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Locke Lord QuickStudy: The NLRB's General Counsel Seeks Further Restrictions on Confidentiality and ?Non-Disparagement Provisions in Severance Agreements

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Following the recent decision in the matter of *McLaren Macomb*, the National Labor Relations Board's ("NLRB") General Counsel, Jennifer Abruzzo ("GC Abruzzo"), issued a memo detailing her view of confidentiality and non-disparagement provisions in severance agreements and compliance with the National Labor Relations Act ("NLRA" or the "Act"). Importantly, the GC memorandum is not law, but it indicates how GC Abruzzo intends to address these issues in her investigatory and prosecutorial capacity. Notably GC Abruzzo's memorandum discusses:

The Continued Viability of Severance Agreements

Per the memorandum, severance agreements are not banned and, in fact, there is NLRB authority approving of them so long as certain criteria are met. Specifically, to be valid under the Act, a severance agreement may only waive "the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement." However, severance agreements cannot have overly broad provisions affecting employees' rights to engage with each other "to improve their lot as employees." GC Abruzzo specifically notes that this limitation extends to efforts beyond the immediate employee-employer relationship, which may include employees "accessing the [NLRB], their union, judicial or administrative or legislative forums, the media or other third parties."

As for confidentiality provisions in severance agreements, GC Abruzzo suggests that they should be "narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justification," but not the ability of individuals to discuss the severance agreement's terms. Similarly, for non-disparagement provisions, GC Abruzzo suggests, "a narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity."

The Retroactivity of the *McLaren Macomb* Decision

GC Abruzzo's memorandum notes that, unless otherwise stated, NLRB decisions must be applied retroactively.

Accordingly, because it does not state otherwise, GC Abruzzo's position is that *McLaren Macomb*, and its holding regarding confidentiality and non-disparagement provisions, must be applied retroactively. Further, the memorandum contends that, while an unlawful proffer of a severance agreement with overly broad terms may be subject to the NLRA's six-month statute of limitations, maintaining or enforcing a previously-entered agreement with such terms would be a continuing violation of the Act and, therefore, a resulting claim would not be untimely under the Act. However, GC Abruzzo indicated that the NLRB may be willing to settle cases involving existing severance agreements if the employer notifies former employees that an overbroad provision is no longer applied. She further noted that employers could potentially avoid liability arising from offering an improper agreement by proactively notifying the relevant employee(s) that any improper provisions are null and void and the employer will not seek to enforce them.

Supervisory Severance Agreements as Potential Subjects of NLRB Scrutiny

Generally speaking, the NLRA does not apply to supervisory employees. For that reason, in our previous QuickStudy we concluded that the *McLaren Macomb* decision only applies to non-managerial employees. However, GC Abruzzo is pressing to expand the decision to encompass supervisory employees in certain circumstances. Specifically, GC Abruzzo takes the position that adverse employment action against a supervisor who refuses to issue a severance agreement with overbroad provisions would constitute retaliation under the NLRA. She also argues that the *McLaren Macomb* decision should be applied to the extent a severance agreement prohibits a supervisor from participating in NLRB proceedings.

Severability Clauses and Disclaimers in Severance Agreements

The memorandum indicates that, while a fact-specific inquiry is required in all instances, NLRB Regional offices should continue to favor striking only the impermissible provision(s) in severance agreements rather than invalidating the entire document, if possible. This approach should be applied even if a severance agreement does not already provide for the severance of any provision that conflicts with applicable law. Nevertheless, even if a severance agreement contains a severability clause or disclaimers related to impermissible provisions, GC Abruzzo's position is that the employer would be liable for any mixed or inconsistent messages that could impede an employee's exercise of their rights under the Act.

Refusals to Sign or Specific Requests as Defenses to Invalid Severance Agreements

Per the *McLaren Macomb* decision, merely offering a severance agreement with an impermissible confidentiality or non-disparagement provision is its own, separate, NLRA violation. GC Abruzzo's memorandum reiterates the decision's conclusion that the individual need not sign such an agreement for the employer to incur this liability. Going further, the memorandum indicates that, even if it is included at the request of the individual, by offering an agreement with an impermissible confidentiality or non-disparagement provision the employer may still be liable under the Act.

Additional Provisions under Scrutiny

Finally, while not addressed in the *McLaren Macomb* decision, GC Abruzzo used her recent memorandum to take aim at other severance agreement provisions she considers problematic. Specifically, provisions she identifies as

potentially contrary to an employee's NLRA rights include: non-competition, non-solicitation, and no poaching clauses; broad liability releases and covenants not to sue that go beyond employment claims and matters as of the effective date of the agreement; and requirements for individuals to cooperate with employers in investigations.

Practical Implications for Employers

As discussed, although GC Abruzzo's memorandum does not constitute binding legal authority, it provides a framework for NLRB Regional offices investigating and prosecuting matters involving severance agreements. While there is no guarantee that the judicial arm of the NLRB will agree with GC Abruzzo's position, given its current membership and recent *McLaren Macomb* decision, it is likely that at least some of that position would be upheld through an enforcement action. Ultimately, the federal appellate courts will have the final say on some of these matters.

Nevertheless, per GC Abruzzo's own memorandum, *McLaren Macomb* does not bar the use of confidentiality or non-disparagement provisions in severance agreements. Instead, that decision and the memorandum only require employers to be cautious with the content and scope of such provisions. In short, confidentiality and non-disparagement provisions should be carefully tailored to avoid running afoul of the Act. As noted in our previous QuickStudy, employers should be particularly cautious in light of the NLRB's recent push to impose consequential damages for violations of the Act because that can significantly increase the financial toll of any unfair labor practice finding.

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