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Insights

NLRB Holds Confidentiality and Non-Disparagement Provisions Unlawful in Severance Agreements: What Employers Need to Know

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There is a common misconception that the National Labor Relations Board (NLRB) only deals with union matters. In fact, the NLRB enforces the National Labor Relations Act (NLRA), which applies to most private sector employers, regardless of whether their employees join a union.

Last month, in a divided 3-2 decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), the NLRB decided that a hospital employer violated the NLRA by offering severance agreements with non-disparagement and confidentiality/non-disclosure provisions to a group of permanently furloughed employees.

The severance agreements at issue contained terms (1) prohibiting the employees from making statements that could disparage or harm the employer and (2) prohibiting the employees from disclosing the terms of their severance agreements. The NLRB determined that these common provisions, often referred to as non-disparagement and confidentiality/non-disclosure provisions, were unlawful because they were too broad and tended to "chill" the exercise of the employees' rights to collectively band together in an effort to improve the workplace. These rights are known as Section 7 rights – referring to Section 7 of the NLRA – and apply to most employees,[1] regardless of whether or not they are members of a union.

Alarmingly for employers, the NLRB has taken the position that the *McLaren Macomb* decision extends retroactively. The NLRB's General Counsel issued Memorandum GC 23-05 last week to address these and other questions raised as a result of *McLaren Macomb*.[2]

Employer concerns about retroactivity are mitigated somewhat by the NLRB's own procedures which require that timely filed charges pertain to a violation allegedly occurring within the past (6) six months. However, the NLRB is focusing on more than the date the allegedly offending severance agreement was provided to the employee. The General Counsel stated the

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following in Memorandum GC 23-05:

> *Board cases are presumed to be applied retroactively and this decision has retroactive application.*
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> *Further, I believe that, while an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation[s]…* ***maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the [six (6) month] period would not be time-barred****. (emphasis added)*
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> Thus, the *McLaren Macomb* decision impacts most employers, not only for employee severance agreements moving forward, but for employee severance agreements that have been executed in the past.

Key Takeaways:

1. **Severance agreements are still lawful**. The NLRB is concerned about overly broad confidentiality and non-disparagement clauses and will focus enforcement efforts pertaining to those provisions.
2. **Managers and supervisors may be covered in some circumstances.** *McLaren Macomb* applies to severance agreements offered to a supervisor, who is ordinarily not protected by the NLRA, if the supervisor is offered a severance agreement in connection with an alleged retaliatory termination because the supervisor allegedly refusing to carry out what the supervisor believes is an unfair labor practice against employees.
3. **Limited confidentiality and non-disparagement provisions may be lawful**. Memorandum GC 23-5 states that confidentiality clauses that are "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications" may be found lawful. Non-disparagement provisions that are "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" may be found lawful.
4. **Overly broad confidentiality and non-disparagement provisions are unenforceable regardless of who requests them**. Even if the employee requests, negotiates or otherwise agrees to an agreement that includes confidentiality and/or non-disparagement provisions that restrict the exercise of Section 7 rights, the provisions will be a violation of the NLRA.
5. **A "savings clause" might not "save the day."** If the NLRB finds mixed or inconsistent messages to the employees that could impede the exercise of Section 7 rights, a provision that "nothing in this agreement is intended to interfere with the employee's Section 7 rights" might not cure what is otherwise a violation of the NLRA.
6. ***McLaren Macomb* applies retroactively**. The NLRB is encouraging employers to contact their former employees and advise them that the overly broad confidentiality and non-disparagement provisions of their severance agreements are null and void and that the employer will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions.

Employers should work closely with counsel to review and analyze previous agreements, determine what actions to take, if any, in light of *McLaren Macomb*, and prepare carefully crafted language in future proposed severance agreements. Lowndes attorneys are available and prepared to provide counsel to protect your company's interests.

[1]Not all workers have Section 7 rights. Managers, most supervisors, independent contractors, public sector employees, and some agricultural workers are not covered by these NLRA protections.

[2]The NLRB is a federal agency governed by a five-person board and a General Counsel, all of whom are appointed by the President with the consent of the Senate. As such, decisions rendered by the NLRB often mirror the ideals established by the then-current administration.