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The NLRB's Limitation on Certain Severance Agreement Terms and Employer's Enforcement of Presumptively Valid No-Recording Policies

Recently, the National Labor Relations Board (the "NLRB" or the "Board") issued two noteworthy decisions, and employers, whether unionized or not, should pay particular attention to the implications these decisions will have on their policies and practices going forward. The decisions, as discussed in detail below, involved provisions within severance agreements that ran afoul of the National Labor Relations Act ("NLRA") and a presumptively valid, facially neutral no-recording policy.

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

On February 21, 2023, the NLRB ruled that overbroad confidentiality and non-disclosure provisions contained within severance agreements, and the mere offering of such agreements with these overbroad provisions, violated Sections 7 and 8 of the NLRA[1]. Specifically, the Board determined that overbroad confidentiality and non-disclosure provisions contained within severance agreements were violative of the NLRA when their "terms ha[d] a reasonable tendency to interfere with, restrain, or coerce employeess[2] in the exercise of their Section 7 rights."

In *McLaren Macomb*, 11 bargaining unit employees were furloughed and offered severance agreements containing the following provisions:

> **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.

[1] Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." Under Section 8(a)(1), it is an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the NLRA.

[2] The term "employee," as used in Sections 7 and 8 of the NLRA, excludes "any individual employed as a supervisor"—among a few others—from its protections. For purposes of the NLRA, a "supervisor" is "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

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.

The Provisions Violated the NLRA

The NLRB ruled the confidentiality provision violated the NLRA. In demonstrating the overbreadth of the confidentiality provision, the NLRB explained the provision prohibited an employee from disclosing the severance agreement "to *any* third person," and, therefore, an employee would be "precluded from disclosing even the existence of an unlawful provision contained in the agreement." Because the confidentiality provision was so broad, the Board determined the confidentiality provision had a chilling effect on, and therefore violated, employees' Section 7 rights.

The NLRB also found the non-disparagement clause violated the NLRA, reasoning that it substantially interfered with employees' Section 7 rights because "[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the" NLRA. Like the confidentiality provision, the NLRB emphasized that, under the broad terms of the non-disparagement provision, an employee would be prohibited from making a "statement asserting that [their employer] violated the [NLRA]," and such a "sweeping broad bar" would have a "clear chilling tendency" on employees' rights under Section 7.

In addition to the NLRB referencing its own precedent to reach its conclusion on the nexus between the overbroad non-disparagement clause and the NLRA, it also cited to the U.S. Supreme Court's decision in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953), for the proposition that "Section 7 affords protection for employees who engage in communications with a wide range of third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection."

In *Electrical Workers*, Jefferson Standard Broadcasting expanded its broadcasting services to include television in 1949, which was initially unprofitable for several months. Around the same time, 22 broadcast technicians, represented by a union, engaged in collective bargaining negotiations with the broadcast station and demanded the renewal of an arbitration provision in the technicians' employment contracts. The union began peaceful protests during off duty hours, but did not strike, in the wake of negotiations, and emphasized the station's refusal to renew the arbitration provision.

When the negotiations in *Electrical Workers* reached a stalemate, however, several technicians strayed away from peaceful protests and "launched a vitriolic attack on the quality of the company's television broadcasts" by disseminating thousands of misleading handbills to the public in an attempt to gain bargaining power to leverage against the station. Such handbills "related . . . to no labor practice of the company," "made no reference to wages, hours or working conditions," attacked policies "of finance and public relations," and "asked for no public sympathy or support." Ten technicians were terminated due to their involvement in circulating the handbills.

The Supreme Court in *Electrical Workers* determined that nine[3] of the 10 technicians were terminated "solely because, at a critical time in the initiation of the company's television service, they sponsored or distributed 5,000 handbills making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."

Accordingly, the Supreme Court determined that the disparaging attacks the technicians outlined in the handbooks severed any protected connection the employees had to the underlying labor controversy, and therefore such activity fell outside the purview of the NLRA. Such activity, rather, "attacked public policies of the company which had no discernable relation to [the union] controversy." Therefore, the nine technicians in *Electrical Workers* were not engaged in protected activity under the NLRA because their communications were disloyal, reckless, maliciously untrue, and were made "in a manner reasonably calculated to harm the company's reputation and reduce its income."

Although it remains an open question as to how far reaching the NLRB's ruling in *McLaren Macomb* will apply to non-disparagement and confidentiality terms, as indicated by the Board with its reference to the "well-established NLRA definition" of disparagement in *Electrical Workers*, it is possible permissible non-disparagement provisions may include a prohibition on "disparaging attack[s] upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."

The NLRB General Counsel's Guidance Memo

To clarify the determinations and findings of the *McLaren Macomb* decision, the NLRB's general counsel recently released Memorandum GC 23-05 (the "Memo"). The Memo provides that "narrowly-tailored, justified, non-disparagement provision[s] that [are] limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue" may be lawful under the NLRA.

[3] The Court found it "equally important" to note that one employee—the so-called "tenth man"—"participated in simultaneous concerted activities for the purpose of collective bargaining," yet he "refrained from joining the others in separable acts of insubordination, disobedience or disloyalty."

Regarding a permissible confidentiality provision, the NLRB's decision in *McLaren Macomb* does not appear to take issue with protecting a company's trade secrets and proprietary information, and such confidentiality provisions safeguarding this information are still likely enforceable. Indeed, the Memo states "[c]onfidentiality 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."

Not surprisingly, the NLRB's general counsel stated that while "specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions," and thus "[t]he employer may still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights." The Memo, however, also identifies "a statement of rights, which affirmatively and specifically sets out employee statutory rights" that employers may at their option include in their severance agreements "in a predominant way to mitigate the potential coercive impact" of ambiguous terms of the severance agreement and which "are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights)."

The general counsel identified the following "model language," which is designed to make clear that employees have the right to engage in the following activities:

> (1) organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment; (2) forming, joining, or assisting a union, such as by sharing employee contact information; (3) 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; (4) discussing wages and other working conditions with co-workers or a union; (5) 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; (6) striking and picketing, depending on its purpose and means; (7) 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; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

The Memo confirms that the *McLaren Macomb* decision does not apply to executives, managers, supervisors, and independent contractors because they are outside the definition of "employees" covered by the NLRA. The Memo, however, notes that the NLRA prohibits retaliation against supervisors for, among other things, proffering an overly broad severance agreement to employees.

The general counsel further clarified that the *McLaren Macomb* decision applies retroactively to agreements effective before the date the decision was made (February 21, 2023). It is the NLRB's position that an employer enforcing or maintaining a severance agreement "with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such [a violation] beyond the [six months statute of limitations] period would not be time-barred."

Starbucks Corporation, 372 NLRB No. 50 (Feb. 13, 2023)

On February 13, 2023, the NLRB held that two Starbucks employees engaged in protected activity under the NLRA when they covertly recorded conversations with management. The NLRB found that Starbucks violated the NLRA by threatening, interrogating, surveilling and terminating employees for exercising their rights under Sections 7 and 8 of the NLRA, reasoning that such workplace recordings are often essential for an employee to assert such rights. Accordingly, the NLRB determined that covertly recording management is protected activity by employees when the purpose of the recording is used "to document their conversations with management about terms and conditions of employment, including potential discipline, and to preserve evidence for any future employment-related actions that may arise." The NLRB ordered Starbucks to offer reinstatement to the two employees and provide backpay.

Factual Summary

The relevant facts arose when two employees who worked in a Starbucks store located in Pennsylvania began having conversations with their coworkers related to the store's management and about possibly organizing a union. Starbucks disciplined the two employees for holding such conversations, claiming the two failed "to follow corporate policies." Thereafter, Philadelphia Baristas United filed an unfair labor practice charge against Starbucks, accusing it of retaliation. After having further conversations with management about unionizing efforts, as well as engaging in a protest, the two Starbucks employees were terminated.

Following their termination, each employee also filed an unfair labor practice charge against Starbucks. The acting regional director of the NLRB issued a consolidated complaint alleging Starbucks had violated Sections 8(a)(1) and (3) of the NLRA.

The Board's Analysis

Starbucks argued the employees were not entitled to reinstatement or backpay because they covertly recorded conversations with management in violation of Starbucks' no-recording policy and Pennsylvania's two-party consent law, which requires all parties to a conversation consent to the recording. By failing to obtain consent from the managers who participated in the conversations before covertly recording them, Starbucks argued that the employees violated Pennsylvania state law.

The NLRB rejected Starbucks' argument for three reasons. First, the record reflected that Starbucks was aware the two employees were recording conversations with management, yet Starbucks did not rely upon such conduct to discharge the employees. Second, the NLRB determined that even if Starbucks was unaware of the recorded conversations, the two employees would nevertheless be entitled to reinstatement because they were engaged in protected activity under the NLRA. Finally, the NLRB held Starbucks policy and Pennsylvania law were preempted by federal law. Specifically, when a state law regulates conduct arguably protected by the NLRA, the state law is preempted by the NLRA.

Testimony from the two employees made it clear they recorded conversations with Starbucks management "out of concern that [Starbucks] was seeking to retaliate against [their] protected activities" and "to preserve evidence of what was said in the meetings with management and so [they] would have proof if [Starbucks] attempted to discipline [them] for pretextual or retaliatory reasons." The NLRB therefore determined, consistent with its established precedent, that the two employees engaged in protected conduct under the NLRA when they covertly recorded collective bargaining conversations with management.

Next, Starbucks claimed that both its no-recording policy and Pennsylvania law prohibited employees from covertly recording conversations with management. The Board assumed, without deciding, that Starbucks' no-recording policy was lawful and facially neutral. In rejecting Starbucks' policy argument, however, the NLRB asserted that an "employer is prohibited from applying a facially neutral policy in a manner that would restrict protected Section 7 activity." As applied, allowing Starbucks to enforce its no-recording policy over federal law would permit it to retaliate against its employees. Therefore, the Board concluded that although Starbucks' no recording policy was assumed to be lawful and facially neutral, it nevertheless could not be applied in this instance to restrict protected NLRA activity.

Employer Takeaways

Employers should review their standard severance and settlement agreements and determine whether to narrow their confidentiality and non-disparagement provisions or whether disclaimers can bring the provisions within the parameters outlined in *McLaren Macomb*. In addition, while policies prohibiting covert recordings are still lawful to include in employee handbooks if properly and narrowly drafted, employers should be careful when disciplining employees for violating no-recording policies or applicable state law.

If you have questions about how these new NLRB rulings affect your organization, including whether your policies, practices and agreements are compliant with these rulings, or how to properly revise or draft a compliant severance or settlement agreement, please contact your Kutak Rock attorney or a member of the firm's [National Employment Law Group](). You may also visit us at [www.KutakRock.com]().

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