May 23, 2023

NLRB General Counsel Clarifies Limits on Broad Confidentiality and Non-Disparagement Provisions in Employment Documents

As set forth in our previous alert, in *McLaren Macomb*, the National Labor Relations Board (Board) ruled that employers merely offering non-supervisory employees severance agreements containing overly broad confidentiality and non-disparagement provisions violates the National Labor Relations Act (NLRA). This decision left employers with many unanswered questions about what constituted compliance and the status of their existing agreements. On March 22, the Board's General Counsel issued further guidance.

The main points from the General Counsel's memorandum are as follows:

Severance agreements remain permissible. Severance agreements, including those waiving employment claims up to the date of the agreement, are still proper if they do not have overly broad provisions that affect the rights of employees to engage with one another or third parties (including the Board, a union or customers) to improve their working conditions. In addition, the Board's rules on acceptable terms in non-Board settlements of unfair labor practice charges still apply.

Overly broad provisions are unlawful whether or not they are signed. Employers violate the NLRA simply by offering overly broad confidentiality and non-disparagement provisions to employees—even if employees request, or acquiesce and agree to, such terms—since employees cannot waive the future exercise of their rights.

Statutory supervisors may be protected. Even though statutory supervisors are generally not covered by the NLRA, employers may not retaliate against supervisors for refusing to proffer unlawful terms to employees.

Application is retroactive. Despite a six-month statute of limitations under the NLRA, maintaining and/or enforcing an agreement that contains overly broad provisions would be considered a continuing violation of the NLRA, even if the parties executed the agreement more than six months prior.

Unlawful terms are severable. Assuming there are no other unfair labor practices warranting further remedy, if the Board deems a provision to be overly broad, the remedy is to void only the overly broad provision, not the entire agreement. The General Counsel's memorandum indicates that this is the appropriate remedy regardless of whether the agreement contains a severability clause. Employers that proactively provide written notice to employees that overly broad provisions in agreements are no longer enforceable may avoid an NLRA violation.

Former employees are protected. Rights under the NLRA are not limited to only current employees, but also extend to former employees who play an important role in sharing information with current employees or providing evidence to the Board in a way that constitutes mutual aid and protection.

More than severance agreements are affected. Overly broad provisions in any employer communication to employees (including pre-employment or offer letters) that tend to interfere with, restrain or coerce employees' exercise of their rights

would be unlawful if not narrowly tailored to address justification for impinging on employees' rights. Notably, the General Counsel also stated her belief that other provisions in severance agreements, in addition to the confidentiality and non-disparagement provisions, might also interfere with employees' rights under the NLRA. These provisions include non-compete clauses, no-poaching clauses, broad employee liability releases, covenants not to sue that go beyond the employer or employment claims as of the effective date of the agreement, and provisions that require cooperation with investigations or legal proceedings.

Employers may continue to protect trade secrets and prohibit malicious defamation. Narrowly tailored confidentiality provisions that restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications as well as non-disparagement provisions limited to employee statements about the employer and narrowly tailored to meet the definition of defamation as being maliciously untrue (i.e., the statements are made with knowledge of their falsity or with reckless disregard for their truth or falsity) may still be considered lawful.

Disclaimer language may be ineffective. While disclaimer language may be useful to resolve ambiguity over vague terms, it would not necessarily cure overly broad provisions. The General Counsel is recommending that the Board formulate a model prophylactic statement of employee rights, which would include several types of protected conduct relating to union organizing and discussing working conditions with co-workers, that employers could use to aid in their compliance.

To best protect their interests, employers should consult with experienced labor counsel and review their employment documents for compliance with the standards set forth in *McLaren Macomb* and the General Counsel's guidance.

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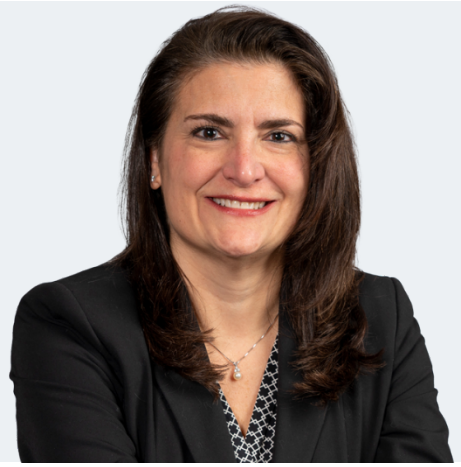

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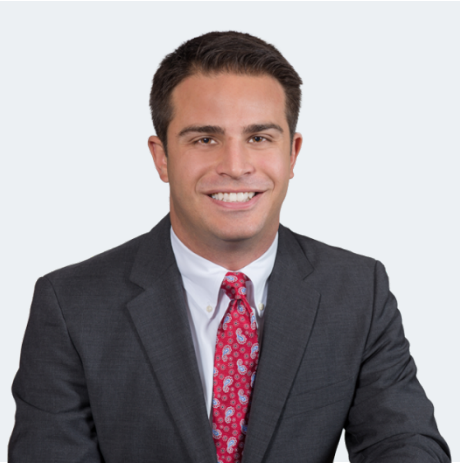

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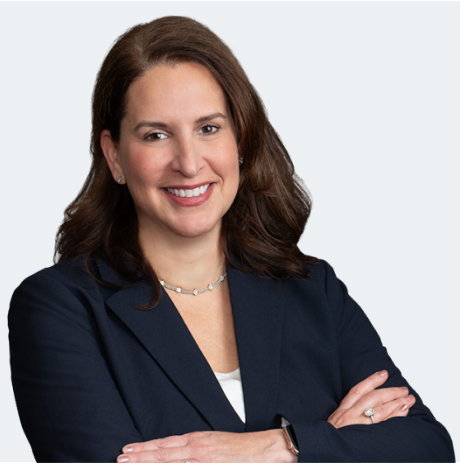

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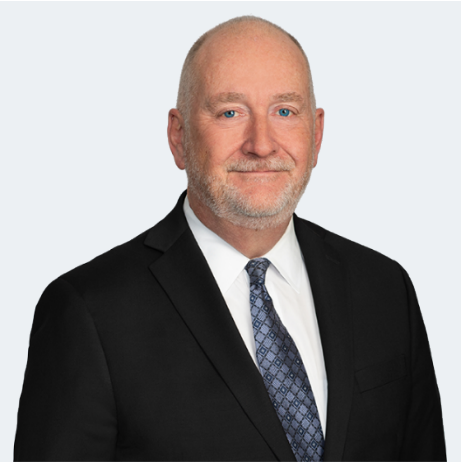

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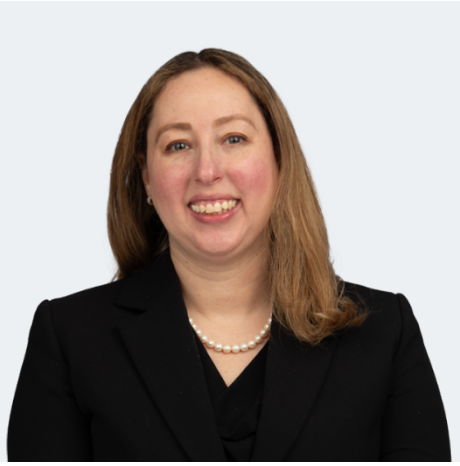

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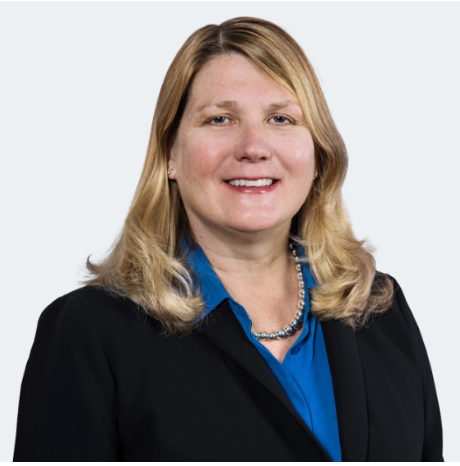

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