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Insights

NLRB Memo Clarifies the Implications of McLaren Macomb and Whether Employers' Severance Agreements Violate Employees' NLRA Rights

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On February 21, 2023, the NLRB issued a decision in *McLaren Macomb* reversing its previous holding in *Baylor University Medical Center* and once again outlawing the use of overly broad non-disparagement and confidentiality agreements in severance packages. A previous Krieg DeVault LLP Client Alert (**Hush Money: Standard Severance Agreement Provisions May Violate Employees' NLRA Rights**) summarized *McLaren Macomb* and identified important takeaways for employers. Following *McLaren Macomb*, the NLRB and HR professionals everywhere saw an increase in inquiries from workers, employers, colleagues, and the public about the implications of the case.

On March 22, 2023, NLRB General Counsel Jennifer Abruzzo issued a **memo** with guidance on the holding of *McLaren Macomb*. In her memo, Abruzzo sought to resolve many of the questions that *McLaren Macomb* had caused. Below are a few of the most relevant frequently asked questions.

Frequently Asked Questions After *McLaren Macomb*

- **Are severance agreements now banned?**
  - No. Lawful severance agreements are still acceptable if they do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees.
- **Are there ever confidentiality provisions in a severance agreement that could be found lawful?**
  - Yes. If a confidentiality clause is narrowly tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications it may be considered lawful.
- **Are there ever non-disparagement provisions in a severance agreement that could be found lawful?**
  - Yes. 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.
- **What if an employee did not sign the severance agreement?**
  - Offering a severance agreement with overly broad confidentiality clauses or non-disparagement provisions inherently damages employees' ability to engage in future protected activities. Even if the employee does not sign the offered severance agreement an employer can still be found to have acted unlawfully.

- **Does the *McLaren Macomb* decision affect severance agreements entered into before February 21, 2023?**
    - Yes. If the NLRB decides that a severance agreement entered into before February 21, 2023, is unlawful, the employer could be found to have committed unlawful action.
- **What if employees request broad confidentiality and non-disparagement clauses in their severance package?**
    - Even if employees or a union request these clauses in severance agreements, the employer can still be found to have acted unlawfully.

Conclusion

Employers can continue to use severance agreements at the end of an employee's time with the employer. However, employers must be careful that their severance agreements do not have overly broad confidentiality or non-disparagement clauses in them. Current guidance indicates this also applies to agreements entered into before *McLaren Macomb*; therefore, assessing employer risk relating to existing agreements should occur on a case-by-case basis.

Our attorneys will continue to monitor guidance from the NLRB related to this decision, severance agreements, and employee rights under the NLRA. If you have questions about this decision or how it may impact your organization moving forward, please contact **Virginia A. Talley**, **Shelley M. Jackson**, or another member of our **Labor and Employment Law Practice**.

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