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NLRB prompts review of severance agreements

Confidentiality, non-disparagement restricted – for now

■ **Kris Olsen**

Even as the 2024 election could swing the pendulum back in their clients' direction, attorneys who represent employers are busy devising strategies to respond to a recent National Labor Relations Board ruling restricting the use of confidentiality and non-disparagement clauses in severance agreements.

Meanwhile, at least some employee-side lawyers are wondering whether the decision will prove to be a mixed blessing.

In *McLaren Macomb, et al.*, the operator of a Michigan hospital furloughed 11 union employees deemed "nonessential" after COVID-19 forced it to cease performing elective and outpatient surgeries. In June 2020, the hospital made the furloughs permanent and presented the employees with severance agreements, which contained broad confidentiality and non-disparagement provisions.

Such provisions likely would have passed muster under the tests established by the Trump-era NLRB in *Baylor University Medical Center* and *IGT d/b/a International Game Technology*.

But those decisions themselves had reversed long-settled precedent and "replaced it with a test that fails to recognize that unlawful provisions in a severance agreement proffered to employees have a reasonable tendency to interfere with, restrain, or coerce the exercise of employment rights under Section 7 of the Act," the NLRB majority in *McLaren* noted.

With its decision in *McLaren*, the NLRB explicitly overruled *Baylor* and *IGT*. It then used its newly reinstated test to find the non-disparagement and confidentiality provisions at issue in *McLaren* unlawful, which made the proffer of the severance agreement to the employees unlawful as well.

The NLRB noted that its 1987 decision in *Enmarco, Inc.* established that employees have a clear right under the National Labor Relations Act to publicize labor disputes, "subject only to the requirement that employees' communications not be so 'disloyal, reckless or maliciously untrue as to lose the Act's protection.'"

The clause in *McLaren* went far further, the NLRB concluded.

"The end result is a sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights by the subject employee," the board wrote.

Its scrutiny of the confidentiality provision of the severance agreement "leads to the same conclusion," the board added.

Specifically, the provision would bar the subject employee from providing information to the NLRB concerning the hospital's unlawful interference with other employees' statutory rights, the board found.

It would also unlawfully preclude an employee from assisting co-workers with workplace issues concerning their employer, and from communicating with others, including a union and the board, about his employment, the board added.

EFFORTS TO SALVAGE CLAUSES UNDERWAY

As an initial matter, the National Labor Relations Act generally does not apply to managers or supervisors, according to employer-side lawyers, which suggests one possible response to the *McLaren* ruling.

"One thing I think that you may see some employers considering is: Do you have two types of agreements — one that aligns more closely with [the *McLaren*] decision for hourly or other non-supervisory employees and another agreement that contains more traditional, broader confidentiality and non-disparagement terms that could be used for supervisory employees who are not subject to the National Relations Act," said Boston attorney Justin F. Keith.

Beyond that, one tactic many are considering is to incorporate into agreements a disclaimer that nothing in the confidentiality or non-disparagement clauses are intended to interfere with an employee's rights under the NLRA. However, most acknowledged that such language alone is not going to salvage the clauses, at least if they are as broad as the ones at issue in *McLaren*.

It would be helpful if the NLRB would offer additional guidance on whether there is an effective way to craft a disclaimer, Keith said.

"One of the big gaps in my view is what is the effect, if any, from the labor board's perspective of savings clause language or disclaimer language in the agreement," he said.

Attorneys are also debating the wisdom of incorporating into their disparagement clauses language that narrows the definition of disparagement to statements that are "disloyal, reckless or maliciously untrue" — in other words, statements that the board has recognized as unworthy of the NLRA's protection.

But doing so could have an unintended consequence: highlighting for dismissed employees where "the line" is and encouraging them to walk right up to it, said Boston lawyer Alexandra D. Thaler.

Several attorneys also noted that the NLRB's decision highlights the value of including severability provisions in severance agreements. That was already a common practice, but it now may take on more importance, said Southborough attorney Michelle M. De Oliveira.

"You want to be sure that you have a provision in there that says that all of the provisions in the agreement are severable, so that if the NLRB or court were to deem the non-disparagement or confidentiality provision unlawful, we wouldn't lose everything that's in the separation agreement," she said.

In a client alert he authored, Boston attorney Timothy P. Van Dyck offered a number of other suggestions, such as limiting the non-disparagement requirement to matters involving past employment; adding temporal limitations; having the clauses apply only to the direct employer as opposed to its parents, subsidiaries and affiliates; and making the covenants mutual to both the employee and employer.

The scope of a confidentiality provision could also carve out from its scope the existence of the severance agreement and underlying facts relating to the terms and conditions of the employee's employment, he added.

However, Van Dyck acknowledged that the steps he has outlined are less than "fail safe."

"I think it's risk mitigation at this point," he said.

But at least one Boston attorney does not see what all the fuss is about. Like her fellow members of the employment bar, Valerie C. Samuels plans to add a sentence or two of disclaimer language to her clients' agreements.

"But, as a practical matter, if you're doing severance agreements and employees are leaving, the risk of that employee then going to the National Labor Relations Board to complain is probably fairly small," she said. "I know everybody's kind of worked up about this, but I don't think it's going to be the death knell of having severance agreements with rank-and-file employees at all."

THE PLAINTIFFS' PERSPECTIVE

Boston attorney David I. Brody, who represents employees, said that while a decision issued by a Biden-era NLRB is naturally going to favor workers to a greater degree than in the previous administration, it is not crystal clear that *McLaren* will be a boon to employees.

To be sure, there will be some employees who will value the NLRB allowing them to reclaim their right to share their stories. But others would be more than willing to keep quiet themselves so long as a confidentiality clause is mutual, ensuring that other people will maintain their silence as well, Brody said.

He added that in a post-*McLaren* world, cases may be harder to settle.

Boston's John F. Welsh, a former NLRB appellate and trial attorney who now counsels employers, did not dispute that notion.

"If it's a nuisance case and if we have to make this settlement amount public, we're going to have a lot of contagion from other employees, so it's going to deter a settlement," he said.

Keith agreed.

"Employers may ask themselves, 'What are we really paying for, if we can't even have confidentiality in non-disparagement clauses?'" he said. "Does that cause some unintended effects and impacts on employees who might otherwise receive different severance terms in the context of a reduction in force or other separation?"

But Cambridge attorney Michaela C. May suggested that *McLaren* will be, on net, a win for employees as employers are forced to reconsider overbroad confidentiality and non-disparagement clauses, which they had been emboldened to foist on largely defenseless employees.

"What struck me about this case is that the NLRB really understands the unequal bargaining power here," May said. "You have people in a very vulnerable time in their lives being given dense language that's usually 'take it or leave it' that they don't really understand."

WHAT'S NEXT?

While employment lawyers may not have been able to foresee the exact contours of the NLRB's decision in *McLaren*, they did have some forewarning that a ruling like it might be coming.

On Aug. 12, 2021, General Counsel Jennifer A. Abruzzo sent a memo to the NLRB's regional directors and officers-in-charge highlighting certain issues likely to come before them that she believed "compel centralized consideration."

Confidentiality provisions and separation agreements were one of the categories of cases Abruzzo flagged that she wanted to be sent to the main office. But it was hardly the only one.

Stemming from Abruzzo's memo, one of the next shoes to drop may relate to employer handbook rules, attorneys said. Indeed, passing reference is made in the *McLaren* decision and its dissent to the fact that the NLRB has invited briefs in the pending case *Stericycle, Inc.*

Stericycle could provide the opportunity for the board to overrule similarly the NLRB's 2017 decision in The Boeing Co., which implicated not only confidentiality and non-disparagement aspects of handbooks but a host of other workplace rules as well.

McLaren "is the precursor of a larger approach that is going to basically require a lot of people not only to look at separation agreements but also employment handbooks, social media policies and processes, and things of that nature," Welsh said.

Of course, looming over the landscape — about 600 days away as of this writing — is the 2024 presidential election, which could again shift the balance of power on the NLRB, meaning that McLaren could be quickly cast aside and the rules from Baylor and IGT could make a roaring comeback.

To be sure, the pendulum swinging back and forth "keeps us busy," Samuels said. But the seeming impossibility of any negotiation or meeting in the middle is ultimately not a good thing, she noted.

"It makes it hard for lawyers to advise clients because there's no way to know what's going to happen, and clients are kind of going crazy because there's no way to predict what's going to happen," Samuels said.

Then there is also the possibility that McLaren — or the likely forthcoming decision in Stericycle — will eventually wend its way up to the U.S. Supreme Court.

The court might adhere to its historic deference to the NLRB and allow the Biden board's decisions to stand, Welsh said.

But if one were looking for ominous signs, one might point to the Supreme Court's decision in Epic Systems Corp. v. Lewis, in which it was almost as if the court "cast a blind eye to 40 years of precedent" to arrive at a pro-arbitration, pro-company ruling, Welsh observed.

Even before McLaren or Stericycle arrive before the Supreme Court — if they do — any challenge may create a "mess in the circuit courts," Welsh said, as the NLRA allows decisions to be appealed to anywhere the respondent does business.

"It's a statute made for forum shopping," he said.

As a result, an appeal may well end up in front of a panel with a decidedly pro-business bent, Welsh noted.

"I wouldn't want to have to argue this case [in the 5th Circuit]," he said.