Cullen | Dykman

National Labor Relations Board Issues Guidance on Severance Agreements in Wake of McLaren Macomb Decision

April 11, 2023

As discussed in our previous client alert, available here, on February 21, 2023, the National Labor Relations Board (the "Board") issued a decision in *McLaren Macomb* that overturned the previous Board's 2020 decisions in *Baylor University Medical Center* (369 NLRB No. 43 (2020)) and *IGT d/b/a International Game Technology (*370 NLRB No. 50 (2020)) and held that employers cannot offer employees severance agreements that require employees to broadly waive their rights under the National Labor Relations Act (the "Act"). Specifically, the Board held that, regardless of whether the employee ultimately accepts the severance agreement, "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 rights under the Act because "[s]uch 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." (Emphasis Added).

On March 22, 2023, the Board's General Counsel issued a guidance memorandum regarding the implications of the *McLaren Macomb* decision (the "Guidance"). The Guidance provides a summary of the *McLaren Macomb* decision and provides answers to various inquiries regarding the decision and its implications. Below is a summary of the key takeaways from the Guidance, however employers should read the Guidance in full as it addresses additional questions and contains additional details about the below topics.

The first key takeaway from the Guidance is that **the *McLaren Macomb* decision applies retroactively and may invalidate agreements entered into prior to February 21, 2023.** The Guidance explains that "[w]hile an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation language under Section 10(b), maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the Section 10(b) period would not be time-barred." The Guidance also notes that "[w]hile specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions" and that the following factors are all **irrelevant** when determining whether a severance agreement violates the Act: (1) surrounding circumstances; (2) whether an employee signs the severance agreement in question (3) who initially raised the issue (employer or employee) of including a broad confidentiality and/or non-disparagement clause.

Fortunately, per the Guidance, Regions generally seek to void only the unlawful provisions, as opposed to the entire agreement, regardless of whether there is a severability clause. Notably, the Guidance says that "while it may not cure a technical violation of an unlawful proffer, employers should consider remedying such violations now by contacting employees subject to severance agreements with overly broad provisions and advising them that the provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions" because such "conduct could form the basis for consideration of a merit dismissal if a meritorious charge solely alleging an unlawful proffer is filed."

A second key takeaway is that the holding in the *McLaren Macomb* decision is not limited to just severance agreements and is applicable to other employer communications with employees. As explained by the Guidance, "overly broad provisions in any employer communication to employees," including pre-employment or offer letters, "that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights would be unlawful if not narrowly tailored to address a special circumstance justifying the impingement on workers' rights."

Importantly, the Guidance clarifies that including confidentiality clauses and non-disparagement clauses in a severance agreement is not *per se* unlawful. "Confidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful." Additionally, "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."

The Guidance notes that former employees are entitled to the same protections under the Act as current employees and, while supervisors are generally not protected by the Act, it would violate the Act for an employer to retaliate against a supervisor who refuses to proffer an unlawfully overbroad severance agreement. Additionally, proffering a severance agreement to a supervisor in connection with *Parker-Robb Chevrolet*-related conduct (i.e., because the supervisor is refusing to act on their employer's behalf in committing an unfair labor practice against employees) could also be unlawful.

Finally, although not addressed by the *McLaren Macomb* decision, the Guidance opines that, in addition to confidentiality, non-disclosure, and non-disparagement provisions, "some other provisions that are included in some severance agreements might interfere with employees' exercise of Section 7 rights, such as: non-compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge." Thus, employers should be cognizant of including such provisions in severance agreements and should consult with legal counsel before doing so.

In sum, most employers, whether they have a unionized workforce or not, should review their form or drafted severance agreements with counsel to determine what, if any, specific changes should be made to decrease the potentiality that any provision, or the agreement in full, may be invalidated by the Board.

If you have questions regarding severance agreements or labor law generally, feel free to contact Jennifer A. McLaughlin at (516) 357-3889 or **jmclaughlin@cullenllp.com**, Brian B. Selchick at 518-788-9426 or **bselchick@cullenllp.com**, or Jennifer E. Seeba at (516) 296-9173 or **jseeba@cullenllp.com**.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Practices

- Labor and Employment

Attorneys

- Jennifer A. McLaughlin
- Brian B. Selchick