

45th Annual Corporate Counsel Institute

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Presented by: Gary Eisenstat

Ogletree Deakins (Dallas)

2023 Employment Law Update



Ogletree
Deakins

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TODAY'S AGENDA

- McLaren Decision and GC Memo 23-05.
- Employment Law Update—stats and notable cases.
- **Employment law survey**/Dobbs
- Amendments to Tex. Lab. Code Ch. 21 re Sexual Harassment, post #MeToo
- Rise in Union Activity
- Joint Employer
- ESG and Corporate Activism

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Use of Separation Agreements with these “standard” terms?

- Nondisparagement:

“At all times hereafter, the Employee agrees not to make statements to Employer’s employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.”

- Confidentiality:

“The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than 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.”

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McLaren Facts:

- Newly formed hospital bargaining unit.
- Hospital (employer) furloughs 11 bargaining unit employees.
- Hospital offers, and all employees sign, Severance Agreements.
- **No notice to, or Union involvement in, furlough or severance agreement negotiations.**
- Agreements include right to seek injunctive relief and damages recovery provisions.

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McLaren Holding:

Non-disclosure language found unlawful

- “At all times hereafter, the Employee agrees not to make statements to Employer’s employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.”

Confidentiality language found unlawful

- “The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than 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.”

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Key McLaren Rulings:

- **Who is Impacted?**
 - *Only* Employees with Section 7 Rights—*i.e.*, individuals who are **not** considered supervisors, managers, or independent contractors. **KEY QUESTION!**
 - *BUT includes former employees:* Section 7 rights are independent of the existence of a current employment relationship.
- **Acceptance of the Agreement and Money?** That the employees *accepted* the agreements was *immaterial*.
- **Narrow Tailoring?** Board left open the idea that a “narrowly tailored” restriction could be lawful, but declined to identify the scope of such tailoring.
- ***But wait, there’s more . . .***

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