bolaños lowe client alert
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Emboldened NLRB Targets Employee Severance Agreements

A late February decision of the National Labor Relations Board (NLRB or the "Board") has held that the confidentiality and non-disparagement provisions of a voluntary severance agreement offered to furloughed employees violated the National Labor Relations Act (the "Act") by interfering with employee rights under the Act, including discussing terms and conditions of employment with co-workers and others. The Board's decision extends a series of aggressively pro-labor rulings that have issued from one of the nation's most prominent and powerful federal administrative agencies since the beginning of the Biden Administration.

The Board's decision in McLaren Macomb centered on a Michigan hospital's offer of severance agreements to eleven permanently-furloughed employees. The agreements, which were presented to the employees for their voluntary consideration and signing, contained three key provisions, concerning confidentiality; non-disparagement; and enforcement. The confidentiality provision limited employee disclosure of the severance agreement to "any third person, other than spouse, or as necessary to professional advisors for the purpose of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency[.]" The non-disparagement provision, in turn, required signing employees to "agree[] 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." The enforcement provision allowed the employer to seek injunctive relief, damages, and attorney fees against former employees breaching the terms of the agreement.

The Board's decision addressed the issue of whether McLaren Macomb, the employer, violated the Act (which among other things protects employees' rights to engage in protected concerted activities to address and improve working conditions) simply by presenting the agreement, with the provisions above, to its furloughed employees for consideration.

The Board reconsidered and overruled a 2020 Board decision, Baylor University Medical Center, which had found that presenting severance agreements with similar conditions to employees was not unlawful or coercive, absent certain circumstances. The Baylor decision keyed on circumstances such as whether the agreement was mandatory or voluntary; dealt strictly with the employee's post-employment activities; had no impact on employment status; was offered to employees who were being lawfully discharged under the

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Act; and whether there was any indication that the offering employer had anti-NLRA or anti-union animus in offering the severance agreements.

The McLaren Macomb Board unreservedly rejected consideration of the surrounding circumstances, holding that it was irrelevant whether an employer offering an employee severance agreement did so in good faith, or with anti-NLRA animus. (Also irrelevant to the Board was whether the employees voluntarily accepted the agreement.) Instead, the Board held, the *only* issue to consider was whether the proposed agreement tended to restrict or interfere with the rights of employees under the Act. In doing so, the Board emphasized that "discussing terms and conditions of employment with co-workers lies at the heart of protected activity," and was not confined to discussions with co-workers, or discussions that took place during the employee's period of employment, but could extend to other individuals and other time periods, such as post-employment. The Board noted that protected "discussions" could extend as far as "administrative, judicial, legislative, and political forums, newspapers, the media, social media, and communications to the public[.]"

Drawing on those observations the Board held that the non-disparagement provision was overbroad, and unlawful under the Act, because among other things, it contained no time limitation; extended far beyond the employer to include parent entities, affiliates, officers, and others; did not define "disparagement"; and included potentially any subject or topic relating to employment, which could interfere with the signing employee's ability to assist fellow employees or the Board in conducting an unfair labor practice investigation. Likewise, the confidentiality provision was held overbroad because restricting the employee from disclosing the agreement to "any third person" could prevent an employee from preventing an unfair labor practice charge (especially one challenging the legality of the severance agreement itself); or assisting Board investigations into the agreement or similar agreements. In addition, it would prevent an employee from discussing the terms of his or her agreement with a fellow employee who had been presented with and was considering whether to sign a similar agreement.

The Board's sweeping decision—that merely *presenting* an employee with a severance agreement containing confidentiality and non-disparagement provisions could potentially violate the NLRA—is a clear call to employers to review, and possibly revise, the terms of any severance or separation agreements they elect to offer their employees, whether or not the agreements are purely voluntary, and regardless of the generosity of the terms. In light of other aggressively anti-employer decisions rendered in the past months by the Board (such as decisions constraining employer dress codes; increasing risk of joint-employment exposure under the Act; and dramatically expanding the type of monetary remedies the Board can impose on employers,

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including out-of-pocket medical expenses, interest and late fees on credit card debt, and search-for-work and interim employment expenses, in addition to backpay, for unlawfully discharged workers), moreover, employers should revisit their NLRA compliance strategies and ensure up-to-date awareness of Board activity in a regulatory environment increasingly fraught with federal scrutiny and financial risk.

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