Non-Disclosure and Non-Disparagement Provisions Under Scrutiny

Recent Case Law, Legislation Affecting Employment Agreements

By Susan L. Nardone and Zachary B. Posess

The inclusion and scope of non-disparagement and non-disclosure provisions in employment agreements has come under increased scrutiny in the last few years. On both the federal and state level, such provisions have been questioned for their potential effect on an employee's ability to discuss the terms and conditions of employment or to participate freely in a governmental investigation. Non-disparagement and non-disclosure provisions are most commonly used in separation agreements presented upon an employee's departure from the employer (*e.g.*, severance agreements) or in settlement agreements involving the resolution of a disputed claim. Here, we address recent developments at the National Labor Relations Board (NLRB) and in New Jersey's courts and Legislature.

The NLRB's Latest Missive

Historically, the NLRB has expressed skepticism over whether non-disparagement and non-disclosure provisions can peacefully coexist with an employee's right to engage in protected concerted activities, such as the right to unionize or come together to advance their interests as employees, under Section 7 of the National Labor Relations Act (NLRA). The Board's position has fluctuated significantly in the past decade. For many years, it maintained that including these clauses in employment contracts violated Section 8(a)(1) of the NLRA if

they interfere with, restrain, or coerce an employee's exercise of Section 7 rights. However, in 2020 decisions in *Baylor University Medical Center* and *IGT d/b/a International Game Technology*, a Republican-led Board held that severance agreements containing non-disclosure and non-disparagement clauses were not unlawful.[1] Instead of evaluating the language of the agreement, the Board focused its inquiry on the circumstances surrounding the offer of severance, including whether the severance agreement was mandatory, restricted post-employment activities, or was offered to employees who had accused the employer of wrongdoing. Absent one of these external conditions, the Board concluded that the inclusion of non-disparagement and non-disclosure provisions did not, on its own, constitute a violation of Section 8(a)(1).

However, in the NRLB's Feb. 21 decision in *McLaren Macomb*, a Democrat-led Board expressly overturned the decisions in *Baylor* and *IGT* and held that the mere proffer of an unlawful severance agreement runs afoul of Section 8(a)(1).[2] The respondent was a Michigan-based hospital employing approximately 2,300 employees, 350 of whom had recently unionized. In accordance with federal regulations prompted by the coronavirus pandemic, the hospital temporarily furloughed 11 bargaining unit employees it deemed nonessential. Several months later, the hospital permanently furloughed those 11 employees and offered each employee a "Severance Agreement, Waiver and Release." All 11 employees signed the severance agreement.

In pertinent part, the severance agreement in *McLaren*: (1) required the employees to release any claims against the hospital arising out of the termination of their employment ("release provision"); (2) broadly prohibited the employees from making "statements to the [hospital's] employees or to the general public which could disparage or harm the image of the [hospital], its parent and affiliated entities and their officers, directors, employees, agents and representatives" ("non-disparagement provision"); and (3) forbade employees from disclosing the terms of the severance agreement "to any third person, other than a 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" ("non-disclosure provision"). The severance agreement also included an "Injunctive Relief" provision imposing substantial monetary and injunctive sanctions on any employee who breached the non-disparagement or non-disclosure provisions.

The primary issue before the Board was whether the hospital had violated Section 8(a)(1) by offering the severance agreement to permanently furloughed employees. The Board ultimately ruled that it had. Departing from its findings in *Baylor* and *IGT*, the Board preliminarily concluded that it need not look beyond the language of the Severance Agreement itself to determine the legality of the contested provisions.

The Board began its analysis with the non-disparagement provision, which it characterized as a "comprehensive ban [that] would encompass employee conduct regarding any labor issue, dispute, or term and condition of employment." It noted that the provision did not define disparagement; was not limited to matters arising during employment; had no temporal limitations; extended to statements made against the employer's parents and affiliated entities and their officers, directors, employees, agents and representatives; and imposed onerous sanctions on a breaching employee. The Board took umbrage with the fact that the non-disparagement provision would preclude an employee from cooperating with the NLRB in its investigation or litigation of an unfair labor practice. It concluded that the non-disparagement provision created a "sweepingly broad bar" against post-employment conduct and was therefore unenforceable.

The Board found that the Non-Disclosure Provision was impermissible for similar reasons. It held that the restrictions set forth in the Non-Disclosure Provision "would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the [hospital's] use of the severance agreement." It emphasized that the furloughed employees were pre-

SUSAN L. NARDONE *is a director in the Employment & Labor Law Group at Gibbons P.C. in the firm's Newark office. She is an experienced litigator who offers guidance to regional and national employers on proactively ensuring compliance with applicable employment laws and obligations and provides strategic and preventive advice and counseling to her clients on everyday employment-related issues.*

ZACHARY B. POSESS *is an associate in the Employment & Labor Law Group at Gibbons P.C. in the firm's Newark office. He is experienced in employment and labor law and served as a law clerk in New Jersey's Appellate Division.*

cluded from "disclosing even the existence of an unlawful provision." The Board further determined that the nondisclosure provision could stifle communications between employees intended to improve the conditions of employment. According to the Board, a signor would not be permitted to discuss "the terms of the severance agreement with former coworkers who could find themselves in a similar predicament facing the decision whether to accept a severance agreement." As such, the Board found both provisions to be unnecessarily broad and unduly restrictive on the former employees' conduct.

Most significantly, the Board expressly overruled its prior rulings in *Baylor* and *IGT* that the employer must have committed an additional unfair labor practice to find a Section 8(a)(1) violation. Instead, the *McLaren* decision proclaims that the mere offering of a coercive agreement could have a "potential chilling effect" on other employees' exercise of Section 7 rights, even if those employees had not actually signed the agreement. The Board emphasized that, were it to consider external circumstances (such as whether the employee actually raised an unfair labor charge or signed the agreement), it may incentivize employers to offer overly restrictive severance agreements. If that were the case, the Board reasoned, it could only intervene "belatedly" to strike down the agreement after an employee had already signed it and then lodged a complaint. Instead, according to the decision in *McLaren*, the Board must place significant value on "the high potential that coercive terms in separation agreements may chill the exercise of Section 7 rights."

The Board also disagreed with the finding in *Baylor* and *IGT* that the employer's animus toward an employee's exercise of Section 7 rights has any bearing on whether a provision violates Section 8(a)(1). However, it did highlight that the hospital shirked its duties to provide adequate notice to Local 40, RN Staff Council, Office & Professional Employees International Union (OPEIU), AFL-CIO. According to the Board, the hospital erred by failing to disclose to the union that the employees' furloughs had become permanent, thereby precluding the union from engaging in negotiations regarding that decision and its effects. Additionally, the hospital did not notify the union that it was presenting the employees with the severance agreement. The Board found that, by not apprising the union of these actions, the hospital had "entirely bypassed and excluded the union from the significant workplace events here: employee's permanent job loss and eligibility for severance benefits."

In effect, the decision in *McLaren* represents a return to the Board's longstanding rule that an employer violates Section 8(a)(1) of the NLRA by including broad non-disparagement and non-disclosure provisions in a severance agreement if they have "a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances." Although *McLaren* involved a unionized workforce, the rights set forth in Section 7 apply to union and nonunion employees alike. Accordingly, employers with nonunionized workforces must heed the Board's decision.

In the immediate aftermath of *McLaren*, NLRB General Counsel Jennifer Abruzzo issued a memo to all NLRB field offices providing guidance and answering inquiries about the import of the decision. She initially noted that the Board's ruling in *McLaren* does not represent an outright ban on severance agreements, so long as "they do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot." Accordingly, Abruzzo confirmed that severance agreements with a general release waiving the employee's right to pursue employment claims arising prior to the date of the agreement are still permissible. She also noted that confidentiality provisions may still be enforceable if they are "narrowly-tailored to restrict the dissemination of proprietary information or trade secret information for a period of time based on legitimate business justifications." Abruzzo, however, placed stricter

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confines on a permissible non-disparagement provision, noting it must be "narrowly-tailored, justified" and "limited to employee statements about the employer that meet the definition of defamation," *i.e.*, statements made with knowledge of their falsity or with reckless disregard for their truth or falsity.

Abruzzo's memo also reinforces several of the substantive portions of *McLaren*. First, she confirmed that outside circumstances, such as whether the employee actually signed the agreement, would remain immaterial to the Board's analysis of a non-disparagement or non-disclosure provision. Additionally, she highlighted that *McLaren* applies to both current and former employees, since Section 7 rights "do not depend on the existence of an employment relationship between the employee and the employer," but not to supervisors, who are not covered by the NLRA. She acknowledged that a savings clause or disclaimer might be useful "to resolve ambiguity over vague terms" but would not rehabilitate overly broad provisions. Abruzzo offered a very detailed "model prophylactic statement of rights" that could be included instead. She further clarified that the decision can be applied retroactively to prior agreements that continue to be maintained and enforced by the employer. Finally, in what could be viewed as predictive of the Board's future decisions, Abruzzo noted that several other common provisions in severance agreements could be viewed as impinging an employee's exercise of their Section 7 rights, including non-compete clauses, no solicitation clauses, and no poaching clauses.

Notably, the NLRB's decision in *McLaren* aligns with the Security and Exchange Commission's (SEC) rules governing confidentiality agreements proffered by public companies and SEC registrants. In 2011, the SEC adopted Rule 21F-17 prohibiting companies from using confidentiality agreements that "impede an individual from communicating directly with the Commission staff about a possible securities law violation."[3] The reasoning behind Rule 21F-17 is similar to the Board's in *McLaren* – that employees must be able to freely report violations to enforcement agencies. The SEC's implementation of this rule, however, has been inconsistent and largely driven by the political affiliations of the executive branch. But that pendulum may be swaying toward increased enforcement actions. In June 2022, the SEC issued an order concluding that onboarding documents signed by thousands of employees violated Rule 21F-17 because they included a confidentiality provision that required employees to obtain written consent from the company before disclosing financial or business information to any third party—including the Commission itself. As a remedy, the SEC required the employer to carve out an exemption in future contracts that expressly permits employees to make whistleblower reports to the SEC, which many employers have been doing for years.[4]

What's the Latest in New Jersey?

At the state level, several years ago New Jersey's Legislature targeted non-disclosure provisions as an improper restriction on employees' rights. Senate Bill No. 121 (S121), signed by Gov. Phil Murphy on March 19, 2019, amended the New Jersey Law Against Discrimination (NJLAD) to prohibit non-disclosure provisions in employment contracts or settlement agreements that are intended to conceal the details of discrimination, retaliation, or harassment claims. S121 expressly states that such provisions are unenforceable and against public policy in New Jersey.[5]

The limitations of S121 were tested in a 2022 Appellate Division case, *Savage v. Township of Neptune*.[6] The plaintiff, a sergeant in the Neptune Police Department, sued the Department alleging sexual harassment, discrimination, hostile work environment, and retaliation for filing an EEOC charge. The parties settled in 2014, and the resulting settlement agreement included a non-disparagement provision. In 2016, Christine Savage filed a new complaint alleging continued sex discrimination, harassment, retaliation, and aiding and abetting discrimination in violation of the NJLAD. She specifically alleged the defendants failed to honor the letter and spirit of the 2014 settlement agreement because the department promoted three men and thereby "sen[t] a message to the rank and file that male dominance of the police department would remain the status quo."

In July 2020, the parties entered into a second settlement agreement and general release that included a negotiated, mutual non-disparagement provision. Several months later, the department filed a motion to enforce the 2020 settlement agreement, alleging that an interview Savage gave to NBC New York violated the non-disparagement provision. In the interview, Savage stated that the department had "abused [her] for about eight years" and she felt "vindicated" by the settlement. She also indicated the department did not "want women there," "oppressed" its female employees, and maintained a "good ol' boy system" when making promotion decisions. Savage opposed the motion, arguing the non-disparagement provision violated the amended NJLAD, was against public policy, and effectively "gagged" her from discussing her claims publicly.

The Appellate Division concluded that the non-disparagement provision was enforceable because the Legislature did not specifically forbid such provisions when drafting and enacting S121. The court also emphasized that the non-disparagement provision in the 2020 settlement agreement was negotiated, agreed upon as a material term, and created a "mutual and reciprocal obligation" that protected both parties, as

opposed to a non-disclosure provision that affords the employer a one-sided benefit. Nevertheless, the court held that Savage's interview with NBC New York did not violate the non-disparagement provision. It reasoned that her comments were "statements about present or future behavior," and the provision only prohibited her from making disparaging statements related to "the past behavior of the parties."

Since the *Savage* decision, the New Jersey Legislature has already proposed new laws to strengthen S121. In June 2022, lawmakers introduced Senate Bill 2930 (S2930), which would further amend NJLAD to treat non-disparagement clauses identically to non-disclosure clauses. New Jersey's Assembly proposed a companion bill (A4521) in September 2022 that has already passed and been referred to the Senate for approval. If enacted, these laws would expand the language of S121 to ban non-disclosure and non-disparagement provisions, as well as "other similar agreements," in employment contracts and settlement agreements if they have "the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment." Given the bi-partisan support for S2930 and A4521, New Jersey employers should prepare for the likelihood that these laws will take effect in the future.

Conclusion

As with any employment law-related changes, these developments require employers to take a careful look at their non-disparagement and non-disclosure provisions and evaluate whether and how to use them. The *McLaren* decision offers something of a roadmap for permissible provisions. New Jersey employment law practitioners have lived with S121 and its effect for four years. If S2930 or A4521 further amend the NJLAD, we will all be ready for it. ■

Endnotes

1. *Baylor University Medical Center*, 369 NLRB No. 43 (2020); *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020).
2. *McLaren Macomb*, 372 NLRB No. 58 (2023).
3. 17 C.F.R. § 240.21F-17.
4. *In the Matter of The Brink's Co.*, Release No. 95138 (June 22, 2022).
5. S121 also bans employment contracts that contain a waiver of any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment. Last year, the Appellate Division in *Antonucci v. Curvature Newco, Inc.,* No. A-1983-20 (App. Div. Feb. 15, 2022), concluded that the Federal Arbitration Act preempts this provision in S121.
6. *Savage v. Twp. of Neptune*, 472 N.J. Super. 291 (App. Div. 2022).