Updates

In February 2023, the National Labor Relations Board (NLRB or the Board) ruled in *McLaren Macomb*, 372 NLRB No. 58 (2023), that employee severance agreements with overly broad confidentiality and nondisparagement provisions violate the National Labor Relations Act (NLRA). Although often overlooked, the NLRA's protections for concerted activity by employees apply to union and nonunion workforces alike. Since the NLRB's ruling, employers have scrambled to understand the impact of the decision on severance agreements, offer letters, and Proprietary Information and Inventions Agreements (PIIAs) (among others).

On March 22, 2023, in the wake of employer questions regarding the scope, impact, and breadth of the NLRB's ruling, NLRB General Counsel Jennifer A. Abruzzo issued a memorandum (GC 23-05) (the Memorandum) to all regional directors, officers-in-charge, and resident officers to "assist Regions in responding to inquiries from workers, employers, labor organizations, and the public about implications stemming from the case." According

to a press release issued by the NLRB:

The memo offers guidance on the decision's scope and effect, such as the retroactive effect of the decision and the application of the decision to supervisors. The memo also provides guidance on the kinds of severance agreement provisions that could violate the Act if proffered, maintained, or enforced, including confidentiality, non-disclosure, and non-disparagement, among others.

Although the Memorandum answers many questions regarding *McLaren Macomb's* potential impact, the press release makes clear that it merely "reflects guidance from the NLRB's General Counsel and does not represent the views of the Board."

Key Insights From the Memorandum

The Memorandum begins by summarizing the NLRB's ruling in *McLaren Macomb*. It then proceeds to offer responses to 15 questions regarding the ruling. The following is a high-level summary of key points from the Memorandum:

- **Severance Agreements Remain Lawful.** The Memorandum clarifies that the NLRB's ruling does not completely ban severance agreements. Instead, "lawful severance agreements may continue to be proffered, maintained, and enforced if they do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees."
- **Agreements Issued to Supervisors *Could* Be Unlawful.** Although the Memorandum notes that the NLRA does not generally cover supervisory employees (as defined by the NLRA), the NLRA protects a supervisor if an employer retaliates against a supervisor who refuses to follow an employer directive that would violate the NLRA. Thus, asking a supervisor to distribute an overbroad agreement would be a violation. And the Memorandum goes one step further to posit that the actions of an employer who "proffers a severance agreement to a supervisor . . . [which contains a provision] preventing the supervisor from participating in a Board proceeding, could also be unlawful."
- ***McLaren Macomb* Applies Retroactively.** The Memorandum concludes that NLRB decisions are "presumed" to apply retroactively and states 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 . . . continues to be a violation[.]"
- **An Unlawful Provision Does Not Likely Nullify an Entire Severance Agreement.** Although the Memorandum specifies that each situation must be individually assessed, "[r]egions generally make decisions based solely on the unlawful provisions and would seek to have those voided out as opposed to the entire agreement, regardless of whether there is a severability clause or not." Note, however, that if the *McLaren Macomb* concepts were raised outside of the Board's jurisdiction, state law on the issue would likely come into play.
- ***McLaren Macomb* Applies to Other Agreements With Employees, Not Just Severance Agreements.** The Memorandum makes clear that "overly broad provisions in *any* employer communication," (emphasis added) such as offer letters, confidentiality agreements, nondisclosure agreements (NDAs), or PIIAs, could be deemed unlawful under the *McLaren Macomb* analysis.
- **Confidentiality Provisions in Severance Agreements Can Be Lawful.** Although *McLaren Macomb* deemed overly broad confidentiality provisions unlawful, the Memorandum explains that "[c]onfidentiality 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 considered

lawful" (emphasis added). Moreover, in what appears to conflict with *McLaren Macomb's* rationale, the Memorandum suggests in footnote 9 that requiring nondisclosure of the financial terms of a settlement agreement (i.e., the amount of money paid) might be permissible under the NLRB's decision.

- **Narrowly Tailored Nondisparagement Provisions May Be Lawful.** The Memorandum confirms that, despite *McLaren Macomb*, a "narrowly-tailored, justified, non-disparagement provision that is 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."
- **A "Savings Clause" or "Disclaimer" May Not Cure an Unlawful Provision.** The Memorandum indicates that although a "savings clause" or "disclaimer" may be "useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions."
- **Other Provisions in a Severance Agreement May Also Be Problematic.** The Memorandum provides that, in addition to the ruling on confidentiality and nondisparagement provisions, additional terms *may* be deemed to interfere with the exercise of Section 7 rights to discuss the terms and conditions of employment with coworkers under the NLRA, including, for example, nonsolicitation clauses, "no-poaching" clauses, "broad liability releases and covenants not to sue," and cooperation requirements. Note, however, that none of those clauses were at issue in *McLaren Macomb*.

Takeaways

The Memorandum makes many definitive statements, some of which appear to go beyond the scope of *McLaren Macomb*. The Board has not officially adopted the guidance contained in the Memorandum, and civil courts would not technically be bound by it. That said, it provides employers with a clear view of what the general counsel is providing her lawyers in the regional offices. To that end, employers must keep in mind that various states have additional laws regarding nondisparagement and confidentiality provisions, each of which might further restrict the scope of such provisions in the employment context. Employers should carefully review the Memorandum and consult with experienced counsel to understand its potential impact. Employers can then make informed decisions regarding how to structure agreements going forward and whether to address existing agreements.

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