Confidentiality and Non-Disparagement Clauses in Severance Agreements Are Ruled Unlawful

Labor and Employment Alert
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On February 21, 2023, the National Labor Relations Board (the "Board") released its decision in *McLaren Macomb and Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL–CIO* (McLaren). In the decision, the Board ruled that broadly worded confidentiality, non-disclosure, and non-disparagement clauses in severance agreements offered to, or entered into, with employees who are covered by National Labor Relations Act (the "Act") are *per se* unlawful—even if willingly accepted by the employee.

By way of background, during the COVID-19 pandemic, McLaren lawfully laid off union-represented employees. Severance agreements were offered which prohibited the disclosure of any confidential, propriety, or privileged information. The agreements also prohibited the disclosure of any terms of the agreement to any individual unless to a spouse; to obtain legal counsel or tax advice; or if compelled by a court or administrative agency.

Critically, the agreements contained a non-disparagement clause which prohibited exiting employees from making any "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 agreements did not define the term "disparage," and the non-disparagement provision applied not just to the employer, but to the employer's parents, affiliates, directors, employees, agents and representatives.

The Board also took issue with the absence of any time limit on the agreement's terms, as well as with provisions in the agreements that provided injunctive relief, actual damages, costs and attorney fees in connection with enforcement of the agreements.

According to the Board, those terms violated Section 7 of the Act because their prohibitions were so broad as to interfere with employee rights. Specifically, the Board found that the agreements interfered with employees' right to make public statements about the workplace, as well as the rights of current or future employees to discuss similar future agreements with their unions. Further, the Board found that the agreements had a coercive effect against filing an unfair labor charge, or against providing assistance to the Board in connection with possible investigations involving the agreements.

For these reasons, the Board not only declared the agreements "unlawfully coercive," but held the mere offering of such agreements to be unlawful as well.

The Board's decision leaves critical questions unanswered. For example, the Board did not address the effect of severability clauses on unlawful provisions within the agreements. A severability clause provides that the terms of a contract operate independently of one another such that, in the event a court should declare one or more of its provisions void or unenforceable, the remainder of the contract continues to be valid and enforceable. Given the Board's holding that an employer violates the Act merely by offering a severance agreement with unlawful terms, it is possible that the inclusion of such terms could invalidate the **entire** agreement, even with a severability clause (emphasis added). However, the law in most states provides that if any provisions in a contract are declared void or unenforceable, all other portions of the contract remain in effect.

Also unaddressed by the Board is the effect of a general disclaimer stating, for example, that no clause of the severance agreement should be construed to interfere with or restrict the employees' Section 7 rights. The decision is also silent on whether an employee may waive their Section 7 rights as part of the severance agreement if, for example, the employee does so knowingly, voluntarily, and with the representation of legal counsel.

Further, the Board's decision applies **retroactively** (emphasis added). As such, in the wake of *McLaren*, even existing severance agreements may be at risk of invalidation by the Board.

As of this writing, *McClaren* has not been appealed. Much of the uncertainty raised by the decision will need to be clarified through further litigation. In the meantime, employers should consult with legal counsel to discuss whether to structure severance agreements in accordance with the Board's decision.

For example, employers might consider how best to limit the scope of such agreements without running afoul of *McClaren*. In this regard, Employers will want to address with whom, and to what extent, a separating employee may discuss their former employer, the terms of their severance agreement, or any other matters relating to their employment. Employers might include statements which convey the intent of the agreement to preserve Section 7 rights, while also limiting discussion of the agreement or their employment, to union representatives, current employees, or the Board, as *McClaren* now requires.[1] In addition, notwithstanding the Board's failure to address the effect of a severability clause, employers should include language stating that if any part of the agreement is deemed unlawful, the remainder of the agreement shall remain in effect.

Employers should also consider that not every situation will warrant a non-disparagement agreement. Where such a clause becomes necessary, its terms might be limited to specific communications without running afoul of *McClaren*. For example, the agreement might prohibit statements which are knowingly false or intentionally malicious.

Finally, employers should be mindful that, although, per the Act, *McClaren* does not apply to managers or supervisors, it is conceivable, based on this decision, that the Board will eventually extend its holding to managerial employees. The decision could also cover managerial employees who claim retaliation in opposing unlawful agreements.

Although the Board did not address the effect of the decision on settlement agreements more generally, employers should assume that *McClaren* applies equally to settlement agreements and is not limited to separation agreements alone.

White and Williams attorneys are monitoring these developments. Please contact a member of the labor and employment group with any questions.

[1] Note however, that *McClaren* applies to unionized and non-union employees alike. Additionally, employers should be mindful that the mere mention of Section 7 rights could unnecessarily implicate the very issues raised in *McClaren*.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.