McLaren Macomb and Beyond: NLRA Considerations for the Union and Non-Union Workplace

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The NLRB Has Been Making Headlines Over the Past Few Months

Employers Must Beware NLRB Noncompete Stance

No Limits: Non-Compete Agreements Next Up
General Counsel Chopping Block

By Michael Le
Posted in Gen

Analysis
NLRB GC's Noncompetes Stance May Not Be Viable, Attys Say

UPDATE: NLRB GC Abruzzo Makes Clear All Non-Disparagement and Confidentiality Clauses Are At Risk After NLRB's McLaren Decision

By Michael Lebowi
Posted in NLRB

GC Update: Abruzzo Issues New Memorandum Outlining Her Objectives

By Joshua Fox and David Gobel on March 23, 2023
Posted in NLRB

Analysis
Attys Foresee Uneven Compliance With New Severance Rules

Drafter Beware: NLRB Finds That Employers Who Offer Severance Agreements With Broad Non-Disparagement or Confidentiality Restrictions Violate The NLRA

By Mark Theodore, Joshua Fox and Raymond Arroyo on February 23, 2023
Posted in NLRB

NLRB GC Clarifies Scope Of Board Severance Pacts Decision

LAW360

GOP Subcommittee Members Blast NLRB's 'Partisan' Policies

Expert Analysis
NLRB GC Memos Complicate Labor Law Compliance

NLRB GC Files Complaint Saying USC Athletes Are Employees

Analysis
Rise In NLRB Filings A Sign Of Energy Behind Union Drives

Our Focus Today - The NLRB's Renewed Efforts to Regulate the Workplace Beyond Typical Union-Management Relations

- The National Labor Relations Act – A Refresher and Why You Should Care
- Severance Agreements
- Non-Compete Agreements
- What's Next? Handbook Provisions!

The National Labor Relations Act

The National Labor Relations Act

- Enacted in 1935 (“Wagner Act”).
- Amended by the Labor Management Relations Act (1947) (“Taft-Hartley Act”).
- Amended by the Labor Management Reporting and Disclosure Act (1959) (“Landrum Griffin Act”).

Refresher On The NLRB's Structure

Divided into Two Administrative Parts:

<u>National Labor Relations Board</u>

- Five Members Appointed By The President
- A *quasi*-judicial body responsible for interpreting the Act

<u>Office of the General Counsel</u>

- Divided into geographic Regions
- Oversees Union Election Proceedings
- Prosecutes Unfair Labor Practices
- Remedies violations of the NLRA
- Current General Counsel Jennifer Abruzzo replaced her predecessor, who was fired by President Biden on the first day in office

Key Provisions of the NLRA

NLRA Section 7

RIGHT OF EMPLOYEES AS TO ORGANIZATION, COLLECTIVE BARGAINING, ETC.

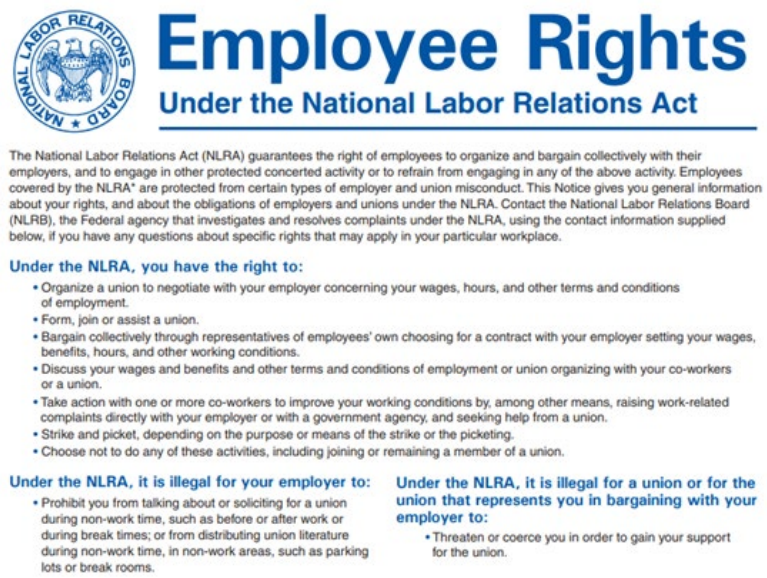
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities…

Employee Rights Protected under the Act

- Organize (or not)
- Bargain collectively
- Engage in other protected "concerted activity"

Who Is Covered By The NLRA?

- Only “employees” are covered – workers whose terms and condition of employment are controlled by an Employer or their agent
- Can also apply to former and prospective “employees”
- Applies to union and non-union employees
- Supervisors are not covered –12-factor test applies (e.g., individuals with direct reports, individuals who set policies and procedures for employees)
- Other workers not covered: public-sector employees, agricultural and domestic workers, independent contractors, small family businesses



Employee Rights

Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.

Severance Agreements – *McLaren Macomb*

McLaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023)

- **Holding**: The mere offer of an agreement that conditions severance benefits on the waiver of an employee's statutory rights violates the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of Section 7 rights.
- NLRB focused on the confidentiality and non-disparagement provisions of the agreement.

to violate Section 8(a)(1) of the Act. Inherent in any proffered severance agreement requiring workers not to engage in protected concerted activity is the coercive potential of the overly broad surrender of NLRA rights if they wish to receive the benefits of the agreement.[33] Accordingly, we return to the approach followed by Board precedent before *Baylor*, and hold that an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights.[34] Such an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances.

Why the NLRB May Have Targeted Severance-Agreement Provisions

- Perfect storm of:
  - Recent layoffs, particularly in the tech industry
  - Employers routinely offer severance agreements that include broad non-disparagement provisions and confidentiality clauses for non-supervisor employees
- Including such provisions has been a common practice, where employers had not given much second thought
- Employers have also generally felt protected from a NLRA perspective when entering into such agreements with unions or employment lawyers

Pre-*McLaren* – *Baylor* Test and *IGT*

- Prior to *McLaren,* the NLRB adopted a two-factor analysis for finding that a severance agreement violated Section 8(a)(1)
  - Whether the employer discharged the recipient of the agreement in violation of the NLRA or committed another unfair labor practice discriminating against employees under the Act
  - That employer animus towards the exercise of Section 7 rights is a relevant component of an allegation that provisions of a severance agreement violate Section 8(a)(1)
- In *Baylor University and IGT* the Board held the mere proffer of a separation agreement that contained an overbroad confidentiality provision (*Baylor*) or non-disparagement provision (*IGT*) **does not** violate the Act

McLaren – 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.

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.

McLaren – Confidentiality

- NLRB found the following deficiencies with the confidentiality clause at issue:
  - Prohibited employee from disclosing the terms of the agreement to any third party
  - Prevented the furloughed employee from assisting their former coworkers who may also be determining whether they want to accept a severance agreement.

McLaren – Non-Disparagement

- NLRB noted the following deficiencies with the non-disparagement clause:
  - Failed to limit the scope of the agreement to matters regarding **past employment** with the employer.
  - The provision did not provide a definition of "disparagement" that comports with existing Board precedent
  - The disparagement clause was overly broad in that it extended to the employer's "parents and affiliated entities and their officers, directors, employees, agents and representatives."
  - The provision's term continued in perpetuity, which the Board found excessive.

NLRB GC Guidance Memorandum GC 23-05 (March 22, 2023)

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 23-05 **March 22, 2023**

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

RE: Guidance in Response to Inquiries about the *McLaren Macomb* Decision

On February 21, 2023, the Board issued *McLaren Macomb*, 372 NLRB No. 58, returning to longstanding precedent holding that employers violate the National Labor Relations Act (NLRA or Act) when they offer employees severance agreements that require employees to broadly waive their rights under the Act. Specifically, the Board held that where a severance agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates Section 8(a)(1) of the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of those rights - both by the separating employee and those who remain employed. I am issuing this Memo to assist Regions in responding to inquiries from workers, employers, labor organizations, and the public about implications stemming from that case.

The severance agreement at issue in the case contained overly broad non-disparagement and confidentiality clauses that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights. Specifically, the non-disclosure provision contained a non-disparagement clause that advised the employees that they are prohibited from making statements that could disparage or harm the image of the employer, its parent and affiliates, and their officers, directors, employees, agents and representatives. And, the confidentiality clause advised employees that they are prohibited from disclosing the terms of the agreement to anyone, except for a spouse or professional advisor, unless compelled by law to do so. The severance agreement included monetary and injunctive sanctions for breach of these provisions.[1]

The Agency acts in a public capacity to protect public rights in order to effectuate the Congressionally-mandated public policy of the Act.[2] The underlying Board policy and purpose depends on employees' freedom to engage in Section 7 rights and to assist each other and access the Agency. And, the future rights of employees as well as the rights of the public may not be traded away in a manner which requires forbearance from future

According to GC Abruzzo:

- *McLaren* applies retroactively.
- Confidentiality provisions are lawful under only limited circumstances: (1) "narrowly tailored"; (2) targeted to proprietary or trade secret information; (3) limited in temporal scope; and (4) based on legitimate business justifications.
- Only "non-defamation" clauses are lawful.
- Unlawful provisions are severable—even without a severability clause.

NLRB GC Guidance Memorandum (March 22, 2023) – Cont'd.

According to GC Abruzzo:

- The rights are non-waivable; no "safe harbor" for employers who negotiate with union or employee's counsel.
- A "savings clause" likely will not save overbroad provisions.
- The decision could stretch to supervisors and managers in limited circumstances *(i.e.,* retaliation).
- Other types of provisions may be at risk (non-compete, non-solicitation, no-poaching).

McLaren – What's Next In The Litigation

- On April 12, 2023, the NLRB filed an application for enforcement of its Order before the Sixth Circuit
- Sixth Circuit can decide to enforce, set aside or remand the NLRB's decision
- Losing party may file a *writ of certiorari* before the U.S. Supreme Court
- Sixth Circuit or Supreme Court *may* address some of the questions left open by the NLRB decision that were answered by the NLRB GC

Practical Considerations – What Do We Do Now?

- Is it worth amending or modifying existing separation agreements?
- Should we revise separation agreements that we plan to use to comply with the NLRB GC's directives? Is there a middle ground?
- No "one-size fits all" approach to confidentiality provisions – consideration of the company's legitimate business justifications is vital
- Is it worth adding a broad "savings" clause or is doing so counter-productive?
- Risk tolerance and evaluating the worst-case scenarios if an unfair labor practice charge is filed
- Suggest taking a "fresh look" at whether your employees are "employees" or "supervisors" under the NLRA
- What is the impact of *McLaren* on other employment agreements?

Non-Compete Agreements – Next In The NLRB's Sights

Context Of Legal Attacks On Non-Compete Agreements

- Proposed federal and state legislation banning non-compete agreements
- NLRB General Counsel has now focused on the lawfulness of non-compete agreements under the NLRA
- Practical considerations to the use of non-compete agreements

Non-Compete Agreements: FTC Proposed Rule

- On January 5, 2023 the Federal Trade Commission ("FTC") proposed a rule that would largely prohibit employers from entering into non-compete agreements with "workers"
- The rule defines "workers" to include employees, independent contractors, interns, volunteers, apprentices, and gig economy workers
- The rule will apply retroactively
- Employers may still prohibit competition during employment
- The rule will prohibit agreements that could be construed as *de facto* non-compete agreements
- Employers will still be permitted to use common contractual restrictions such as non-disclosure agreements, confidentiality agreements, and non-solicitation agreements
- The notice and comment period for the rule ended on April 19, 2023. The FTC has yet to release a final version of the rule.

Non-Compete Agreements: Increased State Legislation

Minnesota

- On May 16, 2023, Minnesota passed legislation largely banning non-competes for Minnesota employees, effective July 1, 2023
- Includes an exception for non-compete agreements that are:
  - "agreed upon during the sale of a business" or
  - "agreed upon in anticipation of the dissolution of a business"
- Also prohibits choice-of-law or choice-of-venue provisions that would apply another state's law, or allow litigation outside of Minnesota, in a non-competition agreement with a Minnesota employee or independent contractor

New York

- On June 20, 2023, the New York State assembly sent legislation to the Governor which would largely ban non-compete agreements in New York State.

Non-Compete Agreements: NLRB GC Memo

According to GC Abruzzo in her May 31, 2023 Memo:

- "The proffer, maintenance, and enforcement" of non-compete agreements violates the Act
- With extremely limited exception, any agreement that limits future employment interferes with Section 7 rights.

Non-Compete Agreements: Recent GC Memo

- Non-compete agreements prevent employees from engaging in Section 7 activity.
- The only identified exceptions are agreements that relate to limiting individuals' managerial or ownership interests in a competing business, or agreements that restrict independent-contractor relationships.
- "Special circumstances" may permit a narrowly tailored non-compete agreement that infringes on employees' Section 7 rights, but GC Abruzzo did not elaborate as to what these circumstances are.

Practical Considerations – What Do We Do Now?

- Abruzzo's GC Memorandum provides insight into how the Board's various Regions will prosecute non-compete provisions.
- Business community may challenge the enforceability of the GC Memo, like it has with prior controversial GC Memos
- Uncertain whether Administrative Law Judges and/or the NLRB agree with the GC's stance
- GC Memo applies only to statutory employees, not supervisors; good opportunity to review whether your employees are "employees" or "supervisors" under the NLRA
- Potential impact on other agreements – no-poaching, exclusive employment agreements, among others?

Pending NLRB Decision – Lawfulness Of Handbook Provisions

The Boeing Company, 365 NLRB No. 154 (2017)

Introduced paradigm shift in analyzing lawfulness of handbook policies.

- Overruled *Lutheran Heritage*—long standing standard that provided employers violated the NLRA if they adopted workplace rules that could be "reasonably construed" by an employee to prohibit the exercise of their Section 7 rights.
- *Boeing* standard is based on evaluation of:
  - Nature and extent of potential impact on NLRA Rights;
  - Legitimate justifications of the rule.
- *Boeing* separated work rules into categories:
  - Lawful;
  - Warrant individualized scrutiny;
  - Unlawful.

Stericycle, Inc., 371 NLRB No. 48

- Considering 2017 *Boeing* decision regarding the lawfulness of employer workplace rules with significant impact on handbooks.
- ALJ found the company maintained unlawful personal conduct and conflict of interest policies.
- **Question for the NLRB:** Does the employer's workplace confidentiality rule infringe on NLRA protections that allow employees to collectively speak up on working conditions such as pay and safety?

- GC proposed standard would prohibit the maintenance of facially neutral work rules if "employees would reasonably construe the language to prohibit Section 7 activity."
- GC asked Board to formulate a "model prophylactic statement of rights."

Practical Considerations – What Do We Do Now?

- Impact of decision affects union and non-union employees – not supervisors
- Consider when you last updated your handbook and under what standard
- Crafting handbook language is more art than science
- Consider inclusion of a prophylactic statement of rights to limit liability for inadvertent violations

We Are On Top Of These Issues

- Refresh www.laborrelationsupdate.com for the latest NLRB news – and subscribe to our blog for email updates

- Reach out if you have questions and/or would like to discuss a review of your handbook provisions, non-compete agreements, other employment agreements and separation agreements – particularly for handbook reviews, we have potential fixed-fee proposals we can discuss

- Questions?

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