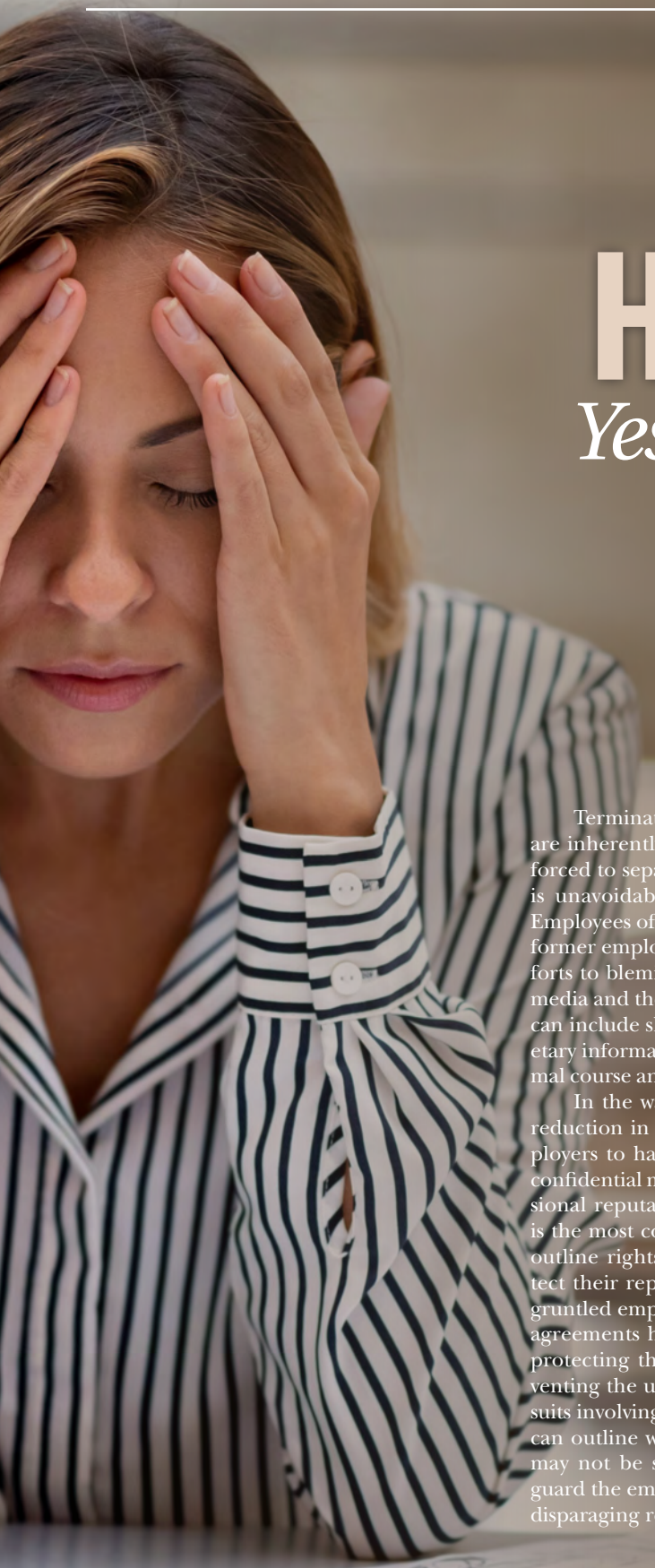

HR BEWARE

Yesterday's Agreements are not Today's Agreements

John C. Krawczyk Fee, Smith & Sharp, LLP.

Terminations and reductions in force are inherently nasty. When an employer is forced to separate from its employee there is unavoidable resentment and hostility. Employees often seek revenge against their former employers and spend significant efforts to blemish their reputation on social media and the internet. Unfortunately, this can include sharing confidential or proprietary information obtained during the normal course and scope of their employment.

In the wake of such a termination or reduction in force, it is important for employers to have some protection for their confidential materials as well as their professional reputation. The written agreement is the most common tool for employers to outline rights and responsibilities to protect their reputation from harm from disgruntled employees. Specifically, severance agreements have been the cornerstone of protecting the employer's rights and preventing the unnecessary cost of future lawsuits involving their staff. These documents can outline what information or materials may not be shared with others and safeguard the employer against fraudulent and disparaging remarks.

NLRB RENDERS *MCLAREN MACCOMB* DECISION

In February 2023, the National Labor Relations Board ("NLRB") issued a decision that sought to limit an employer's ability to draft enforceable confidential and non-disparagement clauses in their severance agreements without narrowing the language of those provisions to avoid any interference with an employee's "Section 7" rights to organize pursuant to the National Labor Relations Act ("NLRA"). Section 7 of the NLRA guarantees:

> 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, as well as the right to refrain from any or all such activities.

The decision stemmed from a disputed matter before the Board, *NLRB v. McLaren Macomb,* which involved a challenge of two provisions in McLaren Macomb's severance agreement offered to several furloughed

employees (McLaren Macomb is a hospital and medical services provider). The first provision involved a non-disparagement clause and the second related to a prohibition against the employee disclosing the terms of the severance agreement. In a true reversal of decisions from the prior administration, the Board determined that these provisions limited the employees' ability to engage in protected activity governed by the NLRA, including the right to participate in unfair labor practice investigations. More broadly, the Board determined it was irrelevant whether the employee knowingly or voluntarily entered into these agreements, so long as the provisions in the severance agreement could hypothetically restrain conduct outlined in the NLRA.

RULING TRIGGERS WIDESPREAD UNCERTAINTY

Many commented that the language of the decision appeared to completely prohibit the use of confidentiality and non-disparagement clauses because limiting any type of speech, whether disparaging comments or otherwise, could, hypothetically, also limit concerted activity. Attorneys complained that the decision was too vague and made it difficult to advise their clients on the specific language that might be deemed acceptable in light of the recent decision. Additionally, McLaren Macomb immediately appealed the NLRB ruling to the United States Court of Appeals for the Sixth Circuit.

A memo was subsequently issued in March 2023 by the general counsel for the NLRB, Jennifer A. Abruzzo, which sought to clarify this concern. Initially, Abruzzo stated that confidentiality clauses and non-disparagement restrictions may still be included in contracts. Yet, Abruzzo noted that any confidentiality clauses must be narrowly tailored and justified by a legitimate business justification in order to be deemed valid. The memo was starkest in its restrictions of non-disparagement clauses, stating that only "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 deemed lawful.

For obvious reasons, attorneys and their clients were not satisfied with this clarification. It seemed to only allow employers to protect themselves from non-disparagement in instances of defamation, which is already a protected right independent of any written agreement. The memo fell short of providing the necessary guidance on what terms such an agreement could lawfully include. It was broad-reaching, and, as a result, many businesses complained to the federal government about their concerns regarding its application.

The United States Chamber of Commerce filed its own brief to the United States Sixth Circuit in support of McLaren Macomb's appeal, requesting that the court reject the NLRB's decision citing the overreach of the NLRB and the negative impacts on business as concerns (The U.S. Chamber of Commerce is a business advocacy group and the largest lobbying group in the United States). Conversely, several unions, including the AFL-CIO, have filed briefs in support of the NLRB's prior decision. Currently, no additional comments have been issued by the NLRB, or its general counsel, and the Sixth Circuit has not yet ruled upon McLaren Macomb's appeal (as of this article, the docket reflects that both parties had filed their initial briefs and McLaren Macomb has filed its reply brief).

WHAT DO BUSINESSES DO NOW?

In light of the confusing nature of the decision and the lack of any definitive rulings from the Sixth Circuit, what do businesses do now?

Initially, the NLRA only affects non-supervisory employees. Thus, employers may prepare confidentiality and non-disparagement clauses in severance agreements offered to supervisory employees without violating the NLRA. For all others, the answer remains unclear. That being said, there are certain steps that can be taken to increase the chances that a provision will be deemed valid post-McLaren Macomb.

- **Specifically articulate a legitimate business interest.**

If you read the NLRB memo carefully, you will notice that the key term used throughout is the NLRB's concern over the "broad waiver" of rights. In contrast, Abruzzo stated that "narrowly tailored" provisions serving "legitimate business justifications" may be considered in determining the validity of the agreements. As such, future severance agreements should seek to specifically articulate the legitimate business interest that the company has in either protecting certain information or the process of keeping certain information confidential. By adding these provisions, litigants will be able to later argue that these provisions meet even the most restrictive interpretation of the NLRB's decision.

- **Outline a recitation of the facts leading to the termination.**

While the memo purports to clarify that the recent NLRB decision is not a complete prohibition of non-disparagement clauses, it notes that these clauses will only be enforceable to combat defamatory statements. These defamatory statements are always difficult to prove after the fact. In particular, it is difficult to maintain the documents and witnesses necessary to demonstrate that the former employee's offending comments were false. Thus, it behooves employers to add in language to the agreement that lays out the underlying facts leading to the termination so that the employee cannot later argue defamatory statements are, in fact, accurate critiques of the employer's conduct.

Unfortunately, navigating the landscape post-McLaren Macomb will not be an exact science. While there are reasonable interpretations as to what language would satisfy Abruzzo's clarification of Board's decision, the concerns regarding vagueness of the scope of the NLRB's decision are valid.

CONCLUSION

One thing is certain, under this new regime, employers will need to dramatically alter their current templates for severance agreements and confidentiality and non-disparagement provisions. It will be imperative that both HR departments and employers speak with their local counsel to discuss altering the current language of their existing agreements to comply with the recent decision's mandates. Failure to adjust could leave employers exposed as they will no longer have any recourse to restrict former employees' conduct that could be detrimental to their confidential business practices or their general reputation.

The legal field will be patiently waiting for the Sixth Circuit to render its decision in the McLaren Macomb appeal. It is unclear how long the court will take to rule on this matter, but given the relative importance, it is reasonable to expect that a decision will be rendered in the next few months. In the interim, businesses will be forced to be additionally careful in drafting agreements moving forward.

John C. Krawczyk is a Dallas attorney and senior counsel with Fee, Smith & Sharp, LLP. He focuses his practice on labor and employment law and matters involving catastrophic loss, construction litigation and insurance defense.