A Death Knell for Standard Boiler-Plate Severance Agreements:

Key Considerations for Individualized Confidentiality and Non-Disparagement Provisions in Severance Agreements after the National Labor Relations Board's *McLaren Macomb* Decision.

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Severance agreements providing financial compensation in exchange for a release of claims by the departing employee have long been a useful tool for employers as a gesture of goodwill toward departing employees to soften the blow of an involuntary termination and avoid future litigation by bringing finality to the employment relationship. In February 2023, however, the National Labor Relations Board disrupted the use of these oft-used tools, creating more questions than answers for employers that wish to separate employees.

The Board issued a bombshell ruling overturning two decisions issued by the Board under the prior administration that had granted employers great latitude in including confidentiality and non-disparagement provisions in severance agreements. *McLaren Macomb,* 372 NLRB No. 58 (2023). In the three months since, all employers – unionized and non-unionized – have been wrestling with the waves of uncertainty in how to handle severance agreements.

The Board's *McLaren Macomb* Decision

In *McLaren*, a unionized teaching hospital permanently furloughed eleven union employees and provided each with a severance agreement and general release. The severance agreements contained both confidentiality and non-disparagement provisions with relatively standard severance agreement terms under prior Board precedent, specifically: (1) the confidentiality provision expressly prohibited the employees from disclosing the terms of the agreement to third persons, other than to the employee's spouse, professional advisors, or where legally compelled to do so; and (2) the non-disparagement provision prohibited the employees from making statements to other employees or third persons "which would disparage or harm the image of [the Company], its parent and affiliated entities and their officers, directors, employees, agents, and representatives."

The Board held not only that including these standard provisions in severance agreements is unlawful, but that the "mere proffer" of the severance agreement which conditions benefits on "the forfeiture of statutory rights" is unlawful. The Board emphasized that "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act." Likewise, the Board noted that prohibition on disclosure to "any third person" chills the exercise of employee rights because it would prohibit employees from "disclosing even the existence of an unlawful provision contained in the agreement" and might deter employees from instituting or participating in investigations by the Board.

Accordingly, the Board found that these provisions are overly broad and, *by their terms*, are unlawful because they have a reasonable tendency to interfere with, restrain, or coerce employees in their Section 7 rights, whether or not an employee ultimately signs the agreement or whether the employer makes any effort to enforce these provisions.

The General Counsel's Advice Memorandum

In response to widespread confusion about the breadth and scope of the Board's *McLaren* decision and how it affects the agreements they had already entered into or planned to enter into with employees, the NLRB's General Counsel issued a question-and-answer format memorandum in which she opined on a number of inquiries related to the decision. Memorandum GC 23-05 (Mar. 22, 2023). While the memorandum simply reflects the General Counsel's opinion – not the law – it provides key insight into the Board's enforcement efforts and guides how the Board will apply and interpret *McLaren* moving forward.

In the memorandum, the General Counsel reaffirmed that employers may continue to proffer, maintain, and enforce severance agreements so long as they do not contain "overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees." The memorandum suggested potential limited confidentiality and non-disparagement provisions that may still be lawful. Specifically, confidentiality provisions that are "narrowly tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications" are lawful. Additionally, she opined that non-disparagement provisions limiting prohibited speech 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" are also likely lawful.

Interestingly, the General Counsel also opined that *McLaren* applies retroactively, meaning that severance agreements proffered even before February 21, 2023, might be unlawful. Generally, the six-month statute of limitations for unfair labor practice charges should protect employers that proffered purportedly unlawful severance agreements more than six months prior to the opinion. However, the General Counsel stated that claims relating to maintenance or enforcement of these provisions would not be time-barred.

Key Takeaways from the Board's McLaren Decision and the General Counsel's Memorandum and Considerations in Crafting Agreements with Employees

It is inescapable that there is simply no one-size-fits-all approach to severance agreements in light of the Board's *McLaren* decision and the General Counsel's memorandum opining on open questions. Thus, it is important for employers to make an individualized assessment as to its holistic approach to agreements with employees based on their individual risk tolerance and the specific circumstances of each agreement. Below are key takeaways and considerations for employers in crafting agreements:

1. **McLaren Applies to Your Workforce, Whether or Not it Is Unionized.** Because the National Labor Relations Act applies to all "employees" within the meaning of Section 2(3) of the Act, any employee can file an unfair labor charge, whether or not they are covered by a collective bargaining agreement. Accordingly, it is important to review and revise your severance agreements, regardless as to whether your workforce is unionized.

2. **Consider Potentially Unlawful Provisions in Other Agreements and Employment Documents.** While the *McLaren* decision applied only to severance agreements, it is entirely likely the Board will extend its reach to separation agreements, settlement agreements, and others alleged to include unlawful provisions. This might include confidentiality agreements that, in addition to protecting confidential data and trade secrets, contain broad language preventing discussion of other current or former employees or the general terms and conditions of employment. Likewise, while *McLaren* did not affect previous precedent as it applies to workplace policies and employee handbooks, the Board's opinion gives insight into its likely response to forthcoming cases challenging them. This is especially true in light of the current Board majority's 2022 suggestion that it intends to reverse the current case law granting employers more latitude in crafting confidentiality provisions in policies and handbooks. Employers wishing to take a more conservative approach can assess their workplace policies and employee handbooks now for chances to narrowly tailor language.

3. **Financial Terms of Settlement Agreements May Still Be Confidential.** In the March 2023 advice memorandum, the General Counsel affirmed that confidentiality clauses prohibiting employees from generally disclosing the financial terms of settlement are lawful. Memorandum OM-07-27 (Dec. 27, 2006). Accordingly, employers wishing to narrowly tailor confidentiality clauses to prohibit disclosure of the financial terms of an employee's severance may still do so.

4. **Do Not Hyperfocus on Confidentiality and Non-Disparagement.** While the vast majority of public discussion has surrounded confidentiality and non-disparagement provisions, do not lose sight of other provisions the Board might determine violate an employee's Section 7 rights. The General Counsel opined that there are other provisions the Board might find "problematic," such as noncompete clauses, no-solicitation clauses, no-poaching clauses, broad liability releases, covenants not to sue, and/or provisions requiring employee cooperation in any current or future investigations or proceedings. You should take a holistic view of your severance agreements and keep an eye out for provisions that arguably interfere with employees' rights to discuss the terms and conditions of their employment.

5. **Include Strong Severability Language in Your Agreements.** The General Counsel's advice memorandum states that the Board will generally seek to void only provisions it determines to be unlawful rather than attempting to void an entire severance agreement. Though the General Counsel opined that would be true even where the agreement does not include a severability clause, you should review and revise your agreements to include strong severability language providing that where any provision of the agreement is deemed invalid, illegal, or unenforceable, all remaining provisions remain unaffected and unimpaired by removing that provision from the agreement.

6. **Include Strong Disclaimer Language in Your Agreements.** Include robust disclaimer and carveout language in severance agreements that make clear that nothing in the agreement and/or the confidentiality and non-disparagement provisions is intended to in any way restrict or impede the employee from exercising their rights under Section 7 of the NLRA or discussing their terms and conditions of employment. It is important to note, however, that the General Counsel's memorandum suggested that "[w]hile the savings clause disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions." Thus, while including disclaimer language is vitally important, it is not in and of itself a remedy for potentially unlawful provisions.

7. **Consider the Interplay of McLaren With State #MeToo Laws.** In the memorandum, the General Counsel opined that overly broad provisions in severance agreements are unlawful, regardless of whether *the employee* requests them because "the Board protects public rights that cannot be waived in a manner that prevents future exercise of those rights regardless of who initially raised the issue." However, this guidance flies in the face of certain state #MeToo laws that give employees the right to request confidentiality and/or non-disparagement provisions to shield their identity or the underlying facts of their claims, particularly in cases of sexual harassment. If you employ individuals in states with these #MeToo laws, consult your employment counsel to determine your obligations under this conflicting guidance.