Mere Proffer of Severance Agreement violates the NLRA, Board Rules

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On Tuesday February 21, a split panel of the National Labor Relations Board (NLRB) issued a decision holding that an employer's "mere proffer" of a severance agreement to furloughed employees that contained generic confidentiality and non-disparagement clauses, is a violation of the former employee's Section 7 rights to engage in "concerted and protected activity". The majority found the two clauses, on their face, interfered with statutory rights, and therefore were unlawful, rendering the act of making the "proffer" of the agreement a violation of the National Labor Relations Act (NLRA).

In ***McLaren Macomb and Local 40 RN Staff Council Office and Professional Employees, International Union (OPEIU), AFL-CIO*** Case 07-CA-263041 (February 21, 2023), the Board - on a 3-1 vote - overturned two 2020 Trump era Board decisions, ***Baylor Univ. Medical Center*** 369 NLRB No. 43 (2020) and ***IGT d/b/a International Game Technology*** 370 NLRB No 50 (2020), reasoning that it was restoring prior Board precedent. In ***McLaren Macomb***, the Employer operated a hospital that permanently furloughed 11 bargaining unit employees during the COVID-19 pandemic and offered each a "Severance Agreement, Waiver and Release" providing monetary payments in exchange for signatures. All 11 employees signed. However, the Employer completely bypassed the Union by failing to give it notice of the furlough (thereby preventing the opportunity to engage in effects bargaining) and dealing directly with the employees and excluding the Union.

All four members of the Board easily agreed that the Employer violated the NLRA by excluding the Union from the process, rendering the Severance Agreements invalid, entitling the furloughed employees to statutory "make whole" remedies.

The case could have ended there, but the majority, led by Board Chairman McFerran, in fact, reversed the Administrative Law Judge (ALJ) on the issue of whether the non-disclosure and non-disparagement provisions rendered the entire agreement unlawful. The ALJ followed recent Board precedent to conclude that, absent any other circumstances, the provisions were benign. The Board, consistent with recent activity, took the opportunity to overrule recent precedent and held that because the Severance Agreements contained "facially unlawful" confidentiality and non-disparagement provisions, then the mere act of offering an agreement containing them is similarly unlawful because it "has a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the Act".

The Board emphasized that the broad scope of Section 7 of the Act, protects not only discussions of the terms and conditions of employment with co-workers, but also protects former employees, and through channels outside of the immediate employer-employee relationship. Those other channels, the Board noted, include communications with

the public, social media, print media, political, legislative and judicial forums. In doing so, the Board found that "[i]nherent in any proffered severance agreement requiring workers not to engage in protected concerted activity has the coercive potential of the overly broad surrender of NLRA rights if they wish to receive the benefits of the agreement." Board member Kaplan, setting the stage for a likely appeal, and in a stinging partial dissent, took issue with the majority's premise that ***Baylor*** and ***IGT*** conflicted with "long standing [prior] precedent." He concluded that a "reasonable employee" would not find that the proffer of a severance agreement would interfere with, restrain, or coerce them in the exercise of their Section 7 rights.

The decision, like so many other recent decisions by this Board, is expected to be appealed. Consequently, it remains an unsettled area of law. If you have any questions regarding this recent NLRB decision or any specific labor inquiries, please contact Kevin Moore or any member of Barley Snyder's Labor Law Team.

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