Update: NLRB's General Counsel Provides Guidance on Severance Agreements with Broad Confidentiality and Non-Disparagement Clauses

March 27, 2023

Key Points

- The NLRB's General Counsel issued a memorandum providing her position on the NLRB's recent decision in *McLaren Macomb*, holding that employers may not offer severance agreements with broad confidentiality or non-disparagement clauses to employees covered by the NLRA.
- The memorandum would apply *McLaren Macomb's* reasoning to job candidates and, in some instances, to supervisors, as well as to other employment documents, such as offer letters, non-compete and non-solicitation agreements, and cooperation clauses in severance agreements.
- The memorandum advises that "savings clauses," which provide that any purported restrictions are meant to be consistent with other rights under the NLRA, are not sufficient to insulate provisions from challenge.
- Although the memorandum is not legally binding, and *McLaren Macomb* could be altered or reversed by a court, employers in the meantime should consult counsel to determine whether to substantially revise severance agreements, offer letters, and other employment policies and agreements.

Background

On March 22, 2023, the General Counsel of the National Labor Relations Board (NLRB) issued a Guidance Memorandum ("Memorandum") setting forth her view on the NLRB's recent decision in *McLaren Macomb*, 372 NLRB No. 58 (2023). *McLaren Macomb* held that employers may not offer severance agreements with broad confidentiality or non-disparagement clauses to union and non-union employees covered by the National Labor Relations Act (NLRA). In the Board's view, such severance agreements are unlawful if they "may chill" activities protected by section 7 of the NLRA—which, in turn, protects the right to organize unions, bargain collectively, engage in mutual aid and protection, and to refrain from doing so.

The Memorandum reiterates the NLRB's position that proffering a purportedly overbroad severance agreement violates the NLRA, but further adds that the "mere proffer" of

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such agreements is "inherently coercive" and impinges on section 7 rights *regardless* of whether "the employee actually signed the severance agreement" and even "if employees themselves request broad confidentiality and/or non-disparagement clauses." Thus, the General Counsel would pursue charges against employers who offer severance agreements with confidentiality and non-disparagement clauses that are not "narrowly tailored"—even if the agreement also includes disclaimer language specifically protecting NLRA rights.

The Memorandum does not provide a test for determining whether a confidentiality or non-disparagement clause is "narrowly tailored." However, the General Counsel explained that "[c]onfidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade information for a period of time based on legitimate business justifications may be considered lawful." By contrast, according to the Memorandum, "confidentiality clauses that have a chilling effect" on employees who would otherwise assist "others about workplace issues and/or communicating with the [NLRB], a union, legal forums, the media or other third parties are unlawful."

As for non-disparagement clauses, that General Counsel explained that provisions "limited to employee statements about the employers that meet the definition of defamation . . . may be found lawful"—notwithstanding the many state laws banning defamation anyway. By contrast, the General Counsel would pursue charges based on non-disparagement clauses that "encompassed all disputes, terms and conditions, and issues, without a temporal limitation and with application to parents and affiliates and their officers, representatives, employees, directors and agents."

While *McLaren Macomb* focused on confidentiality and non-disparagement clauses, the General Counsel would apply *McLaren Macomb's* reasoning to other provisions in severance agreements, such as "non-compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement;" and "cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an 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 [an NLRB charge]."

Nor would the General Counsel limit the application of *McLaren Macomb* to severance agreements. According to the General Counsel, the NLRB's reasoning applies to other employer communications that touch on section 7 rights—even those that precede the establishment of an employer-employee relationship and follow its termination. The memorandum contends that former employees are "entitled to the same protections under the NLRA as current employees." Thus, despite the lack of legal authority supporting her position, the General Counsel would hold that NLRA rights "are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employers" and, in any event, "former employees can play an important role in providing evidence to the NLRB and otherwise sharing information about working conditions they experience, in a way that constitutes both mutual aid and protection." Applying this broad stroke, the Memorandum also contends that the reasoning of *McLaren Macomb* would apply to "pre-employment communications" such as "offer letters."

Notably, the General Counsel's position is also at odds with other court decisions holding that supervisors are not protected by the NLRA. According to the Memorandum, *McLaren Macomb* would apply to severance agreements that prevent supervisors from engaging in conduct protected by the NLRA. The Memorandum does not explain what sort of supervisor conduct would be protected, let alone which provisions of a supervisor's severance agreement could violate the NLRA. Instead, the General Counsel cites *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), which held that discharging a supervisor for pro-union activities does not violate the NLRA, even though "the discharge of a supervisor for engaging in union or concerted activity almost invariably has a secondary or incidental effect on employees." In other cases, the NLRB has held that the NLRA prohibits employers from firing a supervisor for refusing to commit an unfair labor practice, failing to prevent unionization or cooperating with

NLRB investigations. But, in all those cases, the NLRB reasoned that discharging the supervisor only violated the NLRA because it deterred employees from engaging in protected activity. None of those cases held that supervisors had NLRA-protected rights.

Finally, the Memorandum contends that the NLRA forbids "maintaining and/or enforcing a previously entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights," even if entered into before the NLRB issued its decision in *McLaren Macomb*. Thus, the General Counsel would pursue unfair labor practice charges against employers who seek to enforce purportedly overbroad severance agreements—even agreements that are many years old.

Implications for Employers

While not binding authority, the Memorandum outlines the General Counsel's enforcement agenda regarding severance agreements and signals a shift in thinking about employment agreements and policies more generally. The General Counsel's enforcement agenda, as well as the NLRB's decision in *McLaren Macomb*, may be challenged in court. It remains to be seen whether a court would find that the mere offer of a severance agreement to an employee (much less a supervisor) can violate the NLRA—or whether a court would extend NLRA rights to non-employees, former employees, or supervisors. However, pending challenge in court, the Memorandum reinforces the need for employers to review their severance agreements, as well as offer letters, handbooks, and other workplace policies and agreements.