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).

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