

NLRB General Counsel Answers Questions on Severance Agreements in New Memorandum

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Employers now have some guidance on the National Labor Relations Board's ("NLRB") recent decision finding that certain non-disparagement and confidentiality provisions in severance agreements violate the National Labor Relations Act ("NLRA"). In *McLaren Macomb*, the NLRB held that an employer violates the NLRA by merely offering a severance agreement with such provisions. As a reminder, *McLaren Macomb* applies to all non-supervisory employees at all employers, not just employees who are members of a union and not just to unionized employers. A more detailed discussion of the case itself can be found [here](#).

The General Counsel's [memorandum](#) (GC 23-05), issued on March 22, 2023, addresses ambiguities in the decision that left employers and employees unsure as to how they should interpret the ruling. The guidance does not answer every open question, but the General Counsel addressed some key issues as follows:

- *McLaren Macomb* applies retroactively. Cases based on the unlawful proffer of a severance agreement are subject to the six-month statute of limitations under Section 10(b) of the NLRA. However, "maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions" is likely to be deemed a continuing violation, not subject to the six-month limit.
- Including overbroad confidentiality and non-disparagement provisions in a severance agreement is not grounds for invalidating the entire agreement. Rather, only the unlawful provisions will be voided, regardless of whether an agreement contains a severability clause.
- Confidentiality provisions in severance agreements that are "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications" do not violate the NLRA.
- Non-disparagement provisions may be "narrowly-tailored" to limit 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."
- "Savings" or "disclaimer" language alone is not enough to remedy unlawful provisions. However, such language may be used to interpret ambiguous provisions.
- The NLRB's prior guidance in [OM 07-27](#) is now applicable in light of *McLaren Macomb*. That memorandum addressed whether certain terms in non-Board settlements violate the NLRA. For example, OM 07-27 provides that "confidentiality clauses that prohibit an employee from disclosing the financial terms of the settlement to anyone other than the person's family, attorney and financial advisor are normally acceptable."
- The General Counsel sees other provisions typically contained in severance agreements as "problematic," including non-compete clauses, no solicitation clauses, and no poaching clauses, among others.

While not directly at issue in *McLaren Macomb*, the guidance addresses severance agreements for supervisors as well. More specifically, the guidance notes supervisors are generally not protected by the NLRA. This means that employers may still offer severance agreements to employees who qualify as supervisors under Section 2(11) of the NLRA—employees who have authority over any one of 12 enumerated functions such as hiring, disciplining or firing workers. However, the General Counsel cautioned that supervisors are protected from retaliation if they refuse to proffer a severance agreement with overbroad confidentiality and non-disparagement provisions to a subordinate. Finally, the guidance provides that it could be unlawful for an employer to include certain terms in a severance agreement for a supervisor, such

as a provision restricting the supervisor from participating in an NLRB proceeding. Importantly, General Counsel memoranda do not have the effect of law and only represent the General Counsel's legal opinion. The NLRB will have to decide more cases in this area before we have a full picture of the "narrowly tailored" confidentiality and non-disparagement provisions that will withstand scrutiny under *McLaren Macomb*.

Should you have any questions, please contact **Hope Goldstein** at hgoldstein@vedderprice.com, **Peyton Demith** at pdemith@vedderprice.com or the Vedder Price lawyer(s) with whom you normally work.

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