

NLRB UPDATE: ARE CONFIDENTIALITY AND NON- DISPARAGEMENT CLAUSES NOW COMPLETELY PROHIBITED IN SEVERANCE AGREEMENTS?

INSIGHT

Most employers have seen recent headlines about the National Labor Relations Board's stance that employee severance agreements will be deemed unlawful if they contain confidentiality or non-disparagement provisions. This ruling covers both unionized and nonunionized businesses in the private sector. Employers should consider taking action to help insulate their severance agreements in the event of a challenge.

WHAT HAPPENED WITH CONFIDENTIALITY AND NON-DISPARAGEMENT CLAUSES?

On February 21, 2023, the National Labor Relations Board ("NLRB" or "Board") issued its decision in *McLaren Macomb*, 372 NLRB No. 58 (2023), a case involving early-pandemic-era layoffs and severance agreements. The Board held that simply offering an employee a severance agreement is unlawful if the agreement conditions severance payment on the forfeiture of the employee's rights under Section 7 of the National Labor Relations Act (the "Act" or "NLRA"). Section 7 generally protects employees' rights to self-organization, to join labor organizations, and to engage in "other concerted activities" to improve the workplace. For example, Section 7 rights typically include actions such as making public statements about the workplace, discussions about terms and conditions of employment, working with and assisting co-workers with workplace issues, and cooperating with the NLRB's investigations and litigation. The *McLaren Macomb* decision makes clear that a severance agreement violates the NLRA if its terms interfere with employees' exercise of their Section 7 rights.

In *McLaren Macomb*, a unionized hospital laid off several employees as a result of challenges stemming from the COVID-19 pandemic. The hospital issued severance agreements to laid-off employees which contained standard confidentiality and non-disparagement clauses. The NLRB's prior precedent suggested these clauses are lawful, but the *McLaren Macomb* ruling leaves employers with new rules and restrictions.

The "Confidentiality Agreement" at issue in the *McLaren Macomb* severance agreements states:

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.

The "Non-Disclosure" clause in the *McLaren Macomb* reads as follows:

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 rep representatives.

WHAT DID THE NLRB SAY ABOUT CONFIDENTIALITY CLAUSES?

The Board ruled the confidentiality clause used in the severance agreements is unlawful because it prohibits employees from disclosing the terms of the severance agreement "to any third person," and that such a broad prohibition on disclosure would essentially prevent employees from disclosing potentially unlawful provisions in an agreement. Such language, according to the NLRB, would deter employees from filing charges with the NLRB or assisting the agency in an investigation. The Board also reasoned the confidentiality clause would prohibit employees from discussing their severance agreements with other employees, or, with union representatives.

WHAT DID THE NLRB SAY ABOUT NON-DISPARAGEMENT CLAUSES?

The Board found the clause in *McLaren* unlawful because it prevents "public statements by employees about the workplace," and could "encompass employee conduct regarding any labor issue, dispute, or term and condition of employment of the [hospital]." The Board cited the clause's lack of a temporal limitation, which theoretically stifles all communication indefinitely. The NLRB also held the clause is overly broad in its scope: it applies to the hospital, but also to its officers, directors, employees, agents and representatives. Moreover, the Board noted that "disparagement" itself is not defined in the severance agreement.

DOES THIS MEAN EMPLOYERS MUST STOP USING CONFIDENTIALITY CLAUSES AND NON-DISPARAGEMENT CLAUSES IN AGREEMENTS WITH EMPLOYEES?

Not necessarily, but employers should be careful in how severance agreements are drafted to limit the risk posed by the *McLaren Macomb* decision.

To begin, it is important to remember the NLRA does not provide Section 7 rights to certain workers who are excluded from the Act's coverage. For example, managers and supervisors do not have Section 7 rights and the holding in *McLaren Macomb* should not impact employers' severance agreements with their supervisory and management personnel. Close examination and analysis is often needed to determine whether a worker qualifies as an excluded supervisor or manager.

In addition, the NLRB's decision in *McLaren Macomb* addresses the specific language in the severance agreements used in that case. Unfortunately, the decision does not provide a "roadmap" to ensure future severance agreements satisfy the NLRB standards, and we expect additional NLRB decisions, and decisions from the federal circuit courts, to further define the restrictions over time.

The Board did, however, provide language suggesting factors that might have resulted in a different outcome. For example, a non-disparagement clause that narrowly defines "disparagement," that limits the scope of disparagement to "past employment" and/or that contains a reasonable temporal restriction may survive the Board's scrutiny if challenged.

As for confidentiality clauses, the Board's decision did not comment on employers' rights to safeguard their trade secrets, or their confidential and proprietary information — arguably these items are still protectable by a confidentiality clause. At the same time, the *McLaren* decision strongly suggests a confidentiality clause with a blanket prohibition on discussing an agreement's terms will be deemed unlawful. (For employers in New York, the *McLaren* decision should also be reviewed in the context of settlement agreements resolving discrimination claims, which carries its own mechanisms for implementing confidentiality clauses).

Two important considerations were unfortunately not addressed in the Board's decision: "disclaimer" and "severability" clauses. A "disclaimer" clause purports to preserve an employee's right to engage in activity protected by Section 7 of the NLRA, even if the remainder of the agreement might inadvertently or impliedly infringe on those rights. Such disclaimer language was not present in the *McLaren* agreement, and the Board did not delve into whether this would have changed the analysis. A "severability" clause acts to preserve the remainder of an agreement if one provision is deemed invalid. This, too, was missing from the agreement in *McLaren* and was not addressed by the NLRB.

HOW CAN EMPLOYERS MOVE FORWARD IN LIGHT OF THIS NEW DECISION?

The *McLaren* decision applies to all private sector employers — whether unionized or not. Section 7 rights apply to both union and non-union workers (other than specifically excluded workers, such as supervisors and managers). Employers will need to determine what approach to take when drafting future severance agreements, and this analysis should include careful evaluation of your entity's tolerance for risk and the advice of counsel. All employers should review and evaluate their severance agreements and consider adding disclaimer and severability clauses. Beyond this, employers will need to weigh the risks and benefits of deleting or modifying their typical confidentiality and non-disparagement language and consider edits that may decrease the risk of a successful challenge at the NLRB.

As noted above, severance agreements with managers and supervisors are not impacted by the NLRB's decision, but if there is a question as to whether a worker meets the NLRA test for managerial or supervisory status, this issue must be closely evaluated. The fact that a worker is deemed a supervisor for purposes of a different law (for example, overtime exempt employees under applicable wage-and-hour laws) does not necessarily mean that worker is supervisory or managerial for purposes of the NLRA.

Finally, remember that while the *McLaren* decision dealt with severance agreements, the NLRB may apply the same rules and restrictions to other forms of employment agreements and policies. Employers should expect continued NLRB scrutiny of various employment documents.

Should you have questions about any of these developments or upcoming changes, please feel free to reach out to attorney [Daniel J. Moore](mailto:dmoore@harrisbeach.com) at (585) 419-8626 and dmoore@harrisbeach.com, attorney [Roy R. Galewski](mailto:rgalewski@harrisbeach.com) at (585) 419-8661 and rgalewski@harrisbeach.com, or to 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.

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NEW YORK AMENDS NEW PAY TRANSPARENCY LAW TO CLARIFY IMPACT ON REMOTE WORKERS, RECORD KEEPING AND MORE

INSIGHT

New York state recently made a few notable amendments to its Pay Transparency Law requiring New York employers to include pay ranges and job descriptions in advertisements for jobs, promotions and transfer opportunities.

After the Pay Transparency Law – which goes into effect on September 17, 2023 – was signed into law by Governor Hochul in December of 2022, many questions remained unanswered, particularly with respect to its applicability on remote and multi-state workers, as well as with regard to certain record-keeping obligations.

Prior to the recent amendments, the law was applied to all jobs which “can or will” be performed, at least in part, in the state of New York. This language seemed broad enough to cover remote positions outside of the state, but the new amendment confirms as much. Specifically, the Pay Transparency Law now states that it applies to advertisements and postings for jobs which will be “physically performed, at least in part, in the state of New York, including a job, promotion, or transfer opportunity that is physically performed outside of New York but reports to a supervisor, office, or other work site in New York.”

The amendments also add a definition of “advertise”, which appears to be in response to confusion over obligations relating to unadvertised positions. Specifically, the law now states that “advertise,” means “to make available to pool of potential applicants for internal or public viewing, including electronically, a written description of an employment opportunity.”

Finally, the law removed a section which formerly imposed obligations on employers to keep records pertaining to compensation ranges and job descriptions. From a practical standpoint, however, it still might make sense for employers to maintain these records to better allow them to provide accurate wage ranges or defend the accuracy of a job posting in the event of a dispute.

Given the recent amendments, there now exists some clarity regarding the applicability of the New York Pay Transparency Law, but the law does still direct the New York Department of Labor to issue regulations, so there will likely be additional clarifications once the Department of Labor issues those regulations. Harris Beach’s New York [Labor and Employment Practice Group](#) is monitoring developments.

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