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March 2023

NLRB Issues Employer Guidance on *McLaren Macomb* Decision

In its February 21 *McLaren Macomb* decision, the National Labor Relations Board (NLRB) found that severance agreements with broad non-disparagement or confidentiality provisions violate the National Labor Relations Act (NLRA). It is important to note that *McLaren Macomb* makes it an unfair labor practice for an employer to merely tender such a document to an NLRA-protected employee, even if the employee refuses to sign it. The decision left many questions unanswered and employers struggling to decide how to respond. However, on March 22 NLRB General Counsel Jennifer Abruzzo issued a Memorandum (GC-23-05) clarifying the NLRB's decision and offering employers guidance on what to consider going forward.

First, the Memorandum interprets *McLaren Macomb* to apply retroactively. It goes on to say that while the six-month statute of limitations under Section 10(b) would time-bar an unfair labor practice charge for ***proffering*** an unlawful agreement, maintaining or enforcing such an agreement is a ***continuing violation*** of Section 7 rights and is therefore not time-barred.

The Memorandum also suggests that unlawful confidentiality or non-disparagement provisions will not void the entire severance agreement: "Regions 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." However, while the entire agreement is unlikely to be voided due to unlawful confidentiality or non-disparagement provisions, Abruzzo suggests there are other provisions commonly found in severance agreements that could be problematic, including "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 provisions that may interfere with an NLRA-protected employee's exercise of Section 7 rights.

The Memorandum affirms that confidentiality and non-disparagement provisions are not entirely prohibited but will be carefully scrutinized to ensure they do not unlawfully restrict employees' Section 7 rights. 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 still be lawful. Similarly, non-disparagement clauses may be found lawful only where the clause is "narrowly-tailored" and "justified" and is "limited to employee statements about the employer" that rise to the level of "defamation" as being "maliciously untrue" and made with "knowledge of their falsity or with reckless disregard for their truth or falsity."

Finally, the Memorandum notes a potential remedy for such violations: "Regions have settled cases involving severance agreements which had unlawfully broad terms that chilled the exercise of Section 7 rights by requiring the employer to notify its former employees that the overbroad provisions in their severance agreements no longer applied."

The *McLaren Macomb* decision and GC Abruzzo's guidance Memorandum continue the GC's and NLRB's current trend of pro-union decisions. Employers should become familiar with this Memorandum and consider the guidance for severance and settlement agreements moving forward.

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