Employer Update

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UPDATE: NLRB GC Issues Guidance on Non-Disparagement and Confidentiality Provisions

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Following up on our *Employer Update* earlier this month, we are writing with an update that Jennifer Abruzzo, the General Counsel (GC) of the National Labor Relations Board (NLRB or Board), has issued Guidance on the Board's decision in *McLaren Macomb and Local 40 RN Staff Council*, 372 N.L.R.B. No. 58 (2023) (Guidance). When we first reported on the *McLaren* decision, in which the Board found that an employer merely offering a non-supervisory employee a severance agreement containing a broad non-disparagement or confidentiality provision constitutes an unfair labor practice (ULP) in violation of the National Labor Relations Act (NLRA), we noted that *McLaren* left a number of important questions unanswered. The GC's guidance answers many of those questions.

Significance of GC Guidance and NLRB Charge Procedure

As an initial matter, it is important to understand the legal significance of the Guidance in order to contextualize it appropriately. The GC of the NLRB is responsible for investigating and prosecuting ULP cases and for generally supervising the NLRB field offices in the processing of cases. The GC is not a lawmaker or judge. She does not speak for or on behalf of the NLRB itself. Thus, while her Guidance is important to be aware of, it is possible that the NLRB could disagree and the NLRB is in no way bound by her Guidance.

The primary relevance of the GC's Guidance is that it will impact the situations in which Regional Directors are willing to issue a complaint.[1] Regional Directors will utilize the GC's memo as Guidance in evaluating potential ULPs and determining whether or not to issue complaints on behalf of the NLRB. In that way, while the GC's Guidance itself is not precedential or binding, it will certainly impact whether employers' actions lead to complaints. The Guidance also informs employers on how to utilize non-disparagement or confidentiality provisions in severance agreements in order to protect themselves from ULP charges. Additionally, it provides possible safe harbors for employers who follow the Guidance's recommendations.

Severability

To the relief of many employers, the Guidance makes clear that, in the event a non-disparagement or confidentiality provision in a severance agreement is deemed unlawful, the GC will seek to strike only the unlawful provisions and keep the rest of the severance agreement in place. Notably, the Guidance provides that this will be the case regardless of whether or not the agreement actually contains a severability clause. It is important to remember, though, that per *McLaren*, the proffer of the severance agreement with unlawful provisions itself is a source of independent liability. However, the scope of remedies the NLRB can seek, such as a notice posting, are limited.

If employers are particularly concerned about exposure, the Guidance suggests a potential prophylactic cure: employers might be able to partially cure a violation by sending notices to former employees bound by unlawful severance agreements. Such notices need to inform these former employees that the provisions are invalid and that the employer will not be enforcing the provisions or seeking penalties for a violation of such provisions. Providing such notice might lead to a merit dismissal against a charge related to the proffer of an invalid provision. However, whether or not it makes sense for an organization to undertake such an effort will depend on a range of factors and it should consult with counsel before doing so.

Savings Clause and/or Disclaimers

In response to *McLaren*, many employers are exploring the possibility of including a savings clause or a disclaimer to allow employers to continue to utilize their preferred non-disparagement language. The Guidance, however, provides that a disclaimer may not be sufficient in some situations, and gives some suggestions as to what a potentially satisfactory disclaimer needs to include.

As a general matter, the Guidance makes clear that a savings clause or a disclaimer will not necessarily cure unlawful provisions because an employer may still be liable for mixed or inconsistent messages that could impede employees' Section 7 rights.

Specifically, carve-outs will not save employers where the carve-outs directly contradict prohibitions related to confidentiality and non-disparagements. For example, the Guidance suggests that a clause specifying that employees cannot disparage their employer to their former co-workers cannot be saved by a carve-out that says that the clause is not intended to interfere with Section 7 activity. Thus, employers that include savings clauses in their agreements need to be careful that the savings clause and non-disparagement language fit together, and do not present as mixed or inconsistent messages that could be interpreted as encumbering an employee's NLRA rights.

The Guidance also gives a glimpse into what types of savings clauses the GC may view as sufficient. Unsurprisingly, the requirements are quite strenuous. The Guidance suggests nine specific NLRA rights to call out in a savings clause. The suggested list of activities that employers should inform departing employees they may engage in, included below, is expansive and much broader than what is contained in most carve-out clauses:

- 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;
- 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;
- Discussing wages and other working conditions with co-workers or a union;
- Taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union;
- Striking and picketing, depending on its purpose and means;

- Taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present;
- Wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and
- Choosing not to engage in any of these activities.

Including this language likely creates a safe harbor for employers with regard to how regions will analyze severance agreements, but it remains to be seen whether the Board will deem some or all of the above language required in a lawful severance agreement.

Retroactivity and the Statute of Limitations

The Guidance confirms that the GC will take an expansive view with regard to the statute of limitations for *McLaren* related violations of the NLRA. The GC explains that Board decisions are presumptively retroactive and that the *McLaren* decision will be applied retroactively. She further notes that while Section 10(b) of the NLRA has a six-month statute of limitations for filing a ULP charge, an employer's maintaining or enforcing an existing severance agreement with provisions that run afoul of the NLRA is a continuous violation of the NLRA. In practice, then, there is essentially no statute of limitations that would bar a ULP charge against an employer who maintains or enforces an unlawful severance agreement.

As discussed in more detail above, the Guidance suggests that employers can avoid this liability by notifying any former employee who had signed an agreement with unlawful provisions that these provisions no longer apply to the agreement. However, employers should consult with counsel before taking such a step.

Permissible Provisions

The Guidance explains that there are certain types of non-disparagement and confidentiality provisions the GC views as acceptable. For example, non-disparagements can prohibit employee statements about an employer that are *"maliciously* untrue" – meaning the statements are made with "knowledge of their falsity or with reckless disregard for their truth or falsity." Note, however, that this is a higher threshold than simply prohibiting statements that are untrue.

The Guidance also confirms, as some had suspected, that confidentiality provisions that prohibit employees from discussing the precise financial terms of their severance provisions are acceptable.

Supervisors

As we explained earlier this month, the NLRA expressly does not apply to supervisors and, therefore, the *McLaren* decision does not apply to severance agreements issued to supervisors that contain confidentiality or non-disparagement provisions. The GC's Guidance highlights some relatively niche ways that the *McLaren* decision may impact supervisors.

The Guidance notes that under *Parker-Robb Chevrolet*, 262 N.L.R.B. 402 (1982), an employer cannot retaliate against a supervisor for refusing to engage in ULPs. Thus, the GC reminds employers that they may not retaliate against a supervisor for refusing to proffer an unlawful severance agreement to an employee. The Guidance goes further too, and advises that an employer could commit an unlawful act by proffering a severance agreement with a broad non-disparagement provision to a supervisor who has been improperly fired for engaging in *Parker-Robb Chevrolet* conduct, because such a provision could prevent the supervisor from participating in a Board proceeding. Such a situation is relatively anomalous, and should not change how supervisor agreements should be handled in most situations (with no special action being required).

Other Provisions and Other Agreements

While *McLaren* only touched on non-disclosure and non-disparagement provisions, the Guidance suggests that the GC views other provisions that are often included in severance agreements as potential unlawful restraints on NLRA rights. The laundry list included by the GC includes: non-compete, non-solicitation, and no-poaching clauses; broad liability releases; covenants not to sue that go beyond

employer or employment claims; and cooperation requirements related to investigations or proceedings involving the employer.

As highlighted as a possibility in our previous alert, the Guidance confirms that the GC believes *McLaren* can extend to other types of agreements or communications with employees. The Guidance specifically references offer letters as potentially impacted, and indicates that any employer communication that includes overly broad provisions may be unlawful absent special circumstances. This could include other agreements such as employee handbooks, settlement agreements, and employment agreements.

The GC's suggestion that *McLaren* could apply in a plethora of contexts, and criticism of other types of provisions and agreements is not surprising. Her criticism of restrictive covenants highlights the fact that the NLRB and the Federal Trade Commission (FTC) have recently made increasing efforts to work together. In 2022, the GC and the FTC Commission Chair released a Memorandum of Understanding that formed a commitment to working together to effectuate the promotion of fair competition and workers' rights. The NLRB is clearly interested in engaging in conversations related to competition and antitrust rules. We may continue to see the NLRB increasingly comment on other types of provisions in employment agreements.

Miscellaneous Guidance Points

The Guidance highlights a few portions of the *McLaren* decision that are good reminders for employers. Among other things, it notes:

- It does not matter whether or not an employee *actually* signs a severance agreement that contains unlawful provisions. An employer's proffer of an agreement is independently unlawful regardless of whether an employee signs this agreement because it does not affect the employer's previous conduct.
- Employees' rights under Section 7 of the NLRA cannot be waived. Therefore, even if an employee requests a provision that is unlawful under *McLaren*, an employer is not allowed to include it in a severance agreement.

Conclusion

The GC's Guidance is probative as to how cases will be viewed by Regional Directors, but it is not binding precedent. It is possible that others in the NLRB could take a different view than the GC. However, given the current composition of the Board (three Democrats and one Republican), it would be reasonable to assume that some or all of these views could be shared by a majority of the Board. Thus, employers should keep the above top of mind when determining how to manage and comply with *McLaren*.

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[1] By way of background, when someone (typically an employee, union, or employer) believes a ULP has been committed (a Charging Party), they may file a charge with the relevant region of the NLRB. Investigators, referred to as Board Agents, will then investigate the charge and make a recommendation as to whether the charge has merit. The Board Agent and NLRB Regional Director then work together to determine whether or not to issue a complaint. If the Regional Director issues a complaint, then the NLRB acts as a prosecutor and representative of the Charging Party throughout the process, including potentially in a hearing before an NLRB Administrative Law Judge (ALJ). After an ALJ makes a decision, then a party can appeal the decision (which is referred to as filing exceptions). If a party files exceptions to the ALJ's decision, then the ALJ decision is reviewed by either a panel of three members of the Board, or by the full Board.

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