LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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NLRB General Counsel Releases Guidance on Board's *McLaren Macomb* Decision

On Feb. 21, 2023, the National Labor Relations Board (the Board) ruled in McLaren Macomb, 372 NLRB No. 58, that the mere proffer of a draft severance agreement containing broad confidentiality and non-disparagement provisions violated the National Labor Relations Act (NLRA). You can read our prior blog post outlining the details of the Board's decision here.

Since the Board issued its decision, employers have been left wondering whether and how to include confidentiality and non-disparagement clauses in their severance agreements. In an effort to help guide employers on the breadth of the Board's decision, and how to comply with the new rule, General Counsel (GC) Jennifer Abruzzo released Memo 23-05 on March 22, 2023. The memo attempts to instruct the Board's regional offices on how to respond to inquiries about implications arising from the *McLaren Macomb* decision. Below are some notable takeaways from the memo.

Confidentiality and Non-Disparagement Provisions Are Not Banned

The memo reiterates that *McLaren Macomb* does not outwardly ban the use of confidentiality and/or non-disparagement clauses in severance agreements. However, to be enforceable, such provisions must be narrowly tailored. The memo provides an example of when confidentiality provisions may be lawful, such as when they are "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications." GC Abruzzo notes, however, that "confidentiality clauses that have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the [Board], a union, legal forums, the media or other third parties are unlawful."

With respect to non-disparagement provisions, the memo provides that a "narrowly-tailored, justified, non-disparagement provision that is 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, may be found lawful."

General Disclaimers and Savings Clauses Will Not Save Unlawful Provisions

The memo confirms that, as the Board has stated in other contexts, a general or broad disclaimer or "savings clause" will not necessarily save an otherwise unlawfully broad confidentiality or non-disparagement clause. GC Abruzzo set forth the types of terms that an employer should reference in what she describes as a "prophylactic statement of rights" to potentially include in severance agreements to mitigate any risk of including confidentiality or non-disparagement provisions. Such terms include, for example, organizing a union to negotiate with their employer concerning their wages, hours and other terms and conditions of employment; forming, joining or assisting a union, such as by sharing employee contact information; and talking about or soliciting for a union during

non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Unlawful Provisions Will Not Invalidate the Entire Agreement

On a positive note, the memo provides that confidentiality or non-disparagement clauses that are found to be unlawful will likely not invalidate the entire agreement. Instead, GC Abruzzo states that Board and/or Regional Directors reviewing such agreements "would seek to have those [provisions] voided out as opposed to the entire agreement, regardless of whether there is a severability clause or not." GC Abruzzo also provided an ultra-conservative approach to employers and encouraged them to consider remedying violations now by contacting employees subject to severance agreements with overly broad provisions and advising them that those provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties for breaches of those unlawful provisions.

McLaren Macomb Will Apply Retroactively

Significantly, GC Abruzzo confirmed the GC's position that *McLaren Macomb* applies retroactively. Although offering an employee an overbroad severance agreement is clearly subject to the NLRA's six-month statute of limitations, GC Abruzzo stated that "maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions that restricts the exercise of Section 7 rights continues to be a violation" to which the statute of limitations would not apply. Thus, she believes that employers cannot enforce broad confidentiality or non-disparagement clauses that restrict Section 7 rights regardless of when the employee signed the agreement.

Supervisors May Be Protected Under the NLRA in Certain Contexts

Even though supervisors are generally exempt under the NLRA, the memo clarifies that the NLRA does protect supervisors from being retaliated against based on their refusal to act on behalf of an employer in committing an unfair labor practice. Specifically, this would apply where a supervisor refuses to proffer an unlawfully broad severance agreement. GC Abruzzo takes this interpretation a step further by explaining that she believes a supervisor would also be protected under the NLRA where the employer provides them with a severance agreement that prevents the supervisor from "participating in a Board proceeding."

Overbroad Provisions Are Unlawful Regardless of Who Requests That They Be Included

The memo affirmatively states that even where an employee requests the inclusion of broad confidentiality and/or non-disparagement provisions in a severance agreement, such provisions would still be unlawful. In GC Abruzzo's opinion, "the Board protects public rights that cannot be waived in any manner that prevents future exercise of those rights regardless of who initially raised the issue."

The memo provides some clarity into the questions that have been lingering in employers' minds and provides insight into the Board's enforcement efforts. However, it is important to note that this memo does not have the force of law, and is not binding on anyone, except for the Regions, which may pursue unfair labor practice charges based on the guidance therein. Additionally, as noted previously, *McLaren Macomb* has yet to work its way through the appeal process and further direction from the

courts may be forthcoming on this issue, which may differ from GC Abruzzo's interpretation. For the moment, the memo is a useful guide to employers in how the Board is likely to interpret and apply *McLaren Macomb*. Employers should refer to the parameters and opinions laid out in the memo when reviewing and revising their severance agreements and other compliance efforts.

For more information on the information presented in this information memo, please contact Patrick V. Melfi, Gianelle M. Duby, any attorney in Bond's labor and employment practice or the Bond attorney with whom you are regularly in contact.