Alert

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COZEN O'CONNOR

NLRB Issues Guidance on Non-Disparagement & Confidentiality Clauses

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BACKGROUND

The National Labor Relations Act (NLRA) is a federal law that applies to both unionized and nonunionized workplaces. The government agency responsible for enforcing the NLRA is the National Labor Relations Board (NLRB or the Board). Section 7 of the NLRA protects employees' right to engage in "concerted activity" for purposes of their mutual aid and protection or for purposes of collective bargaining. Stated differently, employees have a protected right to discuss the terms and conditions of their employment with co-workers, including whether to join (or not join) a union and whether to work with co-workers to improve pay, working conditions, or other terms and conditions of employment.

Historically, the NLRB has held confidentiality and non-disparagement provisions in settlement agreements unlawful only when they prohibited employees from cooperating with an NLRB investigation, from litigating an unfair labor practice charge (i.e., an alleged violation of the NLRA), or where the circumstances surrounding the severance evidenced animus towards employees' lawful exercise of Section 7 rights.

THE McLAREN DECISION

On February 21, 2023, the NLRB overturned decades of prior precedent to hold that non-disparagement and confidentiality provisions commonly used in severance agreements are broadly unlawful when imposed on employees (as opposed to managers or supervisors). In *McLaren Macomb,* an employer operating a hospital in Michigan permanently furloughed eleven union employees and offered each of them a severance agreement.[1] Each severance agreement at issue in the *McLaren* decision contained the following provisions:

- **Confidentiality Agreement:** "The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouses, or as necessary to professional advisors for purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."
- **Non-Disparagement:** "At all times hereafter, the Employee agrees not to make statements to Employer's employees or the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents, and representatives."

First, the NLRB noted that the confidentiality provision broadly prohibited employees from disclosing *any* information regarding the terms of the severance agreement. As a result, the NLRB reasoned that such a provision could prevent an employee from discussing the terms of the severance agreement with co-workers who were also deciding whether to accept the severance, and it would "reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting [an NLRB] investigation into the [employer's] use of the severance agreement." As a result, the NLRB found that the imposition of this provision constituted an unfair labor practice and violated federal labor law.

Second, the NLRB held "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the [NLRA]" and, as a result, the non-disparagement provisions violated an employee's Section 7 rights because they prevented employees from making statements that the employer engaged in unfair labor practices and could chill an employee's cooperation with an NLRB investigation.

Notably, the NLRB found the severance terms so onerous and the penalties for non-compliance so great (injunctive relief, attorney fees, actual damages, etc.) that it announced merely *proposing* a severance agreement with what it considers to be an unlawful severance provision violates the NLRA and that it is "immaterial" whether the employee actually accepts the agreement.

The NLRB's General Counsel, Jennifer Abruzzo, appeared on *Employment Law Now* podcast hosted by Mike Schmidt, Vice Chair of Cozen O'Connor's Labor & Employment Department, to answer questions on the recent *McLaren* decision. Notably, she addressed many of the unanswered questions in the wake of *McLaren*, such as whether this decision applies to non-unionized workforces, whether the decision applies to supervisors, and, as a portent of things to come, whether the decision will apply retroactively to *all* severance agreements containing these provisions. The complete interview is publicly available here.

THE NLRB'S GUIDANCE

On March 22, 2023, the NLRB issued much-anticipated guidance for employers on the *McLaren* decision. The following are key takeaways every employer should understand about the NLRB General Counsel's application of *McLaren* from the guidance:

Retroactive

- *McLaren* has "retroactive application" in that it applies to severance agreements signed before February 21, 2023. Further, the six-month statute of limitations to bring an unfair labor practice charge relating to an overly broad severance agreement would be construed as a "continu[ing] violation" by virtue of the employer's "maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions…."

Supervisors

- While supervisors are not generally protected by the NLRA, it would protect from retaliation a supervisor who refuses to commit an unfair labor practice by "proffer[ing] an unlawfully overbroad severance agreement[.]"

Severability

- Generally, the voidability of a severance agreement with overly broad provisions would be decided on a case-by-case basis. However, NLRB "Region[al offices] generally make decisions based solely on the unlawful provisions and would seek to have those voided out as opposed to the entire agreement…."

Employee Request

- An employee requesting an overly broad confidentiality or non-disparagement provision would not change the analysis because "the Board protects public rights that cannot be waived…." Similarly, it is "irrelevant" whether an employee actually signs the severance agreement because, in their view, merely offering a severance agreement with an overly broad provision is unlawful.

Confidentiality

- Confidentiality agreements may still be lawful so long as they are "narrowly-tailored to restrict dissemination of proprietary or trade secret information for a period of time based on legitimate business justification[.]"

Non-Disparagement

- Non-disparagement agreements may still be lawful so long as they are narrowly-tailored and "limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity[.]"

Other Common Provisions May Be Unlawful

- There are a myriad of other common provisions in settlement agreements that the NLRB

General Counsel believes may be equally unlawful, such as non-compete clauses, non-solicitation clauses, no-poaching clauses, “broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond the employment claims and matters as of the effective date of the agreement[,]” and cooperation clauses involving the employer “that affects the employee’s right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.”

CONCLUSION

The recent guidance highlights a broad reading of the *McLaren* decision and an aggressive, pro-employee stance by the NLRB’s General Counsel. These issues will likely take time to work through anticipated legal challenges. Still, employers may want to review their severance agreements and standard terms in light of *McLaren* and the recent guidance.

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[1] 372 NLRB No. 58 (2023).