



Workforce Realignment & Reductions in Force

Part 2: Separation Agreements in
Light of McLaren Macomb

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Seyfarth Shaw LLP

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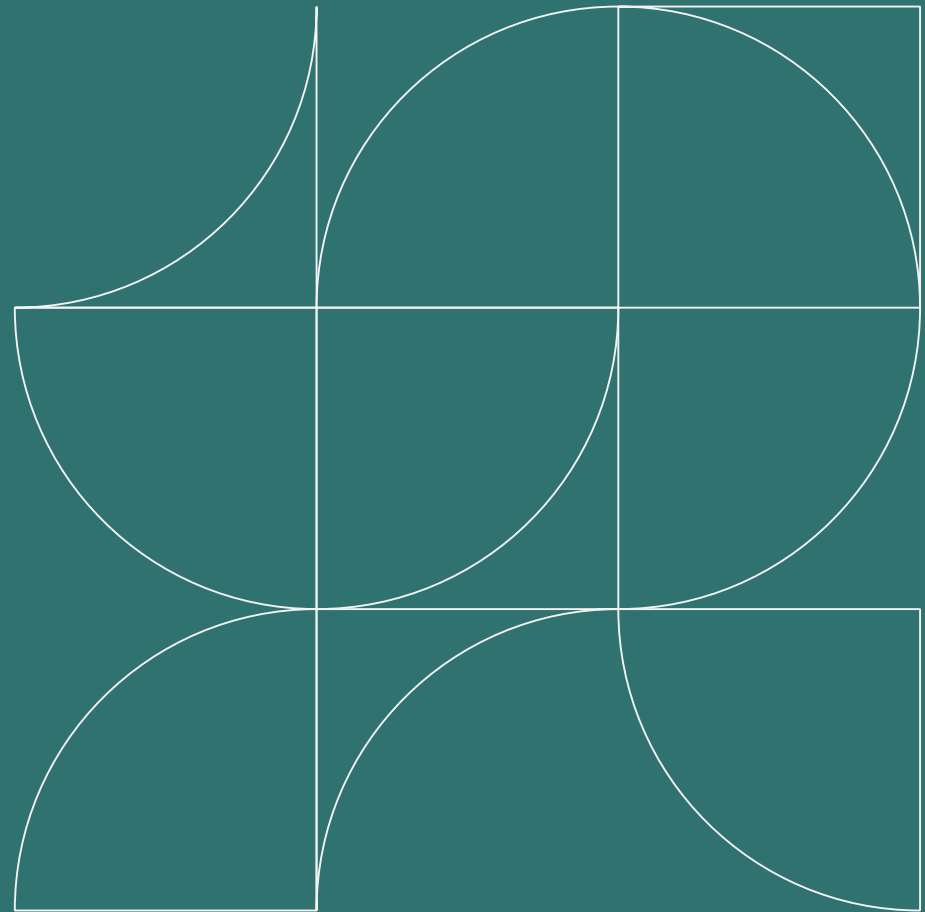


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Agenda

- 01** Overview of NLRB's *McLaren Macomb* Decision
- 02** Practical Implications and Takeaways for Employers in the Context of a Reduction in Force
- 03** Impact of Continued Use of Broad Confidentiality and Non-Disparagement Provisions

Overview of NLRB's *McLaren Maccomb* Decision



***McLaren Macomb* Decision**

- ***McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023)**
 - February 21, 2023 decision from the National Labor Relations Board (NLRB)
 - Held that offering a draft severance agreement to an employee that contains broad confidentiality and non-disparagement provisions violates the National Labor Relations Act (NLRA)



Confidentiality Provision in Agreement at Issue

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.

Non- Disparagement Provision in Agreement at Issue

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 statement to Employers' employees or to the general public which could disparage or harm the image of the Employer**, its parent and affiliated entities and their officers, directors, employees, agents, and representatives.

Severance Agreement Infringes Section 7 Rights

- NLRB found that these provisions violated employees' exercise of their **Section 7** rights.
- *McLaren Macomb*: “It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity.”
 - NLRB says Section 7 activity includes “efforts to improve terms and conditions of employment” through channels outside of the employment relationship, including administrative, judicial, legislative, and political forums, newspapers, media, social media, and communications to the public that are part of and related to an ongoing labor dispute.
- **Many employees have these rights, not just unionized employees.**

NLRB Reasoning in *McLaren Macomb*

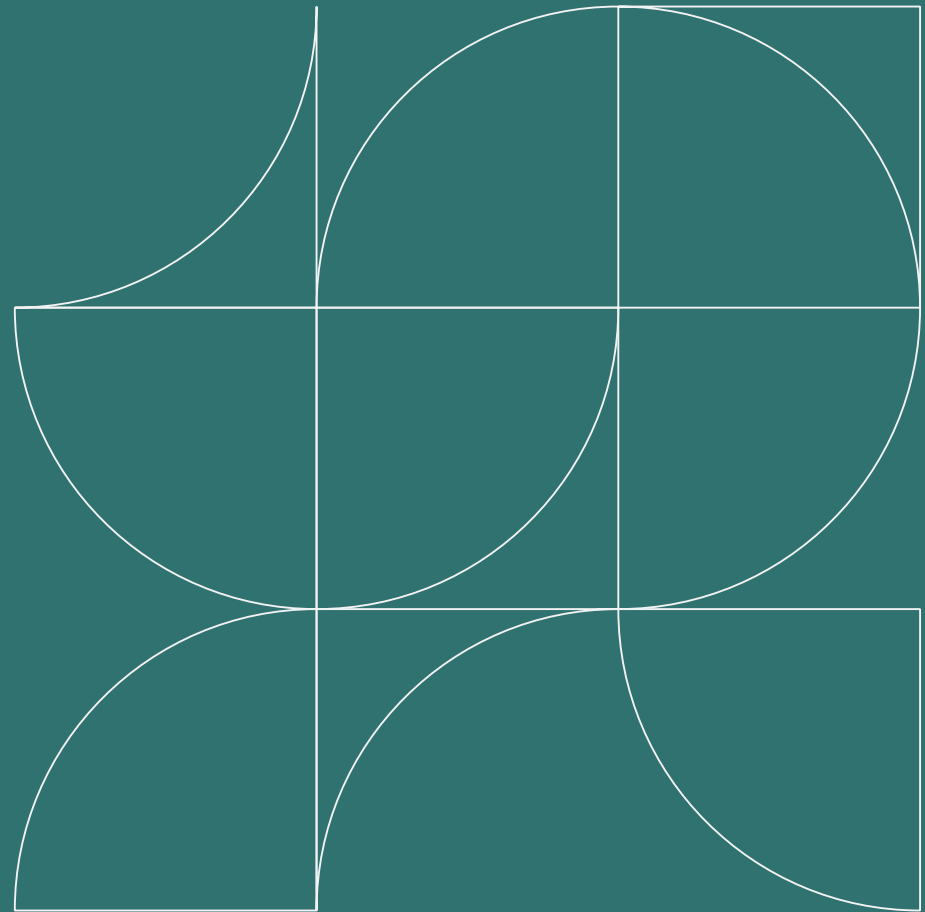
- Confidentiality provision violates NLRA because:
 - (1) Broadly prohibited employees from disclosing the terms of the agreement to any third party (which Board interpreted as including the Board itself, which it interpreted as coercing the employees from filing an unfair labor practice charge or assisting a Board investigation)
 - (2) Prohibited the employees from discussing the terms of the severance agreements with former coworkers deciding whether to accept a severance agreement
 - (3) Prohibited the employees from discussing the terms of the severance agreements with the union
- Non-disparagement provision violates NLRA because:
 - Public statements about the workplace are central to the exercise of employee rights under the NLRA, and the provision prohibited employees from making any statements to the general public that could disparage or harm the image of the employer

NLRB General Counsel Guidance

March 22, 2023 General Counsel Memorandum

- Clarifies severance agreements are not banned
- Employers can still offer severance agreements as long as they “do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees.”
- A severance agreement offered to a “supervisor” might be unlawful if the provisions prevent the supervisor from participating in an NLRB proceeding

Practical Implications and Takeaways for Employers in the Context of a Reduction in Force



- Agreements with supervisory employees vs. non-supervisory employees;
- Agreements made in union vs. non-union context;
- Statute of limitations considerations.



Risk Factors and Considerations When Entering Into Severance Agreements

- When is confidentiality / non-disparagement important?
 - Is it necessary to protect employer's interests?
 - Consider the employee's role and knowledge.
 - Consider the context (i.e. large-scale vs. small RIF)
 - Be mindful of state and federal laws that restrict scope of confidentiality / non-disparagement provisions.

General Considerations

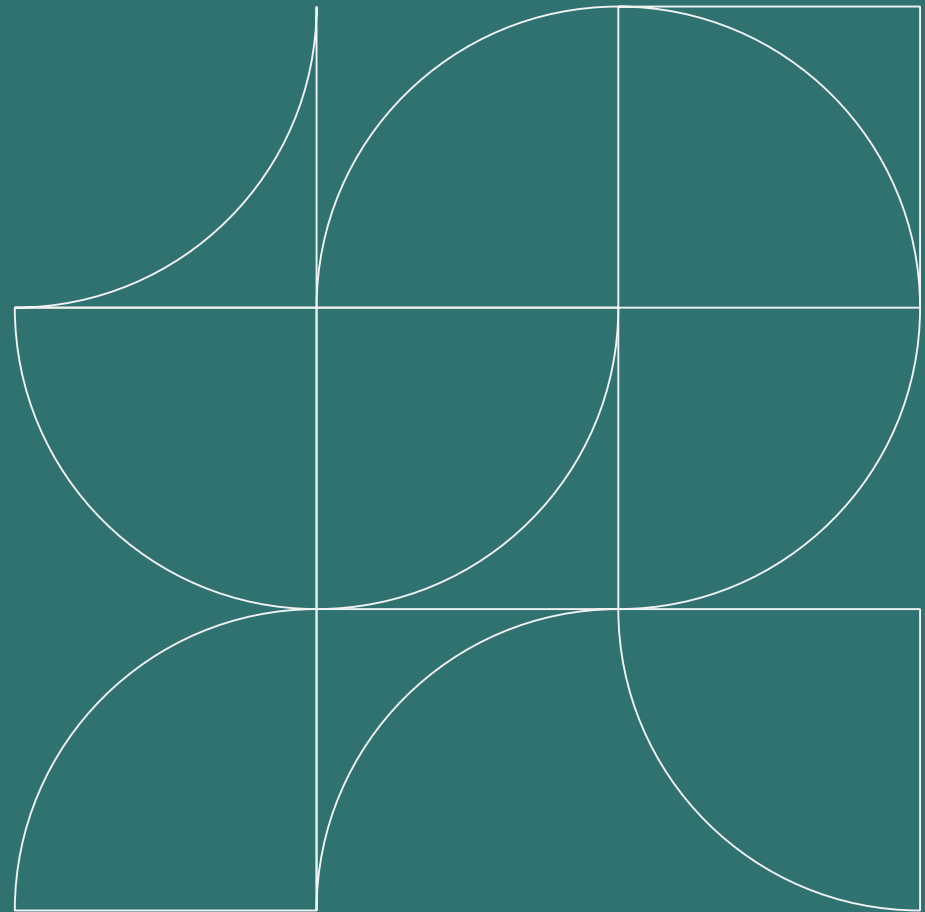
- Review agreement templates for terms that could be interpreted as restricting Sec. 7 rights.
- If employees cannot lawfully be restricted, consider the value of including the clause vs. the risk of an Unfair Labor Practice charge.
- If terms could be interpreted as restricting Sec. 7 rights, those restrictions should be narrow.

Review Templates to Determine Legal Risk

- Include severability language stating that nothing in agreement prevents employees from exercising Section 7 rights.
- Include language indicating that any provision found to be unenforceable will be construed narrowly, and the parties mutually agree that the remainder of the agreement will be given full force and effect.
- General Counsel's memo: unlawful provisions can be excised.

Severability

Impact of Continued Use of Broad Confidentiality and Non-Disparagement Provisions



Risk Assessment

- Unfair labor practice charge
 - More likely in the context of a reduction in force that impacts a bargaining unit
 - Risk is much lower in non-unionized environment

Thank You

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