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February 2023

National Labor Relations Board Issues Decision in *McLaren Macomb*

The National Labor Relations Board ("the Board") issued a decision in *McLaren Macomb*, Case 07-CA-263041 (February 21, 2023), ruling that an employer violates Section 8(a)(1) of the National Labor Relations Act ("the Act") when tendering severance agreements with provisions restricting employees' exercise of Section 7 rights under the Act. This decision represents a continuation of President Biden's Board's practice of overturning the more employer-friendly Trump-era Board precedent.

In *McLaren Macomb*, a Michigan hospital laid off 11 bargaining unit members during the COVID-19 pandemic and offered them severance pay in exchange for signing written severance agreements. As has become standard, the agreements imposed on the employees, among other things, non-disparagement and confidentiality obligations. The Board declared those provisions to be unlawful because they have a reasonable tendency to interfere with, restrain, or coerce employees in exercising their Section 7 rights. According to the Board, "public statements by employees about the workplace are central to the exercise of employee rights under the Act." Moreover, the Board determined that a provision prohibiting disclosure of the agreement's terms has a "chilling effect" on employees' exercising their Section 7 rights. Under this decision, an employer not only violates the Act by executing an agreement containing such language, but also does so by merely tendering an agreement that conditions severance benefits on the waiver or restriction of an employee's rights under the Act even if the employee doesn't sign it.

Notably, this decision would apply only to employees who are covered by the Act, meaning employers can continue using non-disparagement and confidentiality provisions for non-NLRA-covered employees, such as supervisors, managers, executives and exempt administrative personnel.

While this decision specifically addresses provisions in severance agreements, the decision will likely apply to other waiver-and-release documents, such as settlement agreements resolving lawsuits or administrative charges, or separation agreements resolving pre-litigation disputes.

Employers, with the assistance of counsel, would be well-advised to revise and update their waiver-and-release templates for documents to be tendered to NLRA-protected personnel.

FOR MORE INFORMATION

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