FAQs regarding the NLRB's ban on confidentiality and non-disparagement provisions in severance agreements

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On February 21, 2023, the National Labor Relations Board (NLRB or the Board) issued a landmark decision in *McLaren Macomb* that has the potential to seismically change how employers approach and manage employee separations that include severance packages. Overturning well-settled precedent, the Board effectively held in a stunning decision that severance agreements containing broad non-disparagement and confidentiality provisions are unlawful under the National Labor Relations Act (NLRA or the Act) because they interfere with employees' Section 7 rights thereunder.

What did the confidentiality and non-disparagement provisions at issue in *McLaren Macomb* specifically say?

Following were the two provisions at issue:

> 6. **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.
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> 7. **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.

The severance agreement[1] also provided for "substantial monetary and injunctive sanctions against the employee in the event the non-disparagement and confidentiality proscriptions were breached." The Board did not address the first sentence of the non-disclosure section, but instead focused on the last sentence (i.e., the "non-disparagement provision").

Why did the Board conclude that the confidentiality and non-disparagement provisions at issue are unlawful?

The Board essentially concluded that broad confidentiality and non-disparagement provisions like the ones presented in *McLaren Macomb* are unlawful because they tend to "chill" employees' – including actual and soon-to-be former employees' – exercise of their rights under Section 7 of the NLRA, which rights include, among others, engaging in concerted activity and discussion about the workplace and the terms and conditions of employment. Specifically, the Board held that, given the

[1] The term "severance agreement" is used by the Board in the *McLaren Macomb* decision. However, the principles and answers in the decision and this document apply to virtually any agreements entered in connection with the separation of employees, regardless of title.

broad nature of the non-disparagement provision at issue, the provision would unlawfully prohibit employees from publicly criticizing employer policies, including asserting that the employer had violated the NLRA, and raising complaints about the employer with former coworkers, their union, government agencies, the media, or the general public. Similarly, the majority reasoned that the confidentiality provision would unlawfully prohibit the employee from discussing the terms of the severance agreement with former or future coworkers or unions, or even disclosing the existence of an unlawful agreement provision to the Board. The NLRB also concluded that both provisions would unlawfully prohibit employees from reporting unfair labor practices to the Board or assisting the Board in investigations of such charges.

What is the primary takeaway from the decision?

That, at least for the time being, severance agreements containing broad confidentiality and non-disparagement provisions are likely unlawful. That said, as will be discussed below, there are some caveats – and important ones at that.

Does the decision apply to all workers?

No – and this is an incredibly important point. The NLRA protects only workers qualifying under the Act's definition of "employee." This excludes managerial employees (as defined under the Act[2]), supervisors (as defined under the Act[3]), independent contractors, public sector employees, agricultural laborers, domestic service workers of any family or person at their home, individuals employed by a parent or spouse, and individuals employed by an employer subject to the Railway Labor Act.

Because of this, *McLaren Macomb* does not apply to severance agreements with such workers (meaning that, subject to any other, non-NLRA legal requirements, severance agreements with such workers may still contain confidentiality and non-disparagement provisions).

Does the decision apply to only unionized workplaces?

No. The NLRA governs nearly all private sector workplaces, regardless of whether employees are unionized or not. Because of this, if an individual falls within the definition of "employee" under the NLRA – again, see the prior FAQ for a list of workers who are not covered by the NLRA – then any severance agreement offered to that individual, regardless of whether they are a member of a union, would be subject to *McLaren Macomb*.

Is the decision limited to claims under the NLRA?

The potential scope of the decision is unfortunately unclear. The decision would potentially permit an employee to pursue a claim under the NLRA even where the employee previously executed a severance agreement with confidentiality and non-disparagement provisions.

Whether an employee in this context could also pursue a discrimination or other, non-NLRA claim, however, is another question. At this point, we believe there is at least a reasonable likelihood that some courts would still agree to enforce the other provisions of a severance agreement, such as a general release of non-NLRA claims, even if the agreement has confidentiality and non-disparagement clauses made unlawful under *McLaren Macomb*. However, this is unsettled at present.

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[2] The Act defines a "managerial employee" as one who represents management interests by taking or recommending actions that effectively control or implement employer policy. In other words, this is an employee who makes, executes, and exercises independent judgment about management policies.

[3] The Act defines a "supervisor" to mean "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Does *McLaren Macomb* affect confidentiality provisions pertaining to trade secrets, intellectual property, proprietary information, financial information, and other commonly considered "confidential" business information?

No. Although the term "confidentiality" is also used in the context of a common non-disclosure agreement, that is distinguishable from the confidentiality provision at issue in *McLaren Macomb*. The provision in *McLaren Macomb* pertained exclusively to the confidentiality of the existence and the terms of the severance agreement. By contrast, a common non-disclosure agreement requires preservation of the confidentiality, and prohibits disclosure or misappropriation of trade secrets, intellectual property, proprietary information, financial information, and other commonly considered "confidential" business information. In fact, in *McLaren Macomb*, the Board noticeably did not address the first sentence of the "non-disclosure" provision pertaining to such matters and, instead, focused only on the second sentence of that provision pertaining to non-disparagement.

Do employers have any protections against non-disparagement under *McLaren Macomb*?

Likely yes. Even in *McLaren Macomb,* the Board repeatedly cited precedent holding that Section 7 does not protect an employee's disloyalty or public criticism that is maliciously motivated or maliciously untrue (i.e., made with knowledge of its falsity or with reckless disregard for its truth or falsity).

Would we be in compliance with the *McLaren Macomb* decision if we still include confidentiality and non-disparagement provisions in severance agreements *but* choose to never enforce them?

No (if the confidentiality and non-disparagement provisions do not comply with *McLaren Macomb*). This is because the Board concluded that the sheer act of proffering a severance agreement containing such broad confidentiality and non-disparagement provisions is unlawful.

Would we be in compliance with the *McLaren Macomb* decision if we still include confidentiality and non-disparagement provisions in severance agreements *but* we also include (1) narrowly tailored limitations on the scope of such provisions and/or (2) a disclaimer that the agreement does not bar the signing employee from engaging in rights protected under Section 7 of the NLRA?

The decision unfortunately does not directly address these issues. The Board does, however, insinuate that "narrowly tailored" forfeitures of Section 7 rights might be permissible, while noting prior precedent. Unfortunately, however, the Board does not define what a "narrowly tailored" forfeiture might be. Specifically, the majority writes in a footnote that "we are not called on in this case to define today the meaning of a 'narrowly tailored' forfeiture of Sec. 7 rights in a severance agreement, but we note that prior decisions have approved severance agreements where the releases waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement."

In light of this, it is possible that narrowly tailored confidentiality and non-disparagement provisions might save the agreement from invalidation under *McLaren Macomb*. Such tailoring might include adding a temporal proximity to the provisions, limiting them to "matters regarding past employment" with the respondent-employer, and other limitations.

Likewise, a broad, robust disclaimer that the severance agreement does not bar the signing employee from engaging in certain specified legally-protected behavior, might also save the agreement's confidentiality and non-disparagement provisions. (Notably in this regard, the severance agreement at issue in *McLaren Macomb* did not include such a disclaimer.) However, although not addressed in *McLaren Macomb*, the Board's current general counsel has taken the position, in a different context, that broadly stated disclaimers preserving Section 7 rights do not necessarily save a workplace policy that may interfere with such rights.

In short, because the Board did not offer clear guidance on these points, employers opting for either or both of these approaches will be running the risk that the Board finds any sort of tailoring and/or disclaimer insufficient or impermissible and, accordingly, that the entire severance agreement at issue – and not just the confidentiality and non-disparagement provisions – is deemed unlawful.

Would we be in compliance with the *McLaren Macomb* decision if we still include confidentiality and non-disparagement provisions in severance agreements *but* we also include a severability or savings clause in the agreements (i.e., a clause stating that if any provision of the agreement is deemed invalid, the remainder of the agreement would be unaffected and still be valid)?

The decision unfortunately does not directly address this issue but, again, given that the Board found that the mere act of proffering a severance agreement with unlawful confidentiality and non-disparagement provisions is, in itself, an unlawful labor practice, it appears potentially unlikely that a severability or savings clause would save the agreement in its entirety and/or nullify or mitigate the unlawful act of presenting such an agreement are open questions.

Will the Board's decision be the "last word" on this issue?

Very unlikely. First, the employer in *McLaren Macomb* has the right to appeal the decision. Second, decisions like this are sometimes followed by advisory guidance from the Board's general counsel. Given the importance of this topic, such guidance may well be forthcoming in the coming weeks or months. And lastly, given that the Board is made up of political appointees, it is entirely possible that, if a Republican nominee is elected president in the future, their NLRB will reverse or limit the *McLaren Macomb* decision (to the extent the decision is still standing at such time).

Does the *McLaren Macomb* decision apply retroactively (i.e., to severance agreements signed before February 21, 2023)?

The Board did not address this issue either in its decision. That said, it is important to note that, in order to have a severance agreement deemed invalid under *McLaren Macomb*, the employee would need to file an unfair labor practice charge with the NLRB – and that must be done within six months of the alleged practice. Therefore, to the extent it has retroactive effect, *McLaren Macomb* likely would impact only severance agreements given to employees within the last six months.

What are my going-forward options with respect to severance agreements that I offer to employees who are covered by the NLRA?

Employers essentially have four going-forward options with respect to severance agreements that are offered to employees who are covered by the NLRA. The **first option** is to simply eliminate confidentiality and non-disparagement provisions in any severance agreements with such employees. This is the safest and most risk-averse option.

The **second option**, which has potential risk – given the many open questions after *McLaren Macomb* – would be to still include broad confidentiality and non-disparagement provisions in severance agreements but to also include a broad, robust disclaimer that makes it patently clear that the agreement does not bar the signing employees from engaging in certain legally-protected behavior (which behavior should be specifically identified in the agreement). As noted above, however, there is no guarantee that the Board would rule that such disclaimers do in fact save the otherwise unlawful confidentiality and non-disparagement provisions. Given the Board's current agenda, employers opting for this approach run the risk that the NLRB would invalidate their severance agreements even with a comprehensive disclaimer.

The **third option** is to include narrowly-tailored confidentiality and non-disparagement provisions in severance agreements. Although, in *McLaren Macomb,* the Board found probative the fact that the subject confidentiality and non-disparagement provisions, among other things

- had no temporal proximity;
- were not limited to "matters regarding past employment" with the respondent-employer;
- were not limited to statements regarding just the respondent-employer but, also, covered "its parents and affiliated entities and their officers, directors, employees, agents and representatives"; and
- gave no definition or examples of what constitutes disparaging conduct,

and also addressed other specific circumstances under which the provisions violated the Act, the Board ultimately did not clearly define what it means to be "narrowly tailored," as noted above. *Because of this, even if employers restrict confidentiality and non-disparagement provisions in a way that they consider to be narrowly tailored, it remains entirely possible that the Board would disagree and, correspondingly, potentially invalidate the severance agreement at issue.* Of

further note, employers taking this approach may also want to include the above disclaimer discussed in the second option.

The **fourth and final option** would be to continue including broad confidentiality and non-disparagement provisions in severance agreements, but with sparse or no disclaimer or other qualifying language, knowing, however, that this could lead to an unfair labor practice charge and potential adverse outcome pursuant to *McLaren Macomb*.

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If you have any questions on this decision, need assistance developing policies and procedures to adjust for such changes, or have other questions regarding your workforce, please contact Reed Smith's Labor & Employment team or the Reed Smith lawyer with whom you normally work.

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