

Insights: Alerts

The More You Know: An Update to “A 180 Degree Decision: National Labor Relations Board Holds Broad Confidentiality and Non-Disparagement Provisions in Severance Agreement Illegal and Returns the Focus of the Legality of These Provisions Back to the Language Itself”

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On February 24, 2023, we issued an [alert](#) regarding the NLRB's decision in *McLaren Macomb*. In that alert, we indicated that the NLRB would eventually issue guidance on questions arising as a result of that decision and, thankfully, the day has come. On March 22, 2023, Jennifer A. Abruzzo, General Counsel for the NLRB issued Guidance in Response to Inquiries about the *McLaren Macomb* decision. The Guidance covers a range of topics and questions and can be found at this link: [NLRB General Counsel Issues Memo with Guidance to Regions on Severance Agreements | National Labor Relations Board](#)

Abruzzo starts off the Guidance describing the holding of *McLaren Macomb*: “the Board held that where a severance agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates Section 8(a)(1) of the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of those rights – both by the separating employee and those who remain employed.” She continues by answering questions that have arisen since the decision was entered late last month.

Some important takeaways from the Guidance include:

- Severance agreements themselves are not banned under this ruling.
- This decision does have **retroactive** effect.
- Former employees are afforded the same protections as current employees.
- Even if employees request broad confidentiality and/or non-disparagement clauses, this decision prevents public rights from being waived in any manner that prevents future exercise of those rights **regardless of who raises the issue or seeks the provision**.
- **Confidentiality provisions** in severance agreements **can still be found lawful** if they are “narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications[.]” To the contrary, “confidentiality clauses that have a chilling effect that

precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties are unlawful.”

- **Non-disparagement provisions can still be found lawful** if they are narrowly-tailored, justified, and “limited to 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.”

As a final note, the Guidance seems to suggest that the NLRB is focused on increasing the protections given to employee rights. When asked whether there are “other provisions typically contained in severance-related agreements that you view as problematic[,]” Abruzzo stated that she “believe[s] that some other provisions that are included in some severance agreements might interfere with employees’ exercise of Section 7 rights, such as: non-compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee’s right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.”

Kilpatrick Townsend's Labor & Employment team are here to assist with any further questions and needs. Our team will continue to monitor any supplemental guidance put out by the NLRB and update this Legal Alert accordingly.

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