

Post-McLaren: How Confidentiality and Non-Disparagement Provisions in Severance Agreements Interact with Section 7 Rights

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Confidentiality and non-disparagement clauses are frequently included by employers when negotiating and drafting severance agreements. Several recent challenges, on both the state and federal level, have been made to these types of provisions, specifically, whether they are illegal on their face and/or unduly coercive. The National Labor Relations Board (“NLRB”) recently chimed in, holding in *McLaren Macomb*, 372 NLRB No. 58, that an employer violates Section 7 of the NLRA “when it proffers a severance agreement with provisions that would restrict employees’ exercise of their NLRA rights,” including agreements containing broad confidentiality and/or non-disparagement prohibitions. Thus, under *McLaren*, an employer violates the NLRA, which applies to both union and nonunion employees, anytime it offers a severance agreement to an employee that contains an unreasonably broad confidentiality and/or non-disparagement provision – whether the employee signs the agreement is irrelevant.

The *McLaren* decision has sparked significant interest. On March 22, 2023, NLRB General Counsel Jennifer Abruzzo issued GC Memo 23-05 (the “GC Memo”), which addresses questions raised by the decision and provides guidance to employers. The memo confirms that confidentiality clauses that are narrowly tailored to restrict the dissemination of proprietary or trade secret information, have a limited duration, and are based on legitimate business reasons are permissible. Similarly, the memo notes that it is acceptable to restrict employee statements that are “maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.” The memo also confirmed that the *McLaren* decision will apply retroactively; therefore, agreements proffered to employees prior to February 21, 2023, may be subject to challenge up to six months after the unlawful proffer if unsigned. Executed agreements containing unlawful provisions are not subject to any time bar if they do not contain an expiration date.

Importantly, the GC Memo also clarified that the decision is not limited to severance agreements. The types of provisions that may interfere with Section 7 rights include noncompete clauses, non-solicitation clauses, no-poaching clauses, broad liability releases and covenants not to sue that go beyond the employer and/or employment claims, and cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects the employee’s right to refrain under Section 7, such as if the employee were asked to testify against co-workers that the employee assisted with filing an unfair labor practice charge.

Considering the *McLaren* decision and the GC Memo, employers should review and update their template agreements to mitigate or eliminate risk. This includes not only severance agreements, but also any separation or settlement agreements and other employment-related documents. Employers may also want to consider whether to take the preemptive remedial action of notifying prior recipients of agreements that overbroad confidentiality and non-disparagement restrictions will not be enforced.

