

NLRB General Counsel Issues Guidance on Severance Agreement Restrictions

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On March 22, 2023, the General Counsel of the National Labor Relations Board (NLRB or the Board), Jennifer Abruzzo, issued guidance about the Board's *McLaren Macomb* decision from earlier this year. The guidance made clear that the General Counsel will, when given the opportunity, prosecute a case before the Board to have the NLRB invalidate provisions in severance agreements that attempt to restrict the rights of departing employees to engage in activity protected by the National Labor Relations Act (NLRA). The General Counsel also emphasized her view of the retroactive application of the decision, noting that employers attempting to enforce old severance agreements will face new unfair labor practice liability even if the statute of limitations has run since the execution of the now-unlawful agreement. Although the General Counsel's memorandum is not law, employers should pay close attention as the guidance indicates the position the General Counsel will take in prosecuting allegedly unlawful severance agreements.

As discussed in our [February 2023 alert](#), in *McLaren Macomb*, the Board held that employers may not condition severance on the employee's waiver of rights protected by the NLRA, effectively imposing strict limitations on the ability of employers to include confidentiality, non-disclosure and non-disparagement clauses in severance agreements.

This decision created confusion and uncertainty among employers as to what language is acceptable in severance agreements and what language could create liability under the NLRA. The General Counsel's March 22 memorandum addresses that uncertainty.

At the outset, Abruzzo explained that severance agreements are not per se unlawful and may still be utilized by employers so long as "they do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees." She also noted that some confidentiality and non-disparagement provisions may survive scrutiny from the Board. She suggested that the following are likely lawful:

- 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
- Confidentiality clauses prohibiting disclosure of the *financial* terms of the agreement
- Non-disparagement provisions that are narrowly tailored, “justified” and limited to *defamatory* statements about the employer

The memorandum also addressed debate about whether unlawful provisions would invalidate the entire severance agreement. Abruzzo noted that the ordinary remedy in such cases is to strike the unlawfully broad provisions from the severance agreement, even in the absence of a severability clause. However, she also reserved the right for the NLRB to invalidate the agreement entirely based on the circumstances of the case.

Further, Abruzzo affirmed that neither an employee nor the employee’s bargaining representative may waive the protections against overbroad provisions, and that the decision is effective retroactively. While the NLRA’s statute of limitations is six months, the General Counsel and her field offices will view an employer’s efforts to enforce any unlawful provisions of a severance agreement older than six months as a new violation.

The memorandum affirmed that *McLaren Macomb* does not generally apply to severance agreements with supervisory employees, but it argued that in one very narrow circumstance it may apply — when the supervisor has been discharged for refusing to violate the NLRA.

Abruzzo cautioned that boiler plate savings clauses are likely insufficient to save an overbroad severance agreement. Finally, the General Counsel signaled that she considers other provisions that may be included in severance agreements, such as non-compete, no solicitation clauses, no poach clauses, or other broad liability release terms, violative of the NLRA. While the Board must ultimately determine which such provisions are unlawful, Abruzzo’s guidance memorandum serves as a warning to employers that provisions in severance agreements beyond those identified in *McLaren Macomb* may be scrutinized by the NLRB. Moreover, Abruzzo’s signal that other provisions may be unlawful indicates that she may aggressively prosecute severance agreement cases.

Employers must take caution when drafting severance agreements (as well as settlement agreements, non-compete agreements, etc.) so as not to run afoul of the decision or the General Counsel’s enforcement guidance. If you have any questions about the potential implications of the *McLaren Macomb* and the General Counsel’s

memorandum on your business, or any other employment-related questions, please contact an attorney on the Faegre Drinker labor and employment team.