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SEC Corner

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National Labor Relation Board's General Counsel Foreshadows More Expansive Restrictions on Separation Agreements Following Board's *McLaren Macomb* Decision

Andrew I. Herman, Garrett P. Buttrey, and Jason E. Reisman*

In this article, the authors discuss the implications of a recent ruling by the National Labor Relations Board finding two separation agreements to be unlawful.

In *McLaren Macomb*,[1] the National Labor Relations Board (NLRB or Board) found two routinely standard separation agreement provisions—confidentiality as to the agreement and non-disparagement—to be unlawful when included in an agreement offered to an employee.

Thereafter, the general counsel of the NLRB, Jennifer Abruzzo, issued guidance in an effort to clarify the scope and impact of that decision. The general counsel's guidance takes an expansive view of *McLaren Macomb*, foreshadowing more restrictions on separation agreement and other employment agreements.

Background

In *McLaren Macomb*, the NLRB held that employers violate the National Labor Relations Act (NLRA) when they offer severance agreements with provisions that would restrict employees in the exercise of their NLRA rights. The Board explained that, where an agreement "unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates the [NLRA] because it has a reasonable tendency to interfere with or restrain the exercise" of NLRA rights.

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NLRB General Counsel Takes an Expansive View of *McLaren Macomb*

The guidance from General Counsel Abruzzo—the chief investigator and prosecutor of violations of the NLRA—is a warning to employers about her expansive views of the reach of the *McLaren Macomb* decision. In her memorandum, the general counsel provides the following insight about *McLaren Macomb*'s broader implications:

- *Proceed with caution*. *McLaren Macomb* is retroactive, says the general counsel. More troubling, the guidance explains that maintenance and/or enforcement of an existing severance agreement containing unlawful provisions is a continuing violation of the NLRA and, therefore, would not be barred by the NLRA's six-month statute of limitations.
- *No signature required*. It is irrelevant whether the employee signed the severance agreement containing an unlawful provision. Merely offering such an agreement by itself is unlawful because it is inherently coercive to condition severance benefits on the waiver of statutory rights under the NLRA.
- *More than severance agreements at risk*. Even though *McLaren Macomb* dealt with severance agreements, the decision is not limited only to those types of agreements. According to the general counsel, offering any employment agreement containing overly broad provisions that impair an employee's NLRA rights, or similar language in employer communications with employees, could be unlawful under *McLaren Macomb* unless narrowly tailored to address a special circumstance justifying the impingement on workers' rights.
- *Problems with other provisions*. The general counsel believes other provisions that are included in severance agreements that could be problematic include non-compete clauses, no solicitation clauses, no poaching clauses, cooperation requirements involving NLRB investigations or proceedings, and overly broad liability releases and covenants not to sue.
- *We speak for the public*. The guidance proclaims the NLRB "protects public rights that cannot be waived in a manner

that prevents future exercise of those rights" regardless of who requests the unlawful provisions. In the general counsel's view, that means protecting each employee's right to engage in activity protected by the NLRA and to assist other employees in doing so. As a result, even if an employee requests an unlawful provision such as an overly broad confidentiality clause, it would still violate the NLRA.

NLRB General Counsel's Guidance Gives Some Help to Employers

The general counsel's guidance does provide some important reassurances for employers:

- *One bad apple does not spoil the bunch*. The general counsel is clear that the entire agreement is not invalidated because it contains certain unlawful provisions, regardless of whether there is a severability clause. Rather, the offending provisions may be voided without jeopardizing the remainder of the agreement. The general counsel suggests that employers concerned about existing severance agreements with unlawful provisions should consider remedying such violations by notifying employees subject to those agreements that the provisions are null and void and will not be enforced by the employer (although most employers may not want to take such a proactive step).
- *Get a release*. Severance agreements with a release of claims remain lawful if they waive only the signing employee's right to pursue claims arising as of the date of the agreement. Employers should ensure releases (and covenants not to sue) are not overly broad and properly carve out an employee's right to participate or cooperate in NLRB investigations, legal proceedings before the NLRB or in other forums, and to file a charge with the NLRB.
- *Financial terms and proprietary or trade secret information are confidential*. The guidance provides that employers can use narrowly tailored confidentiality clauses to protect the financial terms of a severance agreement and proprietary or trade secret information "for a period of time based on legitimate business justifications."

- *Non-disparagement provisions allowed*. The general counsel says employers can use appropriately tailored non-disparagement clauses that prohibit "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."
- *Supervisors not included (with exception)*. Supervisors are generally not covered by the NLRA; therefore, the *McLaren Macomb* decision does not apply to agreements offered to them. The general counsel cautions, however, that supervisors who are retaliated against because they refuse to act on their employer's behalf in committing a violation of the NLRA are protected, and a severance agreement offered to a supervisor in that context could be unlawful.
- *Savings clauses are valuable, but not a cure*. According to the general counsel, "savings clauses or disclaimer language may be useful to resolve ambiguity over vague terms, [but] they would not necessarily cure [otherwise unlawfully] overly broad provisions." Any mixed or inconsistent messages provided to employees that could impede employees' exercise of NLRA rights could be a liability for the employer. Although no model prophylactic savings clause or disclaimer exists, the general counsel's view is that such provision would contain a statement of rights that "affirmatively and specifically sets out employee statutory rights" akin to an NLRB violation notice that is posted in the workplace (which may be more than most employers are comfortable including in any agreement).

What Should Employers Do?

Employers should not overreact, as there are a number of potential modifications employers can incorporate to minimize the risk of non-compliance with the *McLaren Macomb* decision. It continues to be essential for employers to carefully review the provisions of existing employment-related agreement templates and to tailor their language for each specific situation.

The general counsel's guidance only reinforces the NLRB's drive to extend the reach of the NLRA in the same manner as (or

perhaps farther than) the Obama administration. That being said, it behooves all employers to incorporate some form of savings clause or disclaimer into all separation and employment agreements. Although that may not be a silver bullet, it certainly can provide an argument to defend compliance efforts.

Beyond the *McLaren Macomb* decision, the NLRB and its general counsel have made clear their commitment to overturn precedent established during the Trump administration and to reach further into the employment relationships in non-unionized workplaces. The next domino to fall may be overturning the standard governing employee handbooks and work rules (the *Boeing Company* decision from the Trump NLRB), which balanced employer interests against employee rights, in favor of returning to the intense (and unpredictable) scrutiny applied under the prior standard that barred work rules the Board believes could be "reasonably interpreted" as infringing on an employee's NLRA rights.

Notes

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1. McLaren Macomb, 372 NLRB No. 58 (2023).