

NLRB Issues Guidance on Pivotal *McLaren Macomb* Decision Regarding Confidentiality and Non-Disparagement Clauses in Severance Agreements



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As we anticipated in our initial article regarding the [McLaren Macomb decision](#), the National Labor Relations Board has issued guidance regarding the pivotal decision as it relates to confidentiality and non-disparagement clauses in severance agreements.

In a March 22, 2023 memorandum, NLRB General Counsel Jennifer A. Abruzzo offers assistance to NLRB officers in responding to inquiries from workers, employers, labor unions, and the public about implications stemming from *McLaren Macomb*. In doing so, she provides insight to employers regarding how the NLRB will interpret and enforce the ruling.

Does *McLaren Macomb* also apply to settlement agreements?

Although the GC did not answer this question directly, she clearly indicates that the decision applies to both severance agreements and run-of-the-mill settlement agreements. The GC

further stated the *McLaren* decision applies to any employer communication which contains an overly broad provision that would tend to interfere with, restrain, or coerce employees' exercise of Section 7 rights.

Does *McLaren Macomb* apply to employers without unionized workforces?

Yes. The decision applies to all employers—those with unionized workforces and those without unionized workforces. Section 7 of the NLRA protects the rights of all employees to openly discuss their working conditions, regardless of their union status.

Are severance agreements now banned?

No.

What if an employee refuses to sign a severance agreement that contains prohibited confidentiality and non-disclosure/non-disparagement clauses?

It does not matter. The mere proffer of a prohibited agreement is a violation of the National Labor Relations Act.

Are severance agreements issued to supervisors beyond the scope of the decision?

Sometimes. The NLRB will protect a supervisor who is retaliated against, such as being fired for refusing to act on their employer's behalf in committing an unfair labor practice. As such, not only would the employer be in violation for the termination, but it would violate the act to offer an impermissible severance agreement to such supervisor.

Is the *McLaren Macomb* decision retroactive?

Yes. While an unlawful proffer of a severance agreement may be subject to a six-month statute of limitations, enforcing a previously entered severance agreement would be a violation

and not time-barred.

Is an entire severance agreement null and void if there is just one overbroad provision?

Likely not. The GC advises that in most cases, the unlawful provisions would be voided out, even in the absence of a severability clause.

What if the employee requests a broad confidentiality and/or non-disparagement clause?

It does not matter, as rights under the NLRA cannot be waived.

Are confidentiality provisions always prohibited?

No. Limited confidentiality clauses that prohibit disclosure of the financial terms of the agreement or that are narrowly tailored to restrict the dissemination of proprietary or trade secret information for a certain period of time are allowed.

Are non-disparagement provisions always prohibited?

No. Narrowly tailored non-disparagement provisions that prohibit the employee from making defamatory statements about the employer are allowed.

Would a “savings clause” or disclaimer save overbroad provisions?

Likely not, at least not at this time. The GC has asked the NLRB to craft a model savings clause.

In response to this guidance, employers should review their form severance and settlement agreements and consult with counsel to ensure compliance with the *McLaren Macomb* decision.

We closely monitor labor and employment agency decisions that affect our clients' operations and will continue to provide updates and insights in the coming months. If you have questions about the issues raised in this article, please

contact one of our labor and employment attorneys listed on our Phillips Murrah labor and employment practice group website at <https://phillipsmurrah.com/services/labor-employment/>.

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