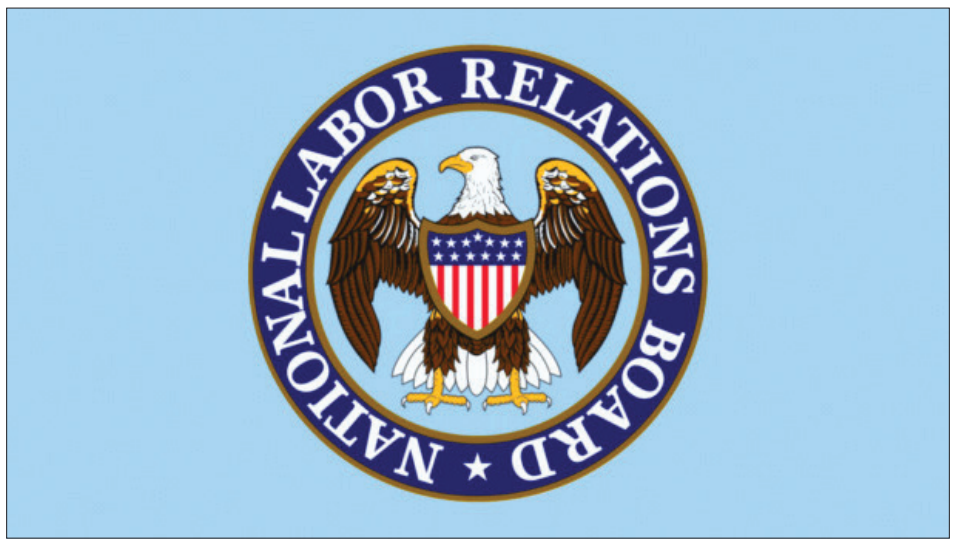
Severance Agreements One Year After *McLaren*

By Beth Deragon and Kathleen Davidson

Deragon

Davidson



Most employment attorneys are aware of the National Labor Relations Board (NLRB) *McLaren Macomb* decision from last year which reaffirmed the precedent that employers may not offer employees severance agreements that require employees to broadly waive their rights under the NLRA. *McLaren Macomb*, 372 NLRB No. 58, (February 21, 2023). The decision left many questions and gray areas.

In response, on March 22, 2023, the NLRB's general counsel issued a memorandum entitled, "Guidance in Response to Inquiries about the McLaren Macomb Decision" (the NLRB Memorandum). While this memo certainly provided more guidance than the decision, it still left a lot of unanswered questions regarding what exactly is and is not allowed. For more information on the decision and memorandum, see attorney Alexander E. Najjar's article in the April 19, 2023 issue of the *New Hampshire Bar News*.

We all waited in anticipation to see what the various members of the employment bar would do in response. Here is what we have seen:

- Many proposed severance agreements now contain disclaimers that nothing therein is intended to limit the employee's Section 7 Rights under the NLRA. From the employer side, that's an attempt to get the broadest confidentiality and anti-disparagement clauses possible, while still attempting to follow the law. From the employee side, however, most employees will have absolutely no idea what this means. Even if the employer adds language such as "concerted activity" that is still not "plain English." Since the NLRB recommended that employers go back and notify former employees that prior confidentiality and non-disparagement agreements were no longer enforceable, it is unlikely that the NLRB would consider such a disclaimer sufficient. However, this seems to be the most common edit.
- Other employers have edited their anti-disparagement clauses to match the standard for defamation. While this is likely sufficient to meet the NLRB's goal, should the paragraph now be titled anti-defamation instead of anti-disparagement? We have not yet seen an employer rename that paragraph. Anti-defamation, however, does not protect an employer from an employee bad mouthing them to customers and causing a loss of business. Would complaining about employment practices to customers instead of coworkers count as concerted activity here? Yet another gray area.
- On the confidentiality section, some employers have edited their agreements to say that the employee is just expected to keep the *amount* of their severance confidential. Such a confidentiality provision appears to be in line with the NLRB's memorandum. As a general practice tip, unrelated to the NLRB, employers may consider adding mortgage brokers into the list of excepted professionals. With today's high interest rates, many employees will be refinancing mortgages in the future and may have to source income over the last two to five years.
- Some employers have made no changes at all to their severances agreements and are refusing to make any even when employees push back. Those employers claim that the NLRB has "no teeth" and they are not at risk

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be construed liberally for the accomplishment of the purposes thereof. (Emphasis added)

Deb: The purposes, found in RSA 354-A: 1 are for the Commission "to eliminate and prevent discrimination," because it is "a matter of state concern" because:

"Discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." (Emphasis added)

The certiorari petition exposes the battle of the "shall" clauses: "*Shall close within 24 months* after filing date" versus the more inspirational "*shall be interpreted liberally* for the accomplishment of its purposes." We shall see.

(To be continued.) ♦

Nancy Richards-Stower advocates for New Hampshire and Massachusetts employees and invented/owns/operates trytosettle.com, a confidential bid, online settlement service. Her website is ***jobsandjustice.com****.*

Debra Weiss Ford is the managing principal at the Portsmouth, New Hampshire offices of Jackson Lewis, PC. Their website is ***jacksonlewis.com****.*

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of being fined. We do not recommend the approach of ignoring the NLRB because if a judge ends up in a position to reform a severance agreement, he or she is not likely to look fondly on an employer who willfully violated the law.

- Most employers have also been broadly ascribing "supervisor" status to employees to exempt them (in most circumstances) from the National Labor Relations Act (NLRA). Whether an employee actually is a supervisor or not extends beyond just their title so employee-side attorneys should gather more information to see if there is room for pushback.
- On the employee side, the argument is that the intent of the NLRB was clear. Employees should be able to complain about their former employers. Likewise, the NLRB memo watered down the decision some by allowing the amount of severance to remain confidential. Employees argue that if they are allowed to compare wages, they should be allowed to compare severances to know that they are receiving a fair amount.

When educating clients on settlements and severance agreements, it is also wise to make sure that their handbooks and general work rules do not unreasonably restrict concerted activity. Most employers know that they can not overtly restrict such behavior, but employers do not always recognize when a rule, such as limiting what employees can say about the business on social media, can inadvertently violate the NLRA.

Shortly after the *McLaren Macomb* decision, on August 2, 2023, the NLRB adopted a new legal standard for evaluating employer work rules. Stericycle, Inc., 372 NLRB No. 113 (August 2, 2023). The new standard is an effort to weigh the competing interests of the employer in promulgating work rules that advance legitimate and substantial business interest but that does not chill employees from exercising their rights under the Act.

Under the new legal standard, NLRB's general counsel must prove that a challenged workplace rule has a "reasonable tendency" to chill employees from exercising their rights under the Act.

"The Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." *Id*.

If the general counsel carries her burden, then the work rule is presumptively unlawful, but the employer then has the opportunity to rebut the presumption by proving that the work rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule. *Id*. "If the employer provides its defense, then the work rule will be found lawful to maintain." *Id*.

While this new legal standard appears to effectuate a more balanced approach, employers who promulgate work policies that are narrowly tailored to its legitimate and substantial business interest are more likely to have a greater chance of prevailing.

While it is a year after *McLaren Macomb*, we are still left with many of the same questions we had when the decision and memo first came out. If you are still wondering what you and your clients are and are not allowed to do under the NLRA, you are in good company.

For more information on best practices, we recommend the New Hampshire Bar Association's "Employment Law 101" CLE from March 6, 2024, specifically attorney Jo Anne Howlett's presentation entitled "NLRA and NLRB Overview" and attorneys Katherine E. Hedges and Julie A. Moore's presentation entitled "Settlement and Severance Agreements." ♦

Beth A. Deragon and Kathleen A. Davidson are counsel at the law firm of Pastori | Krans, PLLC. For more than 18 years, Beth has been practicing employment law, civil litigation, and representation of professionals before licensing boards. For more than 14 years, Kathleen has practiced employment law, civil litigation, and family law.