GUNDERSON DETTMER

New Ruling: Confidentiality and Non-Disparagement Provisions in Employment Separation Agreements May Violate National Labor Laws

Insights
March 15, 2023

Update: On March 22, 2023, the NLRB's General Counsel Jennifer Abruzzo published additional guidance regarding McLaren Macomb, discussed in the alert below. In this newly released memo, GC Abruzzo states the following:

(1) *McLaren Macomb* applies retroactively. In her interpretation of McLaren Macomb, GC Abruzzo states that complaints about employers maintaining or enforcing a previously entered severance agreement that unlawfully restrict the exercise of Section 7 rights are violations **not** subject to a six-month statute of limitations.

(2) *McLaren Macomb* protects supervisors when their employers retaliate against them for refusing to present an employee with an unlawful severance agreement, and/or when supervisors' employers asks them to sign an agreement that prevents them from participating in NLRB proceedings.

While this guidance does not have the weight of law, it represents the policy of regional NLRB offices that investigate employees' charges, so employers should be aware of the GC Abruzzo's position on this important topic. We will continue to monitor this issue and provide additional updates as they become available.

A significant new ruling by the National Labor Relations Board ("NLRB") increases restrictions on employers' ability to include confidentiality and non-disparagement provisions in employment separation agreements, which may also affect the enforceability of some past separation agreements. Employers should immediately begin using separation agreements that have been updated to tailor restrictions around certain protected rights identified in the NLRB ruling.

Overview

In *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023), the NLRB found that a hospital committed unfair labor practices by requiring laid-off employees to agree to non-disparagement and confidentiality provisions in exchange for severance payments. The NLRB determined that the hospital **may not** require employees to sign confidentiality and non-disparagement provisions that:

> (1) broadly prohibited employees from making statements that could disparage or harm the hospital, and
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> (2) prohibited the employees from disclosing the terms of their agreement or discussing workplace conditions with any third parties.

The NLRB found that these provisions improperly restricted discussions with union representatives and other protected conduct under the National Labor Relations Act (the "Act"). Encouraging employees to forgo these rights in exchange for severance payments violated the Act because employers may not interfere with, restrain, or coerce employees from exercising their rights. *McLaren* overturns two Trump-era decisions that had narrowed the NLRB's inquiry to the employer's motivation for the offered agreement, and whether employees were actually coerced into forgoing any rights.

Pressing Questions

Why is this ruling significant?

Employers nationwide may now be liable for unfair labor practices simply by proposing a separation agreement with improper confidentiality or non-disparagement provisions. Whether the employer ever attempts to enforce the provisions is irrelevant and is not a defense. The provisions could be unenforceable, and the employer could face monetary and other penalties.

Does McLaren apply to all employees?

No. The Act protects nearly all employees, but does not cover managers, supervisors, or independent contractors. Therefore, this is unlikely to impact separation negotiations and agreements with managers, supervisors, or independent contractors.

Were the non-disparagement and confidentiality provisions in McLaren unusual or egregious?

No. The provisions were broad, but not unusual for employment separation agreements. Here are the actual provisions:

> **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> **Non-Disclosure.** … At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

The NLRB determined these were overbroad and prevented employees from speaking publicly about concerns, filing NLRB complaints, participating in NLRB investigations, and discussing workplace issues with union representatives.

Can we still use some version of those provisions in our separation agreements?

Yes. Non-disparagement and confidentiality provisions with carve-outs for employees' protected rights and that carefully define "disparagement" and other key terms can satisfy the new NLRB standard.

Gunderson's Employment & Labor Group has modified the non-disparagement and confidentiality provisions in our separation agreements to comply with *McLaren*. We are happy to discuss them with you. We will also update the provisions to comply with additional NLRB guidance expected in the coming months.

Does McLaren impact existing agreements? Does McLaren apply retroactively?

It is unclear at this time whether *McLaren* may be applied retroactively to existing agreements. Even if the NLRB applies *McLaren* retroactively, unfair labor practice

claims must be filed within six (6) months of the alleged violation. This tight window for filing complaints should reduce the risk of signed agreements being invalidated.

Will McLaren be appealed?

It is unknown whether *McLaren* will be appealed, but it could be, and a federal appeals court could overturn *McLaren* sometime in the future.

Next Steps

McLaren leaves many questions unanswered, so employers should take these steps:

- Use only Gunderson's latest separation agreements, which include modified non-disparagement and confidentiality provisions to address the issues identified in *McLaren*. Here is a link to obtain a personalized agreement: Separation Agreement Intake Form.
- Be careful when asking employees to agree to confidentiality or non-disparagement provisions. Speak with a Gunderson Employment & Labor Group attorney to discuss strategies going forward, and to learn more about new NLRB guidance or developments.
- Review recently executed separation and severance agreements (from the past 6 months) and flag any agreements with confidentiality and non-disparagement terms. If those separations were contentious, be prepared for challenges.

Gunderson's Employment & Labor Group attorneys look forward to working with you to navigate this complicated terrain. Please contact our team at #askemployment@zendesk.gunder.com if you have questions or need any help.

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