legal obligation to forfeit those rights. Proffers of such agreements to employee have also been held to be unlawfully coercive."

In addition to making confidentiality and non-disparagement provisions essentially obsolete in agreements offered to workers covered by the NLRA, *McLaren* also expands and extends Section 7 protections to employees' discussions of their terms and conditions of employment with third parties not affiliated with the employer.

Who does *McLaren* **impact?**

The *McLaren* decision applies to both unionized and non-unionized private employers who are subject to the jurisdiction of the NLRA. In other words, it applies to most private employers in the United States, regardless of the unionized status of your workforce. **NOTE: Importantly, however, the decision does not apply to many employees who are traditionally offered severance agreements, such as management-level employees, most supervisors, independent contractors, and any other employees who are not covered by the NLRA. These classes of employees do not have Section 7 rights.**

Should We Have Expected This? What's Next?

The short answer to the first question is yes, you should have expected the NLRB to take this position or a similar position on the issue of employee speech and Section 7

rights. NLRB General Counsel Jennifer Abruzzo has been clear about her intention and goal for the NLRB to be much more aggressive in protecting Section 7 rights, including overturning multiple NLRB decisions that she believes eroded Section 7 rights. To learn more, GC Memo 21-04 (available for download here) sets out a roadmap of the issues that General Counsel Abruzzo intends to tackle during her tenure.

As to what's next from the NLRB, all eyes should be on the *Stericycle* case that is currently pending before the NRLB. In January, 2022, the NLRB took the unusual step of issuing a notice inviting parties and amici to submit briefs addressing whether the Board should adopt a new legal standard to determine whether employer work rules violate Section 8(a)(1) of the National Labor Relations Act. In short, the *Stericycle* case will determine whether the *Board* will overrule the Trump era *Boeing* case and (if GC Abruzzo gets her way) return to the much more strenuous *Lutheran Heritage* standard. If *McLaren* is any indication, and we believe it is, it is more likely than not that the NLRB will reverse *Boeing* and will issue a much more stringent standard for evaluating employers' policies.

Key Takeaways:

1. The NLRB's decision in *McLaren* immediately restricts the inclusion of confidentiality and non-disparagement provisions in severance agreements for most non-supervisory employees.

2. Severance agreements should typically be handled on a case-by-case basis. This quick change situation presented by *McLaren* gives employers the opportunity to revisit their severance agreements, and we strongly recommend that you coordinate with experienced labor and employment counsel on any changes.

3. Note that the *McLaren* decision is likely just a precursor for bigger changes that are coming from the NLRB. Employers should closely monitor the pending *Stericycle* case; if that case follows the NLRB's recent trend, the standard the NLRB will apply to employers' policies will change substantially.

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