

U.S. SUPREME COURT EASES PATHWAY FOR PARENTS OF STUDENTS WITH DISABILITIES TO INITIATE LAWSUITS SEEKING MONETARY DAMAGES FROM PUBLIC SCHOOL DISTRICTS

INSIGHT

On March 21, 2023, the United States Supreme Court issued a ruling that could significantly impact how special education claims against public school districts are litigated.

In *Perez v. Sturgis Public Schools*, the Court unanimously ruled that parents of students with disabilities seeking compensatory damages (i.e., monetary damages) from public school districts may initiate legal proceedings in court without first exhausting their administrative remedies, which in New York requires participating in the impartial hearing process and, if necessary, perfecting an appeal with the Office of State Review. The Court's decision was based on its interpretation of the Individuals with Disabilities Education Act's ("IDEA") exhaustion requirement for parents of students with disabilities seeking relief from public school districts. See 20 U.S.C. § 1415(l).

The Supreme Court most recently addressed the IDEA's exhaustion requirement in 2017 when it issued *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017). In *Fry*, the Court considered whether the parent of a student with a disability may bring a discrimination claim directly to court without first exhausting all available administrative remedies, including the initiation of an impartial due process hearing. The Court ruled a parent may indeed bring a claim directly to federal court, but only if the claim does not allege the denial of a free and appropriate public education ("FAPE") or does not involve the adequacy of the student's program or services.

As a result, under *Fry*, parents have been able to bring non-FAPE-related claims, such as discrimination claims under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, directly to court without exhausting their administrative remedies.

The *Perez* decision further expanded the range of claims exempt from the IDEA's exhaustion requirement. In *Perez*, the Court painstakingly reviewed the text of the IDEA statute and determined FAPE-related claims seeking relief available under the IDEA (e.g., tuition reimbursement, compensatory educational services) are subject to the exhaustion requirement, while claims seeking compensatory damages (i.e., monetary damages) are not.

As a result, parents of students with disabilities seeking monetary damages from school districts may proceed directly to court, without exhausting their administrative remedies, even if their claims are based on an alleged FAPE denial.

There are several factors, however, that may discourage parents from going directly to court:

1. Unlike the impartial hearing process, which is subject to tight timelines, court litigation often lasts years; so this may not be a desirable course of action for litigants seeking prompt relief.
2. Parents who go directly to court will be unable to pursue relief available under the IDEA, including compensatory educational services and tuition reimbursement. Presumably, many parents will not be comfortable forgoing such relief.
3. The burden of proof for parents seeking monetary damages will be higher than demonstrating a FAPE denial. To prevail on a claim for monetary damages, parents will need to prove school personnel intentionally discriminated against their child or were deliberately indifferent to their child's needs. In many instances, it will be difficult for parents to meet such a high burden of proof.

Harris Beach's [Education Team](#) will closely monitor the impact of the *Perez* decision, including the extent to which parents choose to initiate FAPE-related court litigation without first availing themselves to the impartial hearing and state-level appeal process. The group of attorneys pays close attention to special education legal issues. If you have any questions about the matters in this legal alert or any other related legal matters, please reach out to attorney [Jeffrey J. Weiss](#) at (716) 200-5141 and jweiss@harrisbeach.com; attorney [Anne M. McGinnis](#) at (585) 419-8613 and amcginnis@harrisbeach.com; attorney [Andrew R. Mark](#) at (716) 200-5263 and amark@harrisbeach.com; attorney [Howard J. Goldsmith](#) at (518) 701-2736 and [hgoldsmit](mailto:hgoldsmith@harrisbeach.com); or to the Harris Beach attorney with whom you most frequently work.

Attorney Advertising. Prior results do not guarantee a similar outcome.

© 2022 Harris Beach PLLC

Content current as of March 28, 2023 10:24 pm

THE NLRB'S GENERAL COUNSEL ISSUES GUIDANCE MEMORANDUM ON SEVERANCE AGREEMENTS IN LIGHT OF MCLAREN DECISION

INSIGHT

The National Labor Relations Board ("NLRB" or "Board") recently made headlines, ruling in the *McLaren Macomb* case that employers can no longer offer severance agreements with overly broad confidentiality and non-disparagement provisions. The decision impacts both unionized and nonunionized businesses in the private sector.

In the *McLaren* decision, the NLRB reasoned that offering employees a severance agreement with overly broad confidentiality or non-disparagement provision constitutes a restriction on an employee's ability to exercise their "Section 7" rights under the National Labor Relations Act (NLRA). Those rights include employees' rights to self-organization, to join labor organizations, and to engage in "other concerted activities" in an effort to improve the workplace.

Although the decision left most with the impression that broad confidentiality and non-disclosure provisions were, at minimum, strongly disfavored by the Board, the NLRB left many questions unanswered.

Jennifer Abruzzo, the NLRB's General Counsel, issued a memorandum published on March 22, 2023 that provides her broad and aggressive interpretation of the *McLaren* decision (Memorandum GC 23-05). The memorandum provides answers, in the General Counsel's view, to questions such as whether *McLaren* has retroactive effect on agreements already containing such confidentiality and non-disparagement provisions, and, whether the non-disparagement and confidentiality clauses are wholly unlawful for use in employee severance agreements.

An overview of the General Counsel's most pertinent points in the memorandum is provided below. It is important to note that the General Counsel's expansive view of how the *McLaren* decision should be applied in future cases will not necessarily be endorsed by the NLRB or, more importantly, by the federal appellate courts that review NLRB decisions. Nonetheless, the memorandum provides useful guidance on how the NLRB's regional offices will seek to enforce the *McLaren* decision and, therefore, employers should consider this guidance in the memorandum when preparing severance agreements.

ARE SEVERANCE AGREEMENTS BANNED?

No. The General Counsel's memorandum expressly states that issuing severance agreements, as a general practice, will not be regarded as unlawful. The memo noted the Board's previous decisions approved severance agreements containing an employee's release of their right to pursue employment claims arising as of the date the agreement was signed.

The memorandum cautions, however, that severance agreements cannot contain any clause t infringing on employees' rights to "engage with one another to improve their lot as employees."

WHAT IF AN EMPLOYEE DOES NOT SIGN THE SEVERANCE AGREEMENT?

The memorandum confirms the Board's position stated in *McLaren*: if the severance agreement contains an overly broad confidentiality and/or non-disparagement provision, simply offering it to the employee is unlawful. Therefore, whether-or-not the employee actually signs the severance agreement is immaterial.

ARE SEVERANCE AGREEMENTS ISSUED TO SUPERVISORS BEYOND THE SCOPE OF THIS DECISION?

Not necessarily, and this issue is likely to be the source of additional litigation before the Board. The NLRA (the law that the Board has the authority to enforce) generally excludes "managers" and "supervisors" from its protection. In many cases, *McLaren* will not impact severance agreements offered to managers or supervisors.

The General Counsel memorandum, however, leaves the door open for exceptions to this general rule. The memorandum notes the Board's prior decisions have consistently held supervisors cannot be retaliated against for refusing to violate the NLRA. In other words, employers cannot retaliate against a supervisor if the supervisor refuses to commit conduct that violates the NLRA. Likewise, the General Counsel opined that employers may violate the Act by proffering a severance agreement to a supervisor if that agreement would prevent the supervisor from participating in an NLRB proceeding.

DOES THE DECISION HAVE RETROACTIVE EFFECT?

Yes. The General Counsel relies on the NLRA's six-month statute-of-limitations period to find the *McLaren* decision will have retroactive application. *McLaren* was issued on February 21, 2023. Accordingly, severance agreements containing what the Board regards as overly broad confidentiality and non-disparagement provisions that were entered into within six months prior to that date may be subject to Board scrutiny.

The memorandum additionally notes that, while the six-month lookback period applies to the proffering of the agreement itself, "maintaining" and/or "enforcing" such "previously-entered severance agreements with unlawful provisions" can be regarded as a continuing violation which is not time-barred by the six-month window.

ARE THERE EVER CONFIDENTIALITY PROVISIONS IN A SEVERANCE AGREEMENT THAT COULD BE FOUND LAWFUL?

Yes. The memorandum notes that confidentiality clauses which are “narrowly-tailored to restrict dissemination of proprietary or trade secrets information” and which have “legitimate business justifications” may still be regarded as lawful. In stating this, the memorandum seems to reflect the general premise that confidentiality agreements will be unlawful where they restrict employees from assisting others with workplace issues or from communicating with a union or other third parties. This being the case, it remains somewhat unclear if confidentiality provisions can be drafted to prohibit employee’s communication with others regarding matters of past employment.

ARE THERE EVER NON-DISPARAGEMENT PROVISIONS IN A SEVERANCE AGREEMENT THAT COULD BE FOUND LAWFUL?

Yes. This being said, the memorandum notes that such provisions are lawful only where they are “narrowly tailored” and “justified” to prohibit employees’ statements which are “maliciously untrue” and made with “knowledge of their falsity or with reckless disregard for their truth or falsity” such that they rise to the level of what is traditionally considered “defamation.” Additionally, in stride with the decision, the memorandum makes clear non-disparagement provisions will be overly broad where they encompass all disputes, terms and conditions without a temporal limitation and with applicability to not only the employer itself, but to its parents and affiliates.

WOULD A “SAVINGS CLAUSE” OR DISCLAIMER SAVE OVERBROAD PROVISIONS IN A SEVERANCE AGREEMENT?

Maybe. While the memorandum does not prohibit disclaimers, it notes that “the employer may still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights.” To this end, the General Counsel states a disclaimer would be best served to include the Section 7 activities that are of primary importance to the NLRA and which are commonly engaged in by employees. The memorandum suggests a “model” disclaimer that lists, in the General Counsel’s view, the “activities that are of primary importance toward the fulfillment of the [NLRA’s] purposes[.]”

ADDITIONAL TAKEAWAYS AND NEXT STEPS

While the memorandum focuses on non-disparagement and confidentiality provisions, it also highlights the General Counsel’s opinion that other commonly included clauses may be unlawful for inclusion in severance agreements under *McLaren*. These include “non-compete clauses,” “no solicitation clauses,” “no poaching clauses,” “broad liability releases,” and “covenants not to sue which go beyond employment claims and matters as of the effective date of the agreement.”

Whether employers need to heavily modify their practices with respect to severance agreements as a result of *McLaren* and this memorandum is a case-dependent question. For all employers, however, it is a prudent time to review any “template” or “model” severance agreements used in their businesses. And for employers entering into severance agreements in *McLaren*’s immediate wake, discussing these new risks with experienced labor and employment counsel is advisable.

Harris Beach's [New York Labor and Employment attorneys](#) are closely following this situation and related matters. Should you have questions about any of these developments or navigating these changes, please feel free to reach out to attorney [Daniel J. Moore](#) at (585) 419-8626 and dmoore@harrisbeach.com, attorney [Roy R. Galewski](#) at (585) 419-8661 and rgalewski@harrisbeach.com, attorney [Ibrahim Tariq](#) at (585) 419-8556 and itariq@harrisbeach.com or the Harris Beach attorney with whom you most frequently work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York State, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as New Haven, Connecticut, Washington, D.C. and Newark, New Jersey.

To read more insights on labor issues:

- [NLRB Update: Are Confidentiality and Non-Disparagement Clauses Now Completely Prohibited in Severance Agreements?](#)
- [H-2A Alert: Department of Labor Final Rule on Adverse Effect Wage Rates](#)
- [Notable Labor and Employment Law Developments of 2022](#)
- [Employers Must Maintain Digital Copies of Workplace Postings](#)
- [New Requirements for New York Businesses Employing Nursing Mothers](#)
- [New York City Pay Transparency Law To Affect Employers Hiring In NYC And Labor Certifications For Foreign National Employees](#)

■ AUTHORS

Roy R. Galewski
Member
(585) 419-8661
rgalewski@harrisbeach.com

Daniel J. Moore
Member
(585) 419-8626
dmoore@harrisbeach.com

Ibrahim Tariq
Associate
(585) 419-8556
itariq@harrisbeach.com

Attorney Advertising. Prior results do not guarantee a similar outcome.

© 2022 Harris Beach PLLC

Content current as of March 29, 2023 7:27 am