Broad Confidentiality And Non-Disclosure Provisions Struck Down As Unlawful in McLaren Macomb, Drastically Changing The Legal Landscape

By Michelle De Oliveira on June 16, 2023

Earlier this year, the National Labor Relations Board (NLRB) issued a groundbreaking decision, *McLaren Macomb*, in which it held that severance agreements with broad confidentiality and broad non-disparagement provisions violate the National Labor Relations Act (NLRA) by, among other things, unlawfully restricting employees' rights to engage in concerted activity or join together to advance their interests as employees.

The two provisions, included in severance agreements presented to eleven furloughed employees at issue in *McLaren*, were as follows:

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 promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. 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.

Although the employees did not challenge the furloughs, they challenged the severance agreement's purported restrictions on their rights to discuss aspects of their employment with current and former employees. Indeed, the right to discuss terms and conditions of employment. in either a union or non-union setting, is protected under Section 7 of the NLRA.

In holding that the above provisions were unlawful, the NLRB reasoned that. among other things, the broad non-disparagement and broad confidentiality provisions had a "reasonable tendency to interfere with. restrain. or coerce employees" in the exercise of their rights under the NLRA. In other words, the broad confidentiality and broad non-disparagement provisions could be interpreted as limiting a former employee's ability to, among other things, speak with current employees about workplace concerns, or the terms and conditions of their separation.

The NLRB took it one step further in *McLaren*, holding that the mere proffer of an agreement with broad confidentiality and non-disparagement provisions. as the ones at

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issue in *McLaren*, violates the NLRA-and could be the basis for an unfair labor practice charge, regardless of whether the employee ever signs the agreement.

On the heels of the *McLaren* decision, the NLRB's General Counsel, Jennifer A Abruzzo, issued a Memorandum with guidance relating to the application of, and implications stemming from, *McLaren*.

Key takeaways from the Memorandum are as follows:

- *McLaren* is retroactive and applies to agreements that were signed before the decision, or before February 21, 2023.
- The NLRA's protections extend to current and former employees.
- Severance agreements that contain a release of claims are still permissible and are not banned.
- Non-broad confidentiality provisions, including provisions that guard the confidentiality of the agreement's financial terms may be permissible.
- Non-broad confidentiality provisions that prevent an employee from disclosing trade secrets or proprietary information for a period of time may be permissible when based on legitimate business justifications.
- Non-broad non-disparagement provisions that are limited to prohibiting defamatory statements (statements that are maliciously untrue, made with the knowledge of their falsity, or with reckless disregard for the statement's truth or falsity) may be permissible.
- Broad confidentiality or non-disparagement provisions in any employer communication or agreement that may interfere with, restrain, or coerce employees' exercise of Section 7 rights would be unlawful if not narrowly tailored to address a special circumstance justifying the impingement on employees' rights.

Although the Memorandum is merely guidance-and is not the law-it is a window into how the NLRB may decide issues that may be raised in unfair labor practices charges before the NLRB.

The aftermath of *McLaren* is significant for employers. At a minimum, employers must now pause and revisit all agreements and/or employee communications that contain non-disparagement and confidentiality provisions. Revisiting these agreements is critical so that employers can carefully assess the breadth of their non-disparagement and confidentiality provisions. Employers are also encouraged to seek the advice of counsel so that non-disparagement and confidentiality provisions in any such agreement can be narrowly tailored to not run afoul of *McLaren*. Importantly here, *McLaren* holds that narrowly tailored provisions may pass muster when not interfering with employees' rights to engage in concerted activity, but until there is more litigation and case law interpreting *McLaren*, the guidance as to what exactly constitutes a narrowly tailored confidentiality and non-disparagement provisions is somewhat limited.

Moreover, the drastic change in the legal landscape is forcing employers to reconsider and reassess the value of non-disparagement and confidentiality provisions-and the impact that the omission of broad provisions (as had been the norm) will have on the severance amount offered to departing employees.

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