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NLRB General Counsel Provides Guidance in McLaren Memorandum

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As we previously reported in our March 1, 2023 article, the National Labor Relations Board (NLRB) recently issued a decision placing restrictions on the permissible scope of confidentiality and non-disparagement provisions in separation agreements with non-management employees. In that decision (*McLaren Macomb*, 372 NLRB No. 58 (2023)), the NLRB ruled that including certain confidentiality and non-disparagement language in agreements with employees can violate employees' rights under Section 7 of the National Labor Relations Act (NLRA) to communicate with each other about the terms and conditions of their employment. The NLRB determined that simply "proffering" a severance agreement containing overly broad confidentiality or non-disparagement provisions interferes with, restrains, or coerces employees' exercise of those rights.

Now, NLRB General Counsel Jennifer Abruzzo has issued a Guidance to the public (Memorandum GC 23-05, the "Guidance") providing her view of *McLaren's* scope. Although the NLRB's general counsel is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices, please note that the Guidance is not binding on either the NLRB or on employers.

The Guidance addresses some of *McLaren's* most pressing unanswered questions and provides insight into how the NLRB's general counsel will apply *McLaren*.

Key Takeaways From the Guidance

First, the Guidance emphasizes that severance agreements remain lawful if they do not contain overly broad provisions that impinge on the rights of employees to communicate with each other about the terms and conditions of their employment or to "improve their lot as employees."

The Guidance also confirms that confidentiality and non-disparagement provisions remain lawful if they are limited in scope. For example, narrowly tailored confidentiality clauses may be lawful if they prohibit employees only from disclosing proprietary or trade secret information for a time period justified by the employer's legitimate business concerns. The Guidance also suggests that non-disparagement provisions may be lawful if limited to restricting an employee's defamatory

statements—that is, harmful statements that the employee knows or should know are untrue. It appears that confidentiality clauses that prohibit disclosure of the financial terms of an agreement will also be considered lawful.

The Guidance suggests that *McLaren* retroactively applies even to agreements proffered to employees before the NLRB issued its *McLaren* decision on February 21. Although a charge challenging an agreement proffered before the NLRB's 6-month statute of limitations would be untimely, the Guidance nonetheless asserts that a charge challenging the employer's maintenance or enforcement of unlawful provisions would not be time-barred regardless of when the charge is filed. Employers should therefore monitor future NLRB decisions on this issue, and Much will publish further client advisories as appropriate.

The Guidance states that "savings clauses" and disclaimers in severance agreements, while useful to resolve ambiguous or vague terms, may not necessarily carry the day. In other words, customary language stating that if a provision of the agreement is deemed to be overly broad, then the agreement can be modified to excise the overly broad portion of the provision and keep the remainder of the provision intact, may not be enough to remedy the impingement on employees' exercise of their Section 7 rights. The Guidance also indicates, however, that an overly broad provision will not necessarily nullify the remainder of the agreement. We interpret this to mean that the release of claims would still be enforceable.

Additionally, the Guidance suggests that although a severance agreement was at issue in *McLaren*, the NLRB's decision may also apply to other types of employee agreements, such as employment contracts and offer letters.

The Guidance also indicates that *McLaren* may apply to supervisors in limited circumstances, even though the NLRA offers no legal protection to supervisors. If, for example, an employer retaliates against a supervisor who refuses to act on the employer's behalf in proffering a separation agreement that violates *McLaren*, the Guidance suggests that the NLRA might protect the supervisor against such retaliation. Employers should monitor future NLRB decisions on this issue too.

Lastly, the Guidance suggests that other types of provisions in employee agreements may be unlawful under *McLaren*, including non-competition clauses, non-solicitation clauses, no-poaching clauses, broad liability releases and covenants not to sue, and/or certain provisions requiring cooperation in any current or future investigation or proceeding.

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