



NLRB Issues Aggressive Guidance on Severance Agreement Language

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As predicted in our February, 24 [advisory](#), the General Counsel of the National Labor Relations Board (NLRB) issued [Memorandum GC 23-05](#) providing guidance on how its regional offices should address the legality of severance agreement language.

The Memorandum follows the NLRB's decision in [McLaren Macomb](#), which held that simply offering an employee an agreement that contained "overbroad" non-disparagement, confidentiality, or non-assistance clauses could violate the National Labor Relations Act (the "Act").

The General Counsel's Memorandum, in part, offered the following guidance:

- Employees may not "broadly waive their rights under the Act."
- Lawful severance agreements *may* be used if they do not contain "overly broad provisions that affect the rights of employees to engage with one another [and other entities] to improve their lot..."
- Employers *cannot* have a legitimate interest in "maintaining a facially unlawful provision in a severance agreement."
- The fact an employee does not sign the agreement does not render the employer's conduct lawful.
- While supervisors generally are not protected by the Act, the Act does protect a supervisor who was retaliated against for refusing to commit an unfair labor practice against employees. For example, in this narrow and highly unusual instance, if that same supervisor was given a severance agreement that arguably prevented him from participating in a NLRB hearing, then the proffer of that agreement also could be unlawful. We emphasize that outside of similar rare situations, an employer can include confidentiality and non-disparagement clauses in severance agreements with supervisors.

- *McLaren Macomb* applies retroactively to any overly broad provision in an employer communication to employees that may impact Section 7 rights, including pre-employment offer letters.
- *McLaren Macomb* applies to former and current employees. Therefore, the NLRB could attempt to apply these limitations to settlement/separation agreements with former employees.
- Generally speaking, regional NLRB offices will make decisions, on an individual basis, whether to void any “unlawful” provision versus voiding the entire severance agreement. Beyond question, employers should continue to include severability clauses in their agreements.
- While violations of the Act are typically subject to a six-month statute of limitations, “maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions ...continues to be a violation and ... would not be time-barred.”
- Employers are encouraged to contact relevant employees (e.g., non-supervisors) subject to any agreements which contain the referenced clauses and inform them the clauses are no longer applicable and will not be enforced.
- Confidentiality clauses are narrowly tailored if they restrict the “dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications.”
- Narrowly tailored non-disparagement clauses limited to 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.
- Savings clauses (e.g., “nothing in this Agreement prevents you from exercising or enforcing your rights under the Act...”) may be useful provided they do not send mixed messages and/or are otherwise clear about what conduct an employee can engage in. According to the NLRB’s General Counsel, Jennifer Abruzzo, any savings clause should focus on protected activities that are most important to employees, such as

organizing a union; discussing wages and other terms and conditions of employment; taking photographs or other recordings; among others. The General Counsel's suggested model "statement of rights" for use in handbook and severance agreements has not yet been adopted by the NLRB. Her overbroad laundry list of employee statutory rights that she demands be included is simply beyond the pale.

- The seminal question employers want answered is whether they legally can prevent an employee from disclosing the financial terms of the severance agreement. Unfortunately, the NLRB's General Counsel did not specifically answer it. However, in a footnote, she stated the approval of a NLRB charge withdrawal request along with a non-NLRB settlement that contains a confidentiality clause solely about the non-disclosure of the financial terms "would not typically interfere with the exercise of Section 7 rights and promotes quick resolution of labor disputes." Whether her logic applies with full force to generic non-disclosure clauses in severance agreements (where the NLRB is not involved) will likely be addressed and resolved in future litigation.

In addition to the game changing "guidance" outlined above, the General Counsel also shared (without explanation) her belief there are other provisions commonly found in severance/employment agreements which "might interfere with Section 7 rights," including: non-compete, no solicitation, and no poaching clauses; broad liability releases and covenants not to sue (which go beyond the employer or the effective date of the agreement); and certain cooperation requirements.

It is **IMPOSSIBLE** to overstate the potential impact of the General Counsel's Memorandum and its likely enforcement by Regional Directors of the NLRB on routine, commonplace, provisions in agreements that have been lawful for decades and routinely have been used by employers and unions alike. The NLRB's pro-union, aggressive march continues. Unfortunately, the scope and impact of the General Counsel's guidance will be litigated through the NLRB and ultimately in the federal courts. Based on this guidance, employers are advised to contact labor counsel to discuss any

necessary changes to their severance agreements or other communications that arguably may impact Section 7 rights.

If you have any questions about this decision or other labor law issues, please contact the authors of this article or any attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

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