



Responding to the NLRB's Ruling on Confidentiality and Non-Disparagement Clauses in Employee Agreements

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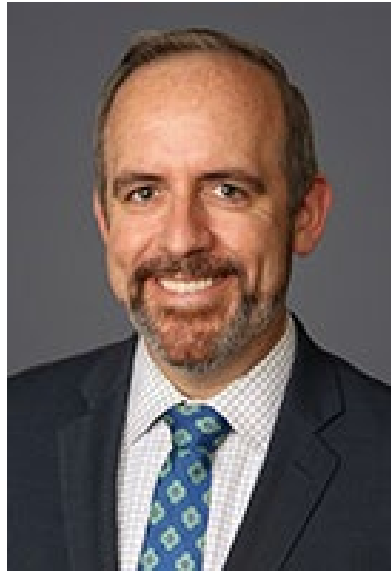


CUPA-HR Webinar

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Agenda

Summary of
key NLRA
concepts
and
coverage

Summary
of
McLaren
decision

FAQs
regarding
McLaren

Possible
next steps

Poll Question

Do you currently use confidentiality provisions in severance/settlement agreements?

- Yes
- No
- Sometimes

Poll Question

Do you currently use nondisparagement provisions in severance/settlement agreements?

- Yes
- No
- Sometimes

Which Workers Are Covered by the NLRA?

Covered

- Section 2(3) Employee, broadly defined and subject to limited exclusions (e.g., agriculture, RLA, domestic servants)

NOT Covered

- Independent contractors are excluded, but the Board will construe employment status expansively
- Section 2(11) Supervisor
- Managerial employees

Section 2(11) Supervisors Not Covered

Any individual “having authority, in the interest of the employer, to **hire**, transfer, suspend, lay off, recall, promote, **discharge**, assign, reward, or **discipline** other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, **if** in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of **independent judgment.**”

Supervisor - Exception

- Unlawful to retaliate against a supervisor who:
 - Gives adverse testimony in NLRB case or grievance;
 - Refuses to commit an unfair labor practice.
- If employer retaliates when a supervisor refuses to offer an unlawful severance agreement to another employee, the NLRB GC would find that retaliation prohibited by the NLRA.

Managerial Employees Not Covered

- Those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy.”

Faculty as Managerial Employees

- Fact-based inquiry. Faculty are “managerial” when they exercise effective, managerial control of:
 - **Academic Programs** – curricular, research, major, minor, and certificate offerings and requirements to complete those offerings
 - **Enrollment management** – size, scope, and make-up of the university's student body
 - **Finances** – tuition, net tuition, expenditures
 - **Academic Policy** – teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy
 - **Personnel Policy and Decisions** – hiring, promotion, tenure, leave, and dismissal

Faculty as Managerial Employees

- Usually applied to tenured faculty members or those who vote on such governance issues.
- Not applied to sub-groups of faculty who have no vote or membership in a body that “exercises effective control.”



Student Workers

- *Columbia University* (2016) - “Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.”
- Proposed 2020 NLRB Rule rejecting coverage of student workers was rescinded in March 2021.

Public Sector



- NLRA does not cover employers that constitute “any State or political subdivision thereof.”
- Exempt political subdivision if it:
 - was created directly by the state, so as to constitute a department or administrative arm of the government; or
 - is administered by individuals responsible to public officials or the general electorate.

Coverage of Religious Institutions

- *Pacific Lutheran (2014) Test for Faculty* – No jurisdiction if institution:
 - Holds itself out as providing a religious educational environment; and
 - Holds out the employees at issue as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large.
- *St. Xavier Test for nonteaching employees*:
 - Board exercises jurisdiction over nonteaching employees of religious schools unless their actual duties required them to perform a specific role in fulfilling the religious mission of the institution

Coverage of Religious Institutions

- *Bethany College (2020)* overruled *Pacific Lutheran*. Board declines jurisdiction if institution:
 - Holds itself out to students, faculty, and community as providing a religious educational environment;
 - Is organized as a nonprofit; and
 - Affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.
- NLRB General Counsel in *St. Leo University (2023)* has urged the Board to re-adopt *Pacific Lutheran*.

Section 7 Rights (PCA)

Applies to both union-represented and non-union workforces

“Employees” have the right to:

- Form, join, or assist labor organizations;
- Bargain collectively through representatives of their own choosing;
- Engage in other ***concerted activities for mutual aid or protection***; or
- Refrain from any of the above activities

PCA is broadly interpreted, particularly by current NLRB GC

Clear PCA Examples

Two or more employees take action for their mutual aid or protection regarding terms and conditions of employment

- Example: Two or more employees addressing their employer about improving their pay

A single employee acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action

- Example: An employee speaking to employer on behalf of one or more coworkers about preventing sexual harassment

Pre-2020 NLRA Law on Confidentiality/Non-Disparagement

Lutheran Heritage (policies)

- An unlawful chilling effect occurs whenever employees would (could?) reasonably construe a workplace rule to limit PCA

Key Pre-2020 Case Law on Severance Agreements

- **Standard:** Did the agreement have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; if so, ***proffer*** is unlawful
- Cases found unlawful broad non-assistance/non-disclosure/confidentiality provisions that would prohibit Board cooperation, assisting former coworkers, or disclosing info to NLRB

2020 Forward Precedents

March 2020 – February 2023

TEST: Severance agreement violates the Act if: (1) the employer offering the agreement discharged the employee in violation of the Act or committed another ULP discriminating against employees; and (2) the employer “harbored animus” toward the exercise of Section 7 activity

Board distinguished **VOLUNTARY** separation agreements from rules/policies that establish mandatory conditions of employment

McLaren (February 21, 2023)

TEST: “An employer violates Section 8(a)(1) of the Act when it **PROFFERS** a severance agreement with provisions that would restrict employees’ exercise of their NLRA rights”

“Such an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances”

McLaren – Key Factual Background

- COVID-related permanent furlough of 11 union-represented bargaining unit employees
- No notice given to union or opportunity to bargain
- All presented with and ***signed*** severance agreements
- Agreements had broad confidentiality ***as to terms of the agreement*** and non-disparagement provisions
- The agreements also had a fee-shifting provision

McLaren – The Challenged Language

Non-Disclosure Language

- At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. ***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.***

Found UNLAWFUL

- Statements by employees about the workplace are central to Section 7
- The language has no temporal, definition, or scope limitation
- Board noted that it was not limited to communications that are "so disloyal, reckless or maliciously untrue" to lose NLRA protection

McLaren – The Challenged Language

Confidentiality Language

- 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.

Found UNLAWFUL

- Prohibited Section 7 discussions relating to the agreement with other employees, union representatives, or NLRB agents
- The confidentiality restriction would prohibit an employee from discussing the terms of the agreement with coworkers and thus also impairs the rights of former coworkers who may receive similar agreements

McLaren – Other Keys

Only Employees with Section 7 Rights: The decision only applies to employees who are not considered 2(11) supervisors or managers under the Act


Former Employees: The NLRB emphasized that Section 7 rights do not depend on the existence of employment relationship

Acceptance: The fact that employees accepted the agreements immaterial

Narrow Tailoring: The Board left open that a “narrowly tailored” restriction could be lawful, but expressly declined to identify the scope of such tailoring

Remedy (in the context of Section 8(a)(5) violation):

- Rescind permanent furloughs, offer jobs, provide backpay*
- Bargain with the union over any terms in a severance agreement*
- Cease and desist from presenting employees with the unlawfully overbroad language
- 60-day posting (physical, U.S. mail, email, text, intranet, readings?)

A world map with a blue-to-orange gradient background. The map shows the continents in a light orange color against a blue background that transitions from a darker blue at the top to a lighter blue at the bottom.

**FAQ 1: Does
McLaren apply to
more than
severance
agreements?**

Yes, With Exceptions

McLaren's reasoning is not limited to severance agreements

The Board has not historically distinguished between severance and settlement agreements

In *McLaren*, the Board discussed severance agreements and settlement agreements interchangeably

Consider impact on similar provisions in employment agreements, noncompetes, nonsolicits, NDAs, invention agreements, arbitration agreements

The Board may view such provisions applicable during an existing employment relationship to more broadly implicate Section 7 rights

A stylized world map with a light blue background and a white-to-orange gradient. The map shows the continents of North America, South America, Europe, Africa, and Asia. The text is centered over the Atlantic and European regions.

FAQ 2: Is *McLaren* retroactive?

Assume Yes

The decision does not specifically address whether it is retroactive

NLRB decisions usually applied retroactively

NLRB GC says decision will be applied retroactively

Six-month statute of limitations, *but* GC says maintaining or enforcing an older unlawful agreement is a **continuing violation**, and a charge is not time-barred

Assume Yes

“[E]mployers 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.” Memo CG 23-05

A stylized world map with a light blue background and a white-to-orange gradient. The map shows the continents of North America, South America, Europe, Africa, and Asia. The text is overlaid on the right side of the map.

FAQ 3: Can we make financial terms of severance or settlement agreement confidential?

Maybe, but “narrowly tailor” words

- CG memo says in reference to unfair labor practice settlement agreements: “[C]onfidentiality 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.” Memo CG 23-05
- Not entirely clear whether this applies to severance agreements or not.


A world map with a light blue background and white landmasses. The map is centered on the Atlantic Ocean, showing North and South America on the left, and Europe, Africa, and Asia on the right. The text is overlaid on the right side of the map.

FAQ 4: Can we limit confidentiality restrictions to proprietary company information?

Maybe, But Draft Carefully

“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.” Memo CG 23-05

Clauses should be carefully drafted and narrowly tailored to ensure they cannot be reasonably interpreted to interfere with or chill PCA

A world map with a light blue background and a white-to-orange gradient. The map shows the continents of North America, South America, Europe, Africa, and Asia. The text is overlaid on the right side of the map.


FAQ 5: Can we include a non-disparagement provision that limits disparagement to defamatory statements?

Not Exactly

The NLRB has found the term “defamation” alone to be overbroad (merely false statements are protected by the NLRA)

McLaren cited restrictions on employee speech when such speech is “maliciously untrue,” defined as made “with knowledge of their falsity or with reckless disregard for their truth or falsity”

“[A] narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the 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.”
Memo CG 23-05

A world map with a light blue background and a white-to-orange gradient overlay. The map shows the continents of North America, South America, Europe, Africa, and Asia. The text is overlaid on the right side of the map.

FAQ 6: Can we incorporate a savings clause/disclaimer and cure any overbroad language?

Unlikely, but . . .

What is a “Savings” Clause? Very broadly – a disclaimer stating that the agreement is not intended to restrict PCA

- The NLRB has previously addressed savings clauses (e.g., handbook cases), generally finding them insufficient to cure overbroad, problematic language

“Savings” Clause Guidelines (for this NLRB)

- The clause must do more than generally refer to the NLRA or PCA
- The clause should address “the broad panoply of rights protected by Section 7”
- The clause should be prominent and proximate to the language it seeks to inform

Unlikely, but . . .

Example of Insufficient “Savings” Clause:

- “Nothing in this Section [] shall be deemed to limit or prohibit Employee from engaging in concerted group activity and communications with co-employees to try to improve his or her working conditions, as provided under Section 7 of the National Labor Relations Act”


Reason Insufficient: Clause did not include the “full panoply” of rights protected by Section 7 (e.g., does not include third parties like unions in the disclaimer)

Unlikely, but . . .

“While specific savings clause or disclaimer language may be **useful to resolve ambiguity** over vague terms, they would not necessarily cure overly broad provisions.” Memo GC 23-05

GC's "Model Language"

Employees have 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.


A world map with a light blue background and a white-to-orange gradient. The map shows the continents of North America, South America, Europe, Africa, and Asia. The text is overlaid on the right side of the map.

**FAQ 7: Can we
include severability
language and cure
any issues?**

Yes, But Likely Will Not “Cure” Section 7 Issues

What is Severability Language? An express provision stating that any sections of an agreement found to be invalid, unlawful, or unenforceable must be construed narrowly, and that the parties intend the remainder of the agreement to be unaffected and continue to be given force and effect

“Regions generally make decisions based solely on the unlawful provisions and would seek to have those voided out as opposed to the entire agreement, regardless of whether there is a severability clause or not.” Memo CG 23-05

A stylized world map with a light blue background. The continents are shown in a light beige color. The map is centered on the Atlantic Ocean, with North and South America on the left and Europe, Africa, and Asia on the right.

FAQ 8: Can employees (or their union) waive Section 7 rights and agree to broad confidentiality/ non-disparagement?

No


In *McLaren*, all 11 employees signed the agreements and (presumably) received the contemplated consideration

The NLRB still found Section 8(a)(1) violations and no waiver

ULP was the “proffer” of agreements with problematic language and interference with meaningful access to NLRB

Unions can waive some Section 7 rights (e.g., right to strike)
... but not others (e.g., unions cannot waive employees’ right to file ULPs)

NLRB GC takes the position that the Board protects “public rights” and employees and unions cannot waive those rights, even if employees request the language. Memo CG 23-05

A world map with a light blue background and a darker blue gradient at the bottom. The map shows the continents in a light tan color. The text is overlaid on the right side of the map.

FAQ 9: What remedies could the Board order in future cases?

Likely Remedies Include...


Rescission of unlawful language

Attorneys' fees and other "direct and foreseeable" consequential damages

Broad "cease and desist" from using similar language

Cease and desist any enforcement actions re: unlawful language

Broad notice posting/notification, including former employees through multiple channels (e.g., physical, U.S. mail, email, text, Skype, readings?, etc.)



**FAQ 10: What
should we consider
doing at this time?**

Three (3) Primary Approaches/Risk Tolerance

Options include:

- 1) Leaving current language untouched (high risk)
- 2) Drafting “narrowly tailored” disclaimer or “savings” language to use with Section 7 employees along with severability provisions
- 3) Removing potentially problematic provisions based on *McLaren* and adopting new form templates to use with Section 7 employees
- 4) (2) and (3) to “resolve ambiguity”

Reminder:

- State law restrictions on confidentiality/non-disparagement language
- Federal Speak Out Act



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