

LEGAL NEWS FOR YOUR BUSINESS

April 2023

Employment Alert

CONFIDENTIALITY AND NON-DISPARAGEMENT TERMS IN SEVERANCE AGREEMENTS

On February 21, 2023, the National Labor Relations Board (“NLRB”) announced a decision in *McClaren McComb*, 372 NLRB No. 58 (2023), overturning two Trump-era cases concerning confidentiality and non-disparagement clauses in severance agreements. Thereafter on March 21, 2023, the NLRB’s General Counsel Jennifer Abruzzo released a clarifying memorandum in response to inquiries on the *McClaren McComb* decision and provided further guidance for employers drafting and using severance agreements.

In *McClaren McComb*, a Michigan hospital permanently furloughed 11 employees as a result of the COVID-19 pandemic and, in return, offered each of them a “Severance Agreement, Waiver and Release” (the “Agreement”), offering different amounts of severance pay to each employee in return for signing the Agreement. The Agreement included a non-disparagement clause that prohibited employees from making statements that could harm the image of the employer, its parent and affiliates, and their officers, directors, employees, agents, and representatives and a confidentiality clause that prohibited employees from disclosing the terms of the Agreement to anyone other than their spouse or professional advisor. Additionally, the employees faced monetary penalties if they or their professional advisor breached the Agreement.

An administrative law judge initially ruled that the Agreement was acceptable, but a decision by the full Board found that the Agreement violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”) by interfering with employees’ Section 7 rights to engage in concerted activities, including discussing terms and conditions of employment and joining with other employees to discuss their collective employment with government agencies or the media. Specifically, the NLRB found the provisions were overbroad, stating that any severance agreement prohibiting workers from engaging in concerted activity has “coercive potential” to force the employee to surrender all of their NLRA rights.

General Counsel Abruzzo clarified the NLRB's position, assuring employers that severance agreements are generally still legal, as long as their provisions are narrowly tailored. Additionally, any severance agreement that contains overbroad provisions is not automatically void; Abruzzo stressed that in those situations, the overall agreement may remain intact, while individual unlawful provisions would be voided. *This decision applies retroactively*, however, so the NLRB encourages employers to reach out to former employees whose severance agreements contain overbroad confidentiality and non-disparagement provisions and advise them that those provisions are null and void.

Along with this recent decision, other NLRA restrictions on severance agreements still apply. Severance agreements may not include a waiver of future employment claims arising after the agreement's date of execution but may settle current or prior employment claims. Agreements also may not require waiver of the right to assist other employees with NLRB investigations or trials and the NLRB strongly discourages employers from including harsh penalties, such as payment of attorneys' fees, for breach of the agreement. Severance agreements may, however, include narrowly tailored confidentiality clauses that prohibit employees from discussing the financial terms of the agreement and non-defamatory statement clauses that prohibit former employees from making statements that would cross the legal definition of defamation. Employers drafting these provisions should take care to make sure they are not overly broad and are in full compliance with NLRB decisions.

If you have questions about the NLRB decision, please reach out to any member of Gardner Skelton's employment team.

Healthcare Alert

DEA'S PROPOSED RULE ON TELEMEDICINE AND PRESCRIBING CONTROLLED SUBSTANCES

The Ryan Haight Online Pharmacy Consumer Protection Act of 2008 (the "Ryan Haight Act") was enacted to amend the Controlled Substances Act to crack down on online prescribing of highly addictive substances, especially to teenagers and young adults, and impose stricter regulations on the use of telemedicine to prescribe controlled substances. When the pandemic hit in 2020, however, many of the requirements in the Ryan Haight Act were suspended due to the public health emergency (the "PHE"), allowing providers to prescribe controlled substances to new patients without an in-person exam.

With the end of the PHE occurring in just two weeks on May 11, 2023, the Drug Enforcement Agency ("DEA") has stepped in with a new Proposed Rule (the "Rule") to phase out the PHE waivers and establish a post-PHE standard for prescribing controlled substances via telemedicine. The Ryan Haight Act currently recognizes seven exemptions from the in-person evaluation requirement, where telemedicine is practiced through (1) treatment in a hospital or clinic; (2) treatment in the physical presence of another DEA-registered

practitioner; (3) treatment by Indian Health Service or Tribal practitioners; (4) treatment during a PHE; (5) treatment by a practitioner with a “special registration”; (6) treatment by a Department of Veterans Affairs practitioner in a medical emergency; and (7) other circumstances specified by regulation. The Rule would create a circumstance under the seventh exemption and would create two new options for telemedicine providers prescribing controlled substances:

1. **Initial Prescriptions:** Providers will be allowed to issue an initial 30-day prescription for a non-narcotic Schedule III-V controlled substance without an in-person exam. A 30-day prescription of buprenorphine as used in the treatment of opioid use disorder may also be issued without an in-person exam. However, before any additional prescribing can occur, the patient must have an in-person exam.
2. **Qualified Telemedicine Referrals:** If a provider receives a referral and conducts a telemedicine exam for a patient who received an in-person exam from a DEA-registered referring provider, they may prescribe controlled substances, including Schedule II-V and narcotic drugs, without an additional in-person exam.

Additionally, for patients who established a telemedicine relationship during the PHE (i.e., sometime between March 16, 2020, and May 11, 2023), the in-person exam waiver will be extended an additional 180 days. After the 180 days, any additional prescribing will require an in-person exam.

While these requirements are stricter than what has been required during the PHE, they do provide more flexibility for telemedicine providers than the Ryan Haight Act. The comment period for the Rule closed March 31, 2023, and the DEA has received over 2000 comments on the Rule. Provider concerns include decreased access to mental health and substance abuse treatment and a “telemedicine prescription stigma” that could cause pharmacies to decline to fill telemedicine prescriptions, causing delays and harm to patients seeking to get their medications.

The final version of the Rule is intended to go into effect on May 11, 2023, as the PHE expires, and will take effect immediately. In this case, the 180-day in-person exam waiver for existing telemedicine patients will last through November 2023. Providers should start taking steps now to make sure their telemedicine prescribing processes are up to date and ready for the transition at the end of the PHE.

If you have questions about the end of the PHE or prescribing controlled substances, please reach out to any member of Gardner Skelton’s healthcare team.



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