OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 23-05 **March 22, 2023**

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

RE: Guidance in Response to Inquiries about the *McLaren Macomb* Decision

On February 21, 2023, the Board issued *McLaren Macomb*, 372 NLRB No. 58, returning to longstanding precedent holding that employers violate the National Labor Relations Act (NLRA or Act) when they offer employees severance agreements that require employees to broadly waive their rights under the Act. Specifically, the Board held that where a severance agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates Section 8(a)(1) of the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of those rights - both by the separating employee and those who remain employed. I am issuing this Memo to assist Regions in responding to inquiries from workers, employers, labor organizations, and the public about implications stemming from that case.

The severance agreement at issue in the case contained overly broad non-disparagement and confidentiality clauses that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights. Specifically, the non-disclosure provision contained a non-disparagement clause that advised the employees that they are prohibited from making statements that could disparage or harm the image of the employer, its parent and affiliates, and their officers, directors, employees, agents and representatives. And, the confidentiality clause advised employees that they are prohibited from disclosing the terms of the agreement to anyone, except for a spouse or professional advisor, unless compelled by law to do so. The severance agreement included monetary and injunctive sanctions for breach of these provisions.[1]

The Agency acts in a public capacity to protect public rights in order to effectuate the Congressionally-mandated public policy of the Act.[2] The underlying Board policy and purpose depends on employees' freedom to engage in Section 7 rights and to assist each other and access the Agency. And, the future rights of employees as well as the rights of the public may not be traded away in a manner which requires forbearance from future

[1] Notably, the employees' collective bargaining representative, OPEIU, was not provided with notice nor included in discussions about the permanent furloughs and related severance agreement, thus the employer was found to have violated Section 8(a)(5) of the Act.
[2] *National Licorice Co. v. NLRB*, 309 US 350, 362-64 (1940).

charges and concerted activities.[3] Thus, the Board determined, based on a plethora of nearly a century of settled law, that employees may not broadly waive their rights under the Act, and that agreements between employers and employees that restrict employees from engaging in activity protected by the Act or from filing unfair labor practice (ULP) charges with the Agency, helping other employees in doing so, or assisting during the Agency's investigatory process are unlawful.

In so finding, the Board overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT*, 370 NLRB No. 50 (2020), which were wrongly premised on the notion that a showing of animus and additional coercive or otherwise unlawful conduct by the employer independent of the plain, overly broad language of the severance agreement was required in order to find a violation related to the severance agreement. As the Board noted, while the presence of additional violations would enhance the coercive potential of the severance agreement, the absence of such conduct does not and cannot eliminate the potential chilling effect of an unlawful severance agreement.

With that context in mind, I offer responses to some inquiries below:

Are severance agreements now banned?

No. In fact, prior Board decisions approved severance agreements where the releases waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement.[4] Thus, lawful severance agreements may continue to be proffered, maintained, and enforced if they do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees. This includes the rights of employees to extend those efforts to channels outside the immediate employee-employer relationship, such as through accessing the Board, their union, judicial or administrative or legislative forums, the media or other third parties.

Why should the circumstances surrounding the proffer not necessarily matter?

Surrounding circumstances do not matter when objectively analyzing whether a provision is facially lawful or not. And, in fact, in footnote 47 of the decision, the Board specifically said that an employer can have no legitimate interest in maintaining a facially unlawful provision in a severance agreement, much less an interest that somehow outweighs the Section 7 rights of employees.

[3] *Mandel Security Bureau*, 202 NLRB 117, 119 (1993).
[4] *Hughes Christensen Co.*, 317 NLRB 633 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996) (severance agreement was found lawful after an examination of the facial language led to the determination that it did not unlawfully waive the employee's right of access to the Board); *First National Supermarkets*, 302 NLRB 727 (1991); *Philips Pipe Line Co.*, 302 NLRB 732 (1991).

What if an employee does not sign the severance agreement?

Whether or not the employee actually signed the severance agreement is irrelevant for purposes of finding a violation of the Act since the proffer itself inherently coerces employees by conditioning severance benefits on the waiver of statutory rights such as the right to engage in future protected concerted activities and the right to file or assist in the investigation and prosecution of charges with the Board. That the employee did not sign the agreement does not render the employer's conduct lawful.[5]

Are severance agreements issued to supervisors beyond the scope of this decision?

While supervisors are generally not protected by the Act, under *Parker-Robb Chevrolet*,[6] the Act does protect a supervisor who is retaliated against, such as being fired, because they are refusing to act on their employer's behalf in committing an unfair labor practice against employees, in other words, they are refusing to violate the NLRA per their employer's directives. So, not only would it be violative for an employer to retaliate against a supervisor who refuses to proffer an unlawfully overbroad severance agreement, but I believe that an employer who proffers a severance agreement to a supervisor in connection with *Parker-Robb Chevrolet*-related conduct, such as preventing the supervisor from participating in a Board proceeding, could also be unlawful.

Does the decision have retroactive effect, such that it may invalidate agreements entered into prior to February 21, 2023, or would a violation only be considered if an employer attempts to enforce a previously-entered into agreement?

Board cases are presumed to be applied retroactively and this decision has retroactive application. If the Board determined that there was manifest injustice requiring prospective application, it would have so advised. Further, I believe that, while an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation language under Section 10(b), maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the Section 10(b) period would not be time-barred. I would note that Regions have settled cases involving severance agreements which had unlawfully broad terms that chilled the exercise of Section 7 rights by requiring the employer to notify its former employees that the overbroad provisions in their severance agreements no longer applied.

Would the entire severance agreement be null and void if there is just one overbroad provision?

While it is necessary to review the facts of each and every case in the first instance, Regions generally make decisions based solely on the unlawful provisions and would

[5] *Metro Networks*, 336 NLRB 63, 67, fn. 20 (2001); *Shamrock Foods*, 366 NLRB No. 117, slip op. at 2-3 & fn. 23 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019).
[6] 262 NLRB 402 (1982), enfd. sub. nom. *Automobile Salesmen Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

seek to have those voided out as opposed to the entire agreement, regardless of whether there is a severability clause or not. As mentioned previously, we have obtained settlement agreements doing just that. Relatedly, while it may not cure a technical violation of an unlawful proffer, employers should consider remedying such violations now by contacting employees subject to severance agreements with overly broad provisions and advising them that the provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions. That conduct could form the basis for consideration of a merit dismissal if a meritorious charge solely alleging an unlawful proffer is filed.

Why are former employees entitled to the same protections under the NLRA as current employees?

The Board in this case confirmed that former employees are entitled to the same protections under the Act based on the statutory language of Section 2(3), which states that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer." The Board reiterated that Section 7 rights are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employer.[7] In addition, former employees can play an important role in providing evidence to the NLRB and otherwise sharing information about the working conditions they experienced, in a way that constitutes both mutual aid and protection.

What is the role of the Board with respect to the rights of parties to make private contracts?

Per its Congressional mandate to address the inequality of bargaining power between employees, who do not possess full freedom of association or actual liberty of contract, and their employers, the Board must act in a public capacity to protect public rights to effectuate the public policy of the Act. Thus, the Board in this case correctly noted that the future rights of employees as well as the rights of the public may not be waived in a way that precludes future exercise of Section 7 rights, including engaging in protected concerted activities and accessing the Agency.

What if employees themselves request broad confidentiality and/or non-disparagement clauses?

In that unlikely scenario, I would reiterate that the Board protects public rights that cannot be waived in a manner that prevents future exercise of those rights regardless of who initially raised the issue.[8]

[7] *Cedars-Sinai Medical Center*, 368 NLRB No. 83, slip op. at 8 fn. 7 (2019); *Waco, Inc*., 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co*., 227 NLRB 1406 (1977); *Briggs Manufacturing Co*., 75 NLRB 569, 570 (1947).

[8] Based on the same reasoning, unions could not lawfully waive these rights on behalf of employees.

Is OM 07-27, which addresses acceptable terms in non-Board settlement agreements, still in full force and effect?

Yes. OM 07-27 is consistent with the *McLaren Macomb* decision. It provides guidance on, among other things, non-Board settlement agreements, which include: waivers of the right to file NLRB charges on future unfair labor practices and on future employment; waivers of the right to assist other employees in the investigation and trial of NLRB cases; narrowly-tailored confidentiality clauses[9] and clauses that prohibit an employee from engaging in non-defamatory talk about the employer; and unduly harsh penalties for breach of the agreement.

How does this decision affect other employer communications with employees, such as pre-employment or offer letters?

Based on extant Board law, overly broad provisions in any employer communication to employees that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights would be unlawful if not narrowly tailored to address a special circumstance justifying the impingement on workers' rights.

Are there ever confidentiality provisions in a severance agreement that could be found lawful?

Confidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful. See note 9, *supra*. However, confidentiality clauses that have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties are unlawful.

Are there ever non-disparagement provisions in a severance agreement that could be found lawful?

It is critical to remember that public statements by employees about the workplace are central to the exercise of employees' rights under the Act. In *McLaren Macomb*, the Board referenced *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953) and *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub. nom. *Nevada Service Employees, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009), when finding an overly broad non-disparagement ban that encompassed all disputes, terms and conditions, and issues, without a temporal limitation and with application to parents and affiliates and their officers, representatives, employees, directors and agents. Thus, a narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the

[9] *McLaren Macomb* allows for narrowly-tailored provisions, and I believe that approving a withdrawal request when a non-Board settlement has a confidentiality clause only with regard to non-disclosure of the financial terms comports with the Board's decision, would not typically interfere with the exercise of Section 7 rights, and promotes quick resolution of labor disputes.

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, may be found lawful.

Would a "savings clause" or disclaimer save overbroad provisions in a severance agreement?

While specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions. The employer may still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights. As noted in my *Stericycle* brief to the Board regarding employer rules, I asked it to formulate a model prophylactic statement of rights, which affirmatively and specifically sets out employee statutory rights and explains that no rule should be interpreted as restricting those rights, that employers may—at their option—include in handbooks in a predominant way to mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights and simplify compliance, which could also easily apply to severance agreements.[10] I noted that the description of statutory rights should focus on Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights), and likely to be chilled by overbroad rules, and provided suggested model language for inclusion to make it clear to employees that they had rights to engage in: (1) organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment; (2) forming, joining, or assisting a union, such as by sharing employee contact information; (3) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discussing wages and other working conditions with co-workers or a union; (5) taking action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (6) striking and picketing, depending on its purpose and means; (7) taking photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (8) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

Are there other provisions typically contained in severance-related agreements that you view as problematic?

Confidentiality, non-disclosure and non-disparagement provisions are certainly prevalent terms. However, I believe that some other provisions that are included in some severance agreements might interfere with employees' exercise of Section 7 rights, such as: non-

[10] This example does not mean that substantive work rules law must apply when determining whether certain provisions contained in severance agreements are lawful. See *Shamrock Foods Co.*, 366 NLRB No. 117 (2018), slip op. at 3, n.12.

compete clauses; no solicitation clauses; no poaching clauses; broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.

As always, thank you for all you do for our Agency and the public we serve. I hope this memo provides useful guidance to you in addressing questions about the *McLaren Macomb* decision. Should you receive other inquiries about the decision that are not addressed in this memo, please contact the Division of Advice.

/s/
J.A.A.