Tucker Ellis LLP

NLRB General Counsel Issues Guidance on Decision Ruling Overly Broad Non-Disparagement and Confidentiality Provisions in Severance Agreements Violate Federal Law

MARCH 2023

On March 22, 2023, the National Labor Relations Board's ("NLRB") General Counsel Jennifer A. Abruzzo ("General Counsel") issued guidance in response to inquiries arising from the NLRB's recent ruling that overly broad non-disparagement and confidentiality provisions in severance agreements are unlawful. (*McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023); "National Labor Relations Board Rules That Non-Disparagement and Confidentiality Provisions in Severance Agreements Violate Federal Law" (Tucker Ellis Client Alert, February 2023).

While the guidance is not binding precedent, it sheds light on many questions raised by *McLaren Macomb* and what employers should and should not do in the eyes of the General Counsel, but it still leaves several unanswered questions. Below is a brief summary of the main points covered in the General Counsel's guidance.

Severance Agreements Are Not Banned

General Counsel noted that *McLaren Macomb* does not outright ban severance agreements. Narrowly tailored provisions that do not infringe upon the right of employees to engage in concerted activity to advance their common interests, as protected by Section 7 of the National Labor Relations Act ("NLRA"), are lawful and enforceable. Those rights include the ability to communicate with the NLRB; labor unions; judicial, administrative or legislative forums; media; or other third parties. Further, General Counsel reinforced that releasing the right to pursue employment claims existing as of the date of the agreement remains lawful.

Permissible Confidentiality and Non-Disparagement Provisions

General Counsel advised that narrowly tailored confidentiality clauses designed to prohibit the disclosure of trade secrets or proprietary information for a period of time based on legitimate business justifications could be considered lawful. However, those that have a chilling effect on employees' Section 7 rights would be unlawful. Importantly, in a footnote, General Counsel indicated the possibility that provisions prohibiting disclosure of financial terms only may remain permissible.

Similarly, a narrowly tailored and justified non-disparagement provision that is limited to statements regarding the employer that meet the definition of defamation, such as maliciously untrue statements made with knowledge of their falsity or with reckless disregard of the same, may be found lawful.

Circumstances Surrounding a Severance Agreement and Whether an Employee Signs It Are Irrelevant

Surrounding circumstances will not be taken into consideration during an objective analysis of whether a provision is lawful on its face. Further, an unsigned severance agreement will not prevent a finding of a violation of the Act. In fact, the mere proffer of an unlawful severance agreement itself is sufficient to result in a violation.

Importantly, however, General Counsel advised it is likely that only unlawful provisions would be voided as opposed to the worry that the inclusion of an unlawfully overbroad provision would void an entire agreement. However, the striking of the unlawful provision would likely not cure the violation of an unlawful proffer.

While General Counsel also opined that a general savings clause would not necessarily cure overbroad provisions, she subsequently suggested that including a detailed list of nine core activities protected by Section 7 of the NLRA could mitigate potential risk to employers, thereby suggesting that employers could reduce their risks by including a carefully crafted disclaimer that the severance agreement does not prohibit those nine activities, which are the right to engage in:

- organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment;
- forming, joining, or assisting a union, such as by sharing employee contact information;
- talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms;
- discussing wages and other working conditions with co-workers or a union;
- taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union;
- striking and picketing, depending on its purpose and means;
- taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present;

- wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and
- choosing not to engage in any of these activities.

The Decision Applies Retroactively and Equally Protects Former Employees

General Counsel opined that *McLaren Macomb* applies retroactively and went even further to suggest that severance agreements with unlawful provisions would not be subject to the six-month statute of limitations because "maintaining and/or enforcing a previously-entered severance agreement" that contains unlawful provisions "continues to be a violation." However, a past, unlawful proffer of a severance agreement "may be subject to the six-month statute of limitation." Additionally, former employees are entitled to the same protections as current employees.

Accordingly, General Counsel suggested employers revisit their severance agreements to determine whether they contain overly broad non-disparagement and confidentiality provisions. She also advised that the act of informing employees subject to overly broad severance agreement provisions that the provisions are void and that the employer will not seek to enforce them may serve as a basis for dismissal of a charge alleging an unlawful proffer.

Application to Supervisors

One comfort that employers took following the *McLaren Macomb* decision was that supervisors are not covered under the NLRA, so the decision would generally have no effect on severance agreements with departing supervisors. However, General Counsel explained her belief that *McLaren Macomb* may offer some protection to supervisors. Pointing to prior NLRB decisions holding that supervisors cannot be retaliated against for refusing to follow their employer's directives that would violate the NLRA, such as proffering an unlawfully overbroad severance agreement, General Counsel opined that proffering a severance agreement to a supervisor that prevents them from participating in an NLRB proceeding could also be unlawful. In this respect, the guidance leaves the door open for exceptions to the general rule that supervisors are excluded from the NLRA's protection.

Other Severance Agreement Provisions

General counsel opined that other provisions commonly included in severance agreements may also infringe on employees' Section 7 rights, including non-compete and non-solicitation provisions, broad releases, covenants not to sue, and cooperation requirements. Employers should review such provisions to ensure they are narrowly tailored and are tied to legitimate business justifications.

What Should Employers Do?

Employers should continue to revisit their severance agreements to determine whether they contain overly broad non-disparagement and confidentiality provisions. Since the decision applies retroactively, at least with regard to attempts to enforce those provisions, employers should also carefully consider the impact of *McLaren Macomb* before instituting enforcement actions with respect to previous agreements containing overly broad provisions. While a savings clause may not cure unlawful provisions, employers should consider adopting the detailed disclaimer suggested by the General Counsel. Last, employers should consider the decision's impact on other provisions in severance agreements that may, under General Counsel's broad view, infringe on employees' Section 7 rights. Overall, employers should proceed with caution and seek legal advice when crafting and enforcing severance agreements, both new and old.

Additional Information

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