Foster Garvey

NLRB Decision Restricts the Use of Confidentiality and Non-Disparagement Provisions

Overview

On February 21, 2023, in *McLaren Macomb*, the National Labor Relations Board (the "**Board**") held that an employer violates the National Labor Relations Act ("**NLRA**") by proffering broadly drafted confidentiality and non-disparagement provisions in a severance agreement. Many employers typically propose the types of non-disparagement and confidentiality provisions that the Board found to be unlawful in severance or separation agreements. In light of the Board's decision, employers should review confidentiality and non-disparagement provisions with legal counsel to ensure compliance with the Board's decision.

The *McLaren* Decision

McLaren Macomb is a hospital in Michigan. The hospital permanently furloughed eleven employees and presented each of them with a severance agreement. In addition to requiring the employees to release the hospital from any claims arising out of their employment or termination of employment, the severance agreements contained confidentiality and non-disparagement provisions. The provisions are typical of what many employers include in severance or separation agreements:

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 spouse, or as necessary to professional advisors for the 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-Disclosure. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to 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.

The Board found that the mere proffer to employees of the severance agreements containing these provisions violated the NLRA, regardless of whether the employees agreed to sign the agreements, or the employer attempted to enforce the provisions. The *McLaren* decision overrules prior precedent from a republican-majority Board that generally allowed confidentiality and non-disparagement provisions.

Section 7 of the NLRA guarantees employees "*the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*," as well as the right "*to refrain from any or all such activities*." According to the Board, even the mere proffer of an agreement that unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights violates the Act, because it has a reasonable tendency to interfere with, restrain, or coerce employees in the prospective exercise of Section 7 rights, both
by the separating employee and those who remain employed.

The Board concluded that the non-disparagement clause could reasonably deter employees from engaging in Section 7 protected activity, such as:

- Critiquing the hospital, including statements that the hospital had violated employee rights under the NLRA;
- Making complaints about the terms and conditions of their prior employment with the hospital, including with the Union, the Board, other government agencies, and the media;
- Assisting employees who are still employed by the hospital in exercising their NLRA rights; and
- Cooperating with NLRB investigations and litigation.

The Board similarly concluded that the confidentiality clause had an impermissible chilling tendency on Section 7 rights because it could reasonably deter employees from:

- Disclosing the existence of unlawful provisions in the severance agreement;
- Discussing the terms of the severance agreement with their Union or with other former coworkers who find themselves faced with similar decisions about whether to sign a severance agreement; and
- Organizing or discussing the severance agreement with future co-workers.

The Board also noted the broad scope of the provisions, applying to any harmful statements about the employer or multiple related entities and individuals, and for an unlimited period of time. The Board also took issue with the fact that the agreement provided for substantial monetary and injunctive sanctions against the employee in the event of a breach by the employee, including actual costs and attorney fees associated with the breaches.

Questions Employers are Asking

For many, the *McLaren* decision raises more questions than it purports to answer or clarify. On March 22, 2023, the NLRB General Counsel, Jennifer Abruzzo, released GC Memo 23-05 (the "**Memorandum**"). The Memorandum is in question-and-answer format and seeks to provide further guidance. You can find the Memorandum here.

Below are answers to several questions we anticipate employers may have about the new decision.

What is the National Labor Relations Board?

- The National Labor Relations Board is an independent federal agency that protects employees from unfair labor practices and protects the right of private sector employees to join together, with or without a union, to improve wages, benefits, and working conditions.
- The National Labor Relations Board enforces the National Labor Relations Act. The NLRA is a federal law that grants employees the right to form or join unions; engage in protected, concerted activities to address or improve working conditions; or refrain from engaging in these activities. The Board is comprised of politically appointed members, and it is not unusual for precedent on controversial issues to change when appointees of a new presidential administration attain a majority status on the Board.

Why Is the McLaren Decision Important?

- The *McLaren* decision holds that broadly-drafted confidentiality and non-disparagement provisions in a severance agreement violate the law. An employer who violates the NLRA may be subject to a cease-and-desist order or liable for monetary remedies, payment of dues, fines, and other costs. In addition, an intended release of claims in an agreement with the unlawful provisions may also be invalid without a properly drafted severability clause.
- The employer in the *McLaren* decision may ask the Sixth Circuit of Appeals or the Court of Appeals for the District of Columbia to overturn the decision. However, the NLRB decision takes effect immediately.

Does the McLaren Decision Apply to All Employees?

- The decision applies to most employees, except those not protected by the NLRA. While the *McLaren* decision involved unionized employees, the decision applies to all employees entitled to Section 7 rights under the NLRA, whether or not unionized. The NLRA's protections do not extend to independent contractors, supervisors, most agricultural workers, workers covered by the Railway Labor Act, and public sector employees (although state laws may offer similar protection in the public sector). Whether the NLRA excludes an individual is highly fact-specific, and employers should consult with legal counsel. For example, the Memorandum notes that the NLRA protects a supervisor who is retaliated against for refusing to act on their employer's behalf in committing an unfair labor practice. The General Counsel further opines that a severance agreement that prohibits a supervisor from participating in a Board proceeding related to the supervisor's protected conduct would also violate the NLRA.

May Employers Continue to Use Confidentiality and Non-Disparagment Clauses?

- The Memorandum makes clear that severance agreements are not banned, but neither the *McLaren* decision nor the Memorandum provide specific or clear instruction about alternative confidentiality or non-disparagement language that would not violate the NLRA. The scope of permissible and impermissible language may be refined through future decisions or Board guidance. There is no one-size-fits-all approach to complying with the *McLaren* decision. With the assistance of legal counsel, employers may consider whether previously-used confidentiality and non-disparagement clauses are still needed, and eliminate such clauses where appropriate. Employers and legal counsel may also consider how to narrowly tailor contract language to address legitimate needs without affecting employees' Section 7 rights. Clauses that protect a business's services, products or proprietary information from reputational harm or disclosure in a manner that does not restrict employees' rights to publicly comment on or act in concert with other employees to address working conditions may be acceptable. Confidentiality and non-disparagement provisions should specifically allow for complaints to the NLRB and participation in NLRB investigations and administrative actions, but such allowances will not automatically ensure that a clause is not unlawfully restrictive in other respects.

Does the McLaren Decision Affect Other Types of Employment Agreements?

- The *McLaren* decision addressed severance agreements. However, the decision's reasoning will likely be applied by the Board to other types of agreements containing confidentiality and non-disparagement provisions that employees may sign during the course of their employment, such as non-disclosure, confidentiality, or proprietary information agreements. Therefore, employers should consult legal counsel to ensure that confidentiality and non-disparagement provisions in any agreement offered to employees address the *McLaren* decision. While the decision did not address employer policies or handbooks, the Board has expressed an intention to revisit other precedent related to permissible employer policies. Accordingly, Employers may also want to consider consulting legal counsel to review other employment policies or handbooks. Finally, The Memorandum states that other provisions typically included in severance agreements, such as non-compete clauses, no solicitation clauses, no-poaching clauses, broad liability releases, and covenants not to sue, may also be impermissible, but does not state the NLRB General Counsel's rationale for that assessment. What is clear is that the NLRB may have its sights set on further restricting common provisions in employment agreements that it views as restrictive of Section 7 rights.

Does the McLaren Decision Apply to Existing Employment Agreements?

- Yes. The Memorandum states that the Board's decision applies retroactively, meaning it is not limited to new agreements. If a dispute arose over an existing agreement, the Board would likely find an employer's enforcement of overbroad terms in existing severance agreements unlawful. Employees generally have six months to bring an unfair labor practice charge under the statute of limitations set out in Section 10(b) of the NLRA. However, the NLRB General Counsel appears to take the position that maintaining or enforcing a previously-executed severance agreement containing unlawful provisions would be considered a "continuing violation." Put another way, an employee who signed a severance agreement more than six months prior could nevertheless file an unfair labor practice charge based on overly broad provisions that purportedly chill the employee's Section 7 rights.

Key Takeaways

We encourage employers to consult with legal counsel to:

- Review any form or template employment agreements that contain confidentiality and non-disparagement provisions and consider with legal counsel options for complying with the *McLaren* decision that are appropriate for your business situation;
- Review previously executed employment agreements to determine whether they should be revised, superseded, or rescinded; and
- Consider how other federal and state laws, such as the federal Speak Out Act, Washington State's Silenced No More Act, or New York's law governing nondisclosure agreements, may impact the enforceability of confidentiality and non-disparagement provisions.

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