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Severance Agreements Take Another Hit: The NLRB General Counsel Weighs In

On March 22, a memorandum issued by the National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo provided her perspective on a number of questions employers have been asking after the *McLaren Macomb* decision was issued a month ago.

First, the good news, limited as it is. Employers are not prohibited from entering into severance agreements with their employees. The bad news? Many of the severance agreements employers have used for years when terminating an employee will now be deemed illegal by the General Counsel.

In Abruzzo's view, a severance agreement between an employer and an employee violates the National Labor Relations Act (NLRA) if it contains:

- An "overly broad" non-disparagement clause.
- An "overly broad" confidentiality clause.
- An "overly broad" non-disparagement provision.
- Requires an employee to waive the right to file unfair labor practice charges, helping other individuals to file unfair labor practice charges, and/or assisting the Board in its investigatory process.
- A limit on an employee's right to engage with others related to their "lot as employees" including access to the Board, their union, judicial or legislative, forums, the media and "other third parties."

What happens if an employee refuses to sign a severance agreement that contains an unlawful provision?

If the severance agreement offered to an employee contains one or more unlawful provision, the employer commits an unfair labor practice even though the employee does not sign the agreement.

What impact does the *McLaren Macomb* decision have on severance agreements that were signed by the parties before February 21, 2023, when the Board's decision issued?

The General Counsel stated the Board's decision applies retroactively. In her view, if an employer maintains or enforces an agreement with unlawful provisions that predated the *McLaren Macomb* decision, that would be viewed as a continuing violation and the Act's six-month statute of limitations would not apply.

Did the memo seek to expand whom the decision applies?

As noted in our prior discussion of the decision, it applies to employees covered by the NLRA, which generally means that it does not apply to managers and supervisors. However, in certain circumstances supervisors can be covered by the NLRA, and the memo makes clear that the Board will view exceptions to coverage under the NLRA narrowly.

Additionally, the memo discussed applicability of the decision and Section 7 of the NLRA generally to former employees. The memo takes the position that former employees may well have Section 7 rights, and that such rights do not depend on the existence of an employment relationship. This statement is quite expansive. In determining whether to include confidentiality and non-disparagement clauses in severance agreements, employers may well want to assess whether individuals are covered by the NLRA on a case-by-case basis, with advice from counsel experienced in traditional labor law.

What if employers simply don't seek to enforce non-disparagement and confidentiality provisions?

The memorandum suggests that not only is enforcing the clauses problematic, but also encourages employers to consider reaching out to any applicable former employee who has signed a severance agreement containing a non-disparagement or confidentiality agreement covered by *McLaren* decision and

advise them that the clauses are null and void. Employers should consult with labor counsel regarding whether this "encouragement" from the General Counsel is a requirement or a preference.

What if the employee is the one who asked for confidentiality?

The memorandum says that this is unlikely, and that even if so, an employer cannot agree to it without violating the NLRA.

Does this mean all confidentiality clauses are unlawful?

Not quite, but clauses that limit employees' ability to talk about the terms of severance agreements could be problematic. The memorandum states an employer may be able to restrict the dissemination of proprietary or trade secret information for a reasonable period of time based on legitimate business justifications. But, if the confidentiality clause has a chilling effect on discussing workplace issues with a union, the media, or other third parties, it is not legal.

What if we carve out Section 7 rights from our confidentiality and non-disparagement clauses?

The memorandum indicates that probably will not work in most situations. If the "savings clause" results in any ambiguous or vague terms, it won't prevent an NLRA violation. Instead, a savings clause will need to specify an employee's NLRA rights very explicitly to have an effect.

Are severance agreements useless then?

Not at all. Employers can still use a severance agreement to pursue a release of employment claims arising as of the date of the agreement. However, there are legal risks if the agreement contains language that, in the view of the NLRB General Counsel, adversely affects an employee's right to communicate freely regarding working terms and conditions.

What other implications does the new memo have?

As noted in our prior discussion of the decision, the NLRB is taking an expansive view of Section 7 of the NLRA, and employers should continue to closely monitor decisions from the Board and the General Counsel's memos that could impact common

provisions in employee handbooks and other work rules.

Key Takeaway

Employers should proceed with caution and consult experienced traditional labor counsel when considering/preparing any agreement that involves the employer providing any benefit (typically money) to an employee in exchange for the employee's promise to not make statements related to their employment that could be perceived as critical or derogatory about the employer.

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