



ECKERT SEAMANS

Navigating Release Agreements in the Post-*McLaren Macomb* World

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***McLaren Macomb and Local 40 RN Staff
Council, Office and Professional
Employees, International Union (OPEIU),
AFL-CIO, Case No. 07-CA-263041***

AGENDA

- **Preview *McLaren Macomb***
- **Impact on Confidentiality and Non-disparagement Clauses**
- **Practical Implications**
- **Impact on Other Agreements**
- **Speak Out Act and State Legislation**



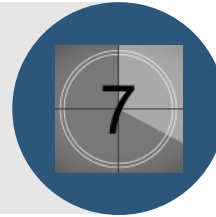
NLRA LANDSCAPE

- **Aim of the NLRA:** To protect non-supervisory employees who engage in activity for mutual aid and protection
- **Application:** Applies to all non-supervisory employees*
- **Enforcement:** NLRB (subject to political forces)



KEY NLRA PROVISIONS

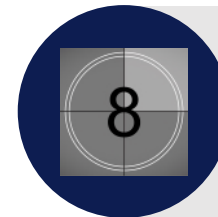
SECTION SEVEN



Guarantees employees: “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” and the right “to refrain from any or all such activities.”



Employers may not “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the Act.”



SECTION EIGHT

CASE OVERVIEW

Did the hospital violate the NLRA by offering severance agreements with the confidentiality and non-disclosure provisions below to 11 permanently furloughed nurses without notice to their union representatives?

6. **Confidentiality Agreement.** 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.

7. **Non-Disclosure.** 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.

RULING:



Yes, the hospital violated § 8(a)(1) and (5) of the Act by:

- Offering the nurses severance agreements with confidentiality and non-disclosure provisions because the facial terms of the confidentiality and non-disparagement provisions in the hospital's severance agreements have a reasonable tendency to interfere with, restrain, or coerce the furloughed nurses' exercise of their Section 7 rights.
- Failing to provide notice to the Union and an opportunity for it to be included in discussions about the furloughs and the related severance agreements.

POST-MCLAREN MACOMB LANDSCAPE

Pre-McLaren Macomb

- Rejected categorical prohibition on non-assistance clauses in severance agreements
- Considered evidence of employer *animus* and discrimination apart from the agreement's facial terms
- Permitted severance agreements to contain non-mandatory restrictions on exclusively post-employment activities

McLaren Macomb

- “A severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, *and* the employers' proffer of such agreements to employees is unlawful.”
- Existence of employer *animus* is irrelevant
- Assumes that severance agreements are largely take-it-or-leave-it with little room for negotiation

IMPACT ON CONFIDENTIALITY AND NON-DISPARAGEMENT

- **Applicability**

- Agreements with non-supervisory employees (supervisors can still have some protections)

- **Impact**

- Settlements under NLRA **and** EEOC statutes
- Amount and terms of agreement

- **Enforcement**

- Subject to change on an administration-by-administration basis
- Retroactive to agreements that predate *McLaren Macomb*

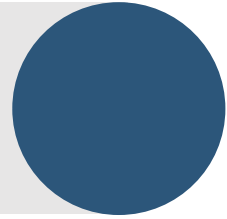


GENERAL COUNSEL'S OM 23-05 – GUIDANCE IN RESPONSE TO INQUIRIES ABOUT THE *MCLAREN MACOMB* DECISION

- Severance Agreements are not banned; GC's prior advice (OM 07-27) is consistent with *McLaren Macomb* decision.
- With respect to non—Board settlements, OM 07-27 advised the Regions **not** to approve agreements that:
 - Include a provision requiring the release of future rights, except that an employee may knowingly waive the right to seek employment with a named employer in the future
 - Prohibit a discriminatee from providing assistance to other employees
 - Prohibit a discriminatee from engaging in discussions about the employer or the terms of the settlement with other employees, ***except*** that defamatory statements may be prohibited (and it may contain a provision limiting the disclosure of the amount of money received)
 - Include language that specifies unduly harsh penalties for breach (*i.e.*, repayment of backpay or a requirement that the charging party or discriminatee pay attorneys' fees or costs for enforcing the agreement)
 - That appear to violate tax laws or regulations

PRACTICAL RESPONSES: SEVERANCE AGREEMENTS

ELIMINATE CONFIDENTIALITY
AND NON-DISPARAGEMENT
CLAUSES IN SEVERANCE
AGREEMENT?

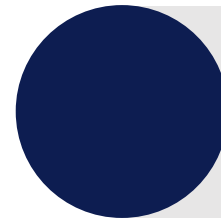


Safest course of action where the
employee or the situation is covered by
the NLRA.

Is it realistic?

“Confidential information” → Can you still protect
“Proprietary confidential information”

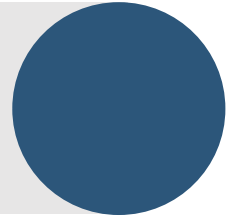
Non-disparagement clause → Protect against
statements with malicious motive or that are
maliciously false (defamatory)



MODIFY CLAUSES IN SEVERANCE
AGREEMENT?

MODIFYING SEVERANCE AGREEMENTS – HOW?

CONFIDENTIALITY –
WHAT IS MOST IMPORTANT??

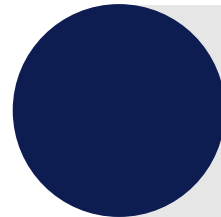


Confidential Proprietary Information?
Amount of Settlement?

Disparagement as a Section 7 Right Has Limits:

“To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive” or be “maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.”

Valley Hospital Medical Center, 351 NLRB at 1252 (2007)



NON-DISPARAGEMENT – CAN
ANYTHING BE SALVAGED?

IF MODIFYING SEVERANCE AGREEMENTS – HOW AND RISKS

- Keep it Simple
- Review the entire agreement, not just the confidentiality and non-disparagement clauses
- Avoid broad prohibitions
- Employee may still knowingly waive the right to seek employment in the future
- Include ADEA-type language to demonstrate a knowing waiver and advice to seek counsel before signing
- Make it clear that the Agreement does not waive Section 7 Rights
- Confidentiality of the settlement **amount** is still okay
- Confidentiality of true proprietary information is still okay
- Prohibit maliciously false or defamatory statements
- Don't require repayment of backpay, attorneys' fees or costs for enforcement
- Consider tax treatment of the settlement

OTHER CONSIDERATIONS

- Be sure to review:
 - Confidentiality and IP Agreements
 - Restrictive Covenants
 - Severance Plans
 - Speak Out Act - federal legislation
 - Applicable state legislation
 - Remain vigilant on the changing landscape



Questions?

