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NLRB Curbs the Scope of Severance Agreements for Non-Supervisory Employees at All Employers

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Employers will need to rethink the terms they include in severance agreements under the National Labor Relation Board's ("NLRB") ruling issued in *McLaren Macomb*, 372 NLRB No. 58 (2023). According to the February 21, 2023 decision, an employer violates the National Labor Relations Act ("NLRA") and commits an unfair labor practice by offering a severance agreement containing certain confidentiality and non-disparagement provisions. Importantly, this decision applies to employers who are unionized, as well as those who do not have any unionized employees.

In *McLaren Macomb*, a Michigan hospital permanently furloughed 11 employees deemed non-essential during the COVID-19 pandemic. The hospital offered to pay severance to the employees in exchange for signing an agreement and release of claims. The NLRB took issue with two provisions. Specifically, the agreement required the employees to maintain the confidentiality of the terms of the agreement and prohibited the employees from making statements that could disparage or harm the employer. The NLRB held that these provisions violated Section 8(a)(1) of the NLRA because they required employees to waive rights guaranteed by Section 7 of the NLRA.

The NLRB explained that "a severance agreement is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights[.]" Further, the NLRB determined that an employer violates the NLRA by merely offering such agreements to employees, stating, "[w]hether the employee accepts the agreement is immaterial."

Section 7 guarantees a broad set of rights to employees covered by the NLRA, including the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." This language is interpreted broadly and protects a wide range of employee activity such as asking for better working conditions and discussing compensation with coworkers. Of particular concern to the NLRB in *McLaren Macomb* was the "chilling effect" confidentiality and non-disparagement provisions may have on Section 7 rights. Notably, Section 8(a)(1) protection does not extend to supervisory employees as defined by the NLRA. Thus, the ruling does not immediately impact severance agreements for supervisory employees.

Going forward, the NLRB will examine the language of severance agreements on a case-by-case basis, "including whether any relinquishment of Section 7 rights is narrowly tailored." The NLRB did not elaborate on what makes an agreement narrowly tailored, but pointed to precedent approving severance agreements limited to the waiver of an employee's right to pursue employment claims arising as of the date of the agreement.

The decision leaves unclear the extent of potential repercussions upon a finding of an unfair labor practice under these circumstances. At the very least, the offending terms will be deemed unlawful and unenforceable.

McLaren Macomb overturned prior rulings in *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020). The NLRB's flip-flop on this issue follows a trend that is expected to continue as the NLRB's Democratic majority looks to overturn other Trump-era precedent.

Should you have any questions, please contact **Hope Goldstein** at hgoldstein@vedderprice.com, **Peyton Demith** at pdemith@vedderprice.com or the Vedder Price lawyer(s) with whom you normally work.