McLaren Macomb *and* Local 40 RN Staff Council, Office and Professional Employees, International Union (OPEIU), AFL–CIO. Case 07–CA–263041

February 21, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, WILCOX AND PROUTY

On August 31, 2021, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Charging Party filed an answering brief in support of the General Counsel's exceptions and in opposition to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The main issue presented is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act) by offering a severance agreement to 11 bargaining unit employees it permanently furloughed. The agreement broadly prohibited them from making statements that could disparage or harm the image of the Respondent and further prohibited them from disclosing the terms of the agreement. Agreements that contain broad proscriptions on employee exercise of Section 7 rights have long been held unlawful because they purport to create an enforceable legal obligation to forfeit those rights. Proffers of such agreements to employee have also been held to be unlawfully coercive. The Board in *Baylor University Medical Center*[2] and *IGT d/b/a International Game Technology*[3] reversed this long-settled precedent and replaced it with a test that fails to recognize that unlawful provisions in a severance agreement proffered to employees have a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under Section 7 of the Act. We accordingly overrule *Baylor* and *IGT* and, upon careful analysis of the terms of the nondisparagement and confidentiality provisions at issue here, we find them to be unlawful, and thus find the severance agreement proffered to employees unlawful.

I.

The Respondent operates a hospital in Mt. Clemens, Michigan, where it employs approximately 2300 employees. After an election on August 28, 2019, the Board certified Local 40 RN Staff Council, Office of Professional Employees International Union (OPEIU), AFL–CIO (Union) as the exclusive collective-bargaining representative of a unit of approximately 350 of the Respondent's service employees. Following the onset of the Coronavirus Disease 2019 (Covid-19) pandemic in March 2020,[4] the government issued regulations prohibiting the Respondent from performing elective and outpatient procedures and from allowing nonessential employees to work inside the hospital. The Respondent then terminated its outpatient services, admitted only trauma, emergency, and Covid-19 patients, and temporarily furloughed 11 bargaining unit employees because they were deemed nonessential employees.[5] In June, the Respondent permanently furloughed those 11 employees[6] and contemporaneously presented each of them with a "Severance Agreement, Waiver and Release" that offered to pay differing severance amounts to each furloughed employee if they signed the agreement. All 11 employees signed the agreement. The agreement required the subject employee to release the Respondent from any claims arising out of their employment or termination of employment. The agreement further contained the following provisions broadly prohibiting disparagement of

[1] We shall modify the judge's recommended Order to conform to the violations found, to the Board's standard remedial language, and in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Cascades Containerboard Packaging–Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021). In accordance with our decision in *Thryv, Inc*., 372 NLRB No. 22 (2022), we have also amended the make-whole remedy and modified the judge's recommended order to provide that the Respondent shall also compensate the employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful furloughs, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). We shall substitute a new notice to conform to the Order as modified.

[2] 369 NLRB No. 43 (2020).

[3] 370 NLRB No. 50 (2020).

[4] All subsequent dates are in 2020.

[5] The 11 employees primarily greeted patients and visitors in the welcome area of the surgery center. The temporary furloughs are not alleged to be unlawful.

[6] The permanently furloughed employees are Roxane Baker, Shanon Chapp, Susan Debruyn, Amy LaFore, Mona Mathews, Brenda Reaves, Patrina Russo, Linda Taylor, Tameshia Smith, Charles Stepnitz, and Mary Valentino. No party disputes that their employment with the Respondent permanently ended in June.

the Respondent and requiring confidentiality about the terms of the agreement:

> 6. **Confidentiality Agreement.** The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
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> 7. **Non-Disclosure.** At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees 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 agreement provided for substantial monetary and injunctive sanctions against the employee in the event the nondisparagement and confidentiality proscriptions were breached:

> 8. **Injunctive Relief.** In the event that Employee violates the provisions of paragraphs 6 or 7, the Employer is hereby authorized and shall have the right to seek and obtain injunctive relief in any court of competent jurisdiction. If Employee individually or by his/her attorneys or representative(s) shall violate the provisions of paragraph 6 or 7, Employee shall pay Employer actual damages, and any costs and attorney fees that are occasioned by the violation of these paragraphs.

The Respondent neither gave the Union notice that it was permanently furloughing the 11 employees nor an opportunity to bargain regarding that decision and its effects. The Respondent also did not give the Union notice that it presented the severance agreement to the employees, nor did it include the Union in its discussions with the employees regarding their permanent furloughs and the severance agreement. Thus, the Respondent entirely bypassed and excluded the Union from the significant workplace events here: employees' permanent job loss and eligibility for severance benefits.

II.

The judge found, and we agree for the reasons set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by permanently furloughing the 11 employees without first notifying the Union and giving it an opportunity to bargain about the furlough decision and its effects. The judge properly found that the Respondent had not met its burden under *RBE Electronics of S.D., Inc.*[7] of establishing an economic exigency compelling prompt action that excused its failure to satisfy its bargaining obligation.[8] We further agree with the judge's finding, as set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by communicating and directly dealing with the 11 employees to enter into the severance agreement, while entirely bypassing and excluding the Union. However, for the reasons set forth below, we reverse the judge's finding under *Baylor* and *IGT* that the Respondent did not violate Section 8(a)(1) of the Act by proffering the severance agreement to the permanently furloughed employees.

III.

The gravamen of the General Counsel's amended complaint is that the nondisparagement and confidentiality provisions of the severance agreement unlawfully restrain and coerce the furloughed employees in the exer-

[7] 320 NLRB 80, 81 (1995). See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

[8] While we recognize, as did the judge, that the Covid-19 pandemic presented a significant crisis in the health care industry, the Respondent has simply failed to carry its heavy burden under *RBE Electronics*. The Respondent argues that "there can be no genuine dispute" that it was "losing business and suffering a financial decline" during the Covid-19 pandemic. As the judge explained, however, the Respondent failed to adduce even a single balance sheet or financial statement establishing a major economic effect on it from the pandemic. Further, the Respondent's reliance on governmental restrictions on its operations that were imposed in March is insufficient to establish economic exigency. While the Respondent responded to those restrictions by temporarily furloughing the 11 employees in March, it has failed to show that conditions had changed in June in such a manner that required it to immediately permanently furlough them at that time without bargaining with the Union. *Port Printing AD & Specialties*, 351 NLRB 1269 (2007), enfd. 589 F.3d 812 (5th Cir. 2009), relied on by the Respondent, is inapposite. The employer's failure there to bargain over layoffs was excused under the economic exigency exception because of an immediate, mandatory, citywide evacuation order due to an impending hurricane. Such patent evidence of an unexpected shutdown resulting in forced layoffs is lacking here.

Because no party has excepted to the applicability of *RBE Electronics*, and because the Respondent has failed to show economic exigency under *RBE*, we find it unnecessary to pass on whether the economic exigency defense is available to an employer who—as here—was testing the validity of the union certification by refusing generally to recognize and bargain with the union at the time it acted unilaterally. See *Thesis Painting, Inc.*, 365 NLRB No. 142, slip op. at 1 fn. 2 (2017).

cise of their Section 7 rights.[9] Applying *Baylor* and *IGT*, the judge found these provisions to be lawful, and thus concluded that the severance agreement was lawful and that the proffer of the agreement to the furloughed employees was lawful. The General Counsel excepts to the dismissal and argues, among other things, that the Board should overrule *Baylor* and *IGT.* We agree.

Until *Baylor*, when faced with an allegation that a severance agreement violated the Act, Board precedent focused on the language of the severance agreement to determine whether proffering the agreement had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 rights.[10] For example, in *Metro Networks*, the Board specifically analyzed the nonassistance and nondisclosure provisions of the severance agreement at issue and found that "the plain language of the severance agreement would prohibit [employee] Brocklehurst from cooperating with the Board in important aspects of the investigation and litigation of unfair labor practice charges." 336 NLRB at 67. The Board accordingly concluded that the proffer of the severance agreement to Brocklehurst was unlawful. Id., at 65–67. In *Clark Distribution Systems*, the Board likewise carefully scrutinized the language of the confidentiality provision contained in the severance agreement offered to employees. The Board found that the language of the provision prohibited employees from participating in the Board's investigative process, and thus, that the proffer of the severance agreement was unlawful. 336 NLRB at 748–749. More recently, in *Shamrock Foods Co.*, the Board found that a separation agreement proffered to an employee that contained confidentiality and non-disparagement provisions was unlawful. The Board, citing and analyzing the specific language of the provisions, found the agreement unlawful because the provisions "broadly required" the employee to whom it was proffered "to waive certain Sec[tion] 7 rights." Specifically, the separation agreement prevented him from assisting his former co-workers, disclosing information to the Board, and making disparaging remarks which could be detrimental to the employer. 366 NLRB No. 117, slip op. at 3 fn. 12.

In none of these cases was the presence of additional unlawful conduct by the employer necessary to find that the plain language of the agreement violated the Act.[11] Rather, the Board treated the legality of a severance agreement provision as an entirely independent issue. What mattered was whether the agreement, on its face, restricted the exercise of statutory rights.[12]

In *Baylor*, the Board abandoned examination and analysis of the severance agreement at issue. *Baylor* shifted focus instead to the circumstances under which the agreement was presented to employees. The *Baylor* Board held that the Respondent did not violate the Act by the "mere proffer" of a severance agreement that re-

[9] The amended complaint alleges that the two provisions threatened employees with the loss of benefits described in the severance agreement and that the Respondent thereby has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Sec. 7 of the Act in violation of Sec. 8(a)(1) of the Act. We disagree with our colleague's assertion that the General Counsel litigated the case on a "different theory" than whether the proffer of the agreements was, as our colleague phrases it, "merely coercive." In both her post-hearing brief and her brief in support of exceptions, the General Counsel asserted that, "[i]n determining whether an employer has violated the Act through interference, restraint, and coercion under Sec. 8(a)(1), one must apply the Board's well-established objective test, which depends on 'whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act,'" and that "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." (Citations omitted.) Thus, the Respondent has at all times been on notice that the coerciveness of the provisions was under consideration, the parties fully and fairly litigated the issue, and there is no meaningful difference between the complaint allegations and the violations found. See, e.g., *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1136 fn. 3 (4th Cir. 1982) (rejecting employer's argument of improper variance between allegation that employer unlawfully threatened loss of benefits and finding that employer unlawfully promised benefits where benefits contingent on same employee action and issue fully litigated), cert. denied 460 U.S. 1083 (1983). We agree with the General Counsel that the proffer of the severance agreements unlawfully threatened employees with the loss of the severance benefits by conditioning the receipt of those benefits on acceptance of unlawfully coercive terms.

[10] See, e.g., *Shamrock Foods Co*., 366 NLRB No. 117 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019); *Clark Distribution Systems*, 336 NLRB 747 (2001); *Metro Networks*, 336 NLRB 63 (2001); *Phillips Pipe Line Co*., 302 NLRB 732 (1991).

[11] In *Shamrock Foods*, the Board found that the employer had unlawfully discharged the employee to whom it offered the unlawful separation agreement, but the maintenance of the agreement was an independent violation of Sec. 8(a)(1), separately found and separately remedied, that was based entirely on the provisions of the agreement that would have required the employee to waive Sec. 7 rights. 366 NLRB No. 117, slip op. at 2–3 & fn. 12. In *Clark Distribution Systems*, the Board's finding that the confidentiality provision in the severance agreement was unlawful on its face was entirely separate from the issue of whether the employees who signed the agreement had been unlawfully terminated. See id. at 749–750 (examining terminations). In *Metro Networks*, severance agreements were found unlawful based on the terms of the agreement, independent of the discharge allegations in the case. 336 NLRB at 66–67. Indeed, the *Metro Networks* Board observed that an employer's restriction on the exercise of a discharged employee's Sec. 7 rights may be found unlawful even where the Board does "not address the question of whether the discharge was unlawful." Id. at 66 (footnote omitted).

[12] Thus, in *Phillips Pipe Line Co*., the Board examined the facial language of the severance agreement at issue, and found "it clear from the language of the release itself" that it did not unlawfully waive the employees' right of access to the Board. 302 NLRB at 732–733. It was immaterial that the Board dismissed an additional unfair labor practice allegation. Id.

quired the signer to agree not to "pursue, assist, or participate in any [c]laim" against Baylor and to keep a broad swath of information confidential. *Baylor*, supra, slip op. at 1. The Board reasoned that the agreement was not mandatory, pertained exclusively to post-employment activities and, therefore, had no impact on terms and conditions of employment, and there was no allegation that anyone offered the agreement had been unlawfully discharged or that the agreement was proffered under circumstances that would tend to infringe on Section 7 rights. Id., slip op. at 1–2. The *Baylor* Board overruled prior decisions to the extent they held to the contrary:

> *Clark Distribution Systems* is overruled to the extent it holds that it is invariably unlawful to offer employees a severance agreement that includes a nonassistance clause. Instead, the holding of *Clark* is limited to the fact pattern that case presents, where an employer offers such an agreement to one or more employees it has discharged in violation of the Act. And *Metro Networks*, supra, and *Shamrock Foods*, supra, are also limited accordingly.

369 NLRB No. 143, slip op. at 2 fn. 6.

Only a few months later, in *IGT*, the Board again dismissed an allegation that the respondent maintained an unlawful nondisparagement provision in the severance agreement it offered to separated employees. The provision required the signer to agree not to "disparate or discredit IGT or any of its affiliates, officers, directors and employees." *IGT*, supra, slip op. at 1. Citing *Baylor*, the Board again reasoned that the agreement was "entirely voluntary, does not affect pay or benefits that were established as terms of employment, and has not been proffered coercively." Id., slip op. at 2.[13] The *IGT* Board underscored that *Baylor* had "overruled" *Shamrock Foods*, *Clark Distribution Systems*, and *Metro Networks*.[14]

As discussed below, *Baylor* and *IGT* are flawed in multiple respects. We therefore overrule both decisions and return to the prior, well-established principle 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, and that employers' proffer of such agreements to employees is unlawful. In making that determination we will examine, as pre-*Baylor* precedent did, the language of the agreement, including whether any relinquishment of Section 7 rights is narrowly tailored.

Notably absent from either *Baylor* or *IGT* was any analysis of the specific language in the challenged provisions of the severance agreements. That is because, under those decisions, an employer's mere proffer to employees of a severance agreement with unlawful provisions cannot be unlawful. Under *Baylor,* coercive language cannot have a reasonable tendency to coerce employees unless it is also proffered in circumstances deemed coercive, independent of the agreement itself. See *IGT*, slip op. at 2; *Baylor*, slip op. at 1–2. In this respect the *Baylor* Board "entirely failed to consider an important aspect of the problem," making its decision arbitrary under the Supreme Court's standard in *Motor Vehicle Manufacturers Assn. v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983).

The *Baylor* test arbitrarily adopts a two-factor analysis for finding that a severance agreement violates Section 8(a)(1) of the Act. First, it requires the employer proffering the severance agreement to have discharged its recipient in violation of the Act, or committed another unfair labor practice discriminating against employees under the Act.[15] *Baylor* thus held that absent such unlawful

[13] Then-Member McFerran, dissenting in *IGT*, argued that the *Baylor* Board had wrongly broken with precedent and "ignore[d] the coercive potential that is inherent in any agreement requiring workers not to engage in protected concerted activity, if they wish to receive the benefits of the agreement." *IGT*, 370 NLRB No. 50, slip op. at 3. She asserted that "[e]ven a broad voluntary waiver of statutory rights undermines the public purposes of the Act, which depend on the freedom of all employees to engage in Section 7 activity, and to support each other in doing so," and that Sec. 7 rights do not depend on the existence of an employment relationship and have long been held to extend to former employees. Id., slip op. at 5.

[14] See *IGT*, slip. op. at 2, fn. 8 ("the Board overruled those cases to the extent they suggested it is '*invariably* unlawful to offer employees a severance agreement that includes a nonassistance clause' or other similar prohibitions," quoting *Baylor*, slip op. at 2 fn. 6 (emphasis added in *IGT*).

[15] *Baylor* rejected the allegation that the proffer of the agreement there was unlawful because "[t]he complaint does not allege that . . . anyone . . . offered th[e] agreement was unlawfully discharged for conduct protected by the Act, or that the Respondent's proffers were made under any circumstances that would tend to infringe on the separating employees' exercise of their own Section 7 rights or those of coworkers." *Baylor*, supra, slip op. at 2 (footnotes omitted). Similarly, *Baylor* concluded that the proffer of the agreement was lawful because "the complaint does not allege that the Respondent has violated the Act in *any* way other than by offering the severance agreements themselves") (emphasis in original). Id., slip op. at 2, fn. 6.

The Board majority in *IGT* further held that only certain unfair labor practices will suffice to find a violation under *Baylor*: violations which "support a finding that the Respondent has discriminated against employees for engaging in Sec. 7 activity." See *IGT*, slip op. at 2 fn. 7 (quoting *Baylor*, slip op. at 2. fn. 6). As the *IGT* majority held, "[a]lthough we found in our original decision that the Respondent unlawfully refused to bargain over a subcontracting decision and threatened employees, during bargaining, with a loss of overtime, such violations do not support a finding that the Respondent has discriminated against employees for engaging in Sec. 7 activity." *IGT*, slip op. at 2 fn. 7.

coercive circumstances, an employer is entirely free to proffer any provision, even a facially unlawful one. The Board did not explain what legitimate employer interest is served by permitting that step, which reasonably could result in the employee's acceptance of the agreement (and its unlawful provisions) and, in turn, the employee's decision not to violate the agreement by exercising Section 7 rights. Nor did the Board offer a persuasive reason to find that an agreement with an unlawful provision has no reasonable tendency to coerce employees unless the employer has a proclivity to violate the Act otherwise or has violated the Act or infringed on employees' Section 7 rights while carrying out actions surrounding the provision of the severance agreement. The presence of such exacerbating circumstances certainly enhances the coercive potential of the severance agreement. But the absence of such behavior does not and cannot eliminate the potential chilling effect of an unlawful severance agreement on the exercise of Section 7 rights. And yet, the standard set by *Baylor* does nothing to protect employees confronted with patently coercive severance agreements, if their employer has not otherwise violated the Act.[16]

Second, the *Baylor* test is incorrectly premised on the contention that employer animus towards the exercise of Section 7 rights is a relevant component of an allegation that provisions of a severance agreement violate Section 8(a)(1) of the Act. The Board in *Baylor* justified its refusal to find a violation of the Act on grounds that "[t]here is no reason to believe that the Respondent harbors animus against Sec. 7 activity, let alone that it is willing to terminate employees who engage in it. Under these circumstances, the offer of a severance agreement does not *reasonably* tend to interfere with the free exercise of employee rights under the Act[.]") (emphasis in original). 369 NLRB No. 43, slip op. at 2, fn. 6. The *IGT* majority made the same finding.[17]

But whether an employer harbors animus against Section 7 activity is irrelevant to the long-established objective test for determining whether Section 8(a)(1) of the Act is violated. "It is well settled that the test of interference, restraint, and coercion under Section 8(a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959). Consistent with Section 8(a)(1) law generally, evaluation of the tendency of a severance agreement to coerce (and therefore its lawfulness) does not involve inquiring, as did the Board in *Baylor* and *IGT,* whether employer animus surrounds or infects the circumstances surrounding the offer of the severance agreement. The *Baylor* Board offered no justification for its consideration of animus and discrimination apart from the terms of the severance agreement, which altered the long-established construction of Section 8(a)(1) of the Act.[18]

Indeed, neither *Baylor* nor the *IGT* majority attempted to articulate any policy considerations that would justify its severely constricted view of Section 7 rights. The *IGT* majority reasons that because *some* employee waivers of Section 7 rights are permissible, *no* waivers can be facially unlawful, but this is a non sequitur. Whether or not employees view employer documents through the prism of Section 7 rights (a proposition questioned by the *IGT* majority), the Board must do so when the General Counsel issues a complaint alleging that a severance agreement violates employee Section 7 rights. Because both *Baylor* and the *IGT* majority fail this test, we overrule them.

IV.

Baylor and the *IGT* majority ignore well-established precedent concerning waiver of employee rights. The Board does not write on a clean slate regarding employee waiver of Section 7 rights via a severance agreement. There is a backdrop of nearly a century of settled law that employees may not broadly waive their rights under the NLRA.[19] Agreements between employers and employees that restrict employees from engaging in activity protected by the Act,[20] or from filing unfair labor practice

[16] The dissent maintains that objectively coercive circumstances other than unlawful discharges or other discriminatory unfair labor practices are sufficient to find unlawful the proffer of a severance agreement under *Baylor* and *IGT*. However, neither *Baylor* nor *IGT* identifies such other circumstances. Nor does the dissent. In any event, this is beside the point. The key point is that the absence of additional objectively coercive misconduct by the employer external to the severance agreements does not ameliorate the reasonable tendency of an unlawful provision in a severance agreement to coerce employees in their exercise of their Sec. 7 rights.

[17] See *IGT*, slip op. at 2 (finding the proffer of the agreement lawful because "this case does not involve 8(a)(3) allegations or evidence of other unlawful discrimination"). Animus against Sec. 7 activity is a long-established required component to find unlawful discrimination under Sec. 8(a)(3) of the Act. See, e.g., *Constellium Rolled Products Ravenswood, LLC,* 371 NLRB No. 16, slip op. 2-3 (2021), enfd. 45 F.4th 234 (D.C. Cir. 2022).

[18] The dissent's assertion that *Baylor* does not suggest that an employer must exhibit animus in order for the Board to find the proffer of a severance agreement unlawful cannot be squared with *Baylor's* consideration and focus on animus and related discrimination.

[19] *National Licorice Co. v. NLRB*, 309 U.S. 350, 360-361 (1940).

[20] See *M & M Affordable Plumbing, Inc.,* 362 NLRB 1303, 1308 (2015) ("Since the enactment of the Norris-LaGuardia Act (29 U.S.C. §101 et seq.) in 1932, all variations of the yellow dog contract have

charges with the Board, assisting other employees in doing so, or assisting the Board's investigative process,[21] have been consistently deemed unlawful. The "future rights of employees as well as the rights of the public may not be traded away" in a manner which requires "forebearance from future charges and concerted activities."[22] This broad proscription underscores that the Board acts in a public capacity to protect public rights to give effect to the declared public policy of the Act. See *National Licorice Co. v. NLRB*, supra, 309 U.S. at 362-364.[23]

The broad scope and the wide protection afforded employees by Section 7 of the Act bear repeating. "It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008). Section 7 rights are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employer,[24] and the Board has repeatedly affirmed that such rights extend to former employees.[25] It is further long-established that Section 7 protections extend to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). These channels include administrative, judicial, legislative, and political forums,[26] newspapers,[27] the media,[28] social media,[29] and communications to the public that are part of and related to an ongoing labor dispute.[30] Accordingly, Section 7 affords protection for employees who engage in communications with a wide range of third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection. See *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 477 (1953).[31]

The Board is tasked with safeguarding the integrity of its processes for employees exercising their Section 7 rights.[32] "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). "This complete freedom is necessary . . . 'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972), quoting *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (1951). "It is also consistent with the fact that the Board does not initiate its own proceedings; implementation is dependent 'upon the initiative of individual persons.'" *NLRB v. Scrivener*, 405 U.S at 122, quoting *Nash v. Florida Industrial Comm'n*, supra, 389 U.S. at 238. The Board's "'ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully to obtain relevant information and supporting statements from individuals[,]'" and "such investigations often rely heavily on the voluntary assistance of individuals in providing information." *Metro Networks*, supra, 336 NLRB at 67, quoting *Certain-Teed Products*, 147 NLRB 1517, 1519–1520 (1964) and citing *NLRB v. Scrivener*, supra, 405 U.S at 122.

It is through the lens of this broad grant of rights and the Board's duty to protect them that the Board scrutiniz-

been deemed invalid and unenforceable, including '[a]ny promise by a statutory employee to refrain from union activity.' *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992).").

[21] See, e.g., *Shamrock Foods Co*., supra, 366 NLRB No. 117, slip op. at 2–3 & fn. 12; *Ishikawa Gasket America*, 337 NLRB 175, 175–176 (2001), affd. 354 F.3d 534 (6th Cir. –2004); *Clark Distribution Systems*, supra, 336 NLRB at 748749; *Metro Networks*, supra, 336 NLRB at 64-67; *Mandel Security Bureau*, 202 NLRB 117, 119 (1973).

[22] *Mandel Security Bureau*, supra, at 119.

[23] See *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (the Board's power to prevent unfair labor practices "is to be performed in the public interest and not in vindication of private rights").

[24] The Act confers Sec. 7 rights on statutory employees. Sec. 2(3) of the Act provides in relevant part that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer."

[25] See *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977); *Briggs Manufacturing Co.*, 75 NLRB 569, 570 (1947). See, e.g., *Cedars-Sinai Medical Center*, 368 NLRB No. 83, slip op. at 8 fn. 7 (2019).

[26] See *Eastex, Inc. v. NLRB*, supra, 437 U.S. at 565 ("Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context.").

[27] See *Hacienda de Salud-Espanola*, 317 NLRB 962, 966 (1995).

[28] See *Tesla, Inc.*, 370 NLRB No. 101, slip op. at 4 (2021).

[29] See *Triple Play Sports Bar & Grille*, 361 NLRB 308, 308-309 (2014), affd. 629 Fed.Appx. 33 (2d Cir. 2015).

[30] See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub nom. *Nevada Service Employees, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009); *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 230–231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980).

[31] The definition of "labor dispute" under Sec. 2(9) of the Act, is itself broad, and includes "*any* controversy concerning terms, tenure, or conditions of employment . . . regardless of whether the disputants stand in the proximate relation of employer and employee." (Emphasis supplied.)

[32] *Metro Networks*, supra, 336 NLRB at 66. See *Filmation Associates*, 227 NLRB 1721, 1721 (1977) ("[T]he duty to preserve the Board's processes from abuse is a function of th[e] Board and may not be delegated to the parties").

es a severance agreement containing provisions alleged to violate Section 8(a)(1) of the Act. Inherent in any proffered severance agreement requiring workers not to engage in protected concerted activity is the coercive potential of the overly broad surrender of NLRA rights if they wish to receive the benefits of the agreement.[33] Accordingly, we return to the approach followed by Board precedent before *Baylor*, and hold that an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights.[34] Such an agreement has a reasonable tendency to restrain, coerce, or interfere with the exercise of Section 7 rights by employees, regardless of the surrounding circumstances.

Certainly such surrounding circumstances may enhance the reasonable tendency of the severance agreement to coerce employees, but that tendency does not depend on them.[35] Where an agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates the Act, because it has a reasonable tendency to interfere with or restrain the prospective exercise of Section 7 rights, both by the separating employee and those who remain employed.[36] Whether the employee accepts the agreement is immaterial. As the Board explained in *Metro Networks*, the employer's "proffer of the severance agreement . . . constitutes an attempt to deter [the employee] from assisting the Board" and the employee's "conduct in *not* signing the agreement [did] not render the [employer's] conduct lawful." 336 NLRB at 67 fn. 20 (emphasis in original).[37] If the law were to the contrary, it would create an incentive for employers to proffer severance agreements with unlawful provisions to employees. Only if the employee signed the agreement, subjected herself to its unlawful requirements, and then came to the Board would the Board be able to address the situation, belatedly. No policy of the Act is served by creating this obstacle to the effective protection of Section 7 rights. In fact, under established standards, no showing of actual coercion is required to prove a violation of Section 8(a)(1) of the Act. Rather, it is the high potential that coercive terms in separation agreements may chill the exercise of Section 7 rights that dictates the Board's traditional approach of viewing severance agreements requiring the forfeiture of Section 7 rights—whether accepted or merely proffered—as unlawful unless narrowly tailored.[38]

V.

Examining the language of the severance agreement here, we conclude that the nondisparagement and confidentiality provisions interfere with, restrain, or coerce employees' exercise of Section 7 rights. Because the agreement conditioned the receipt of severance benefits on the employees' acceptance of those unlawful provisions, we find that the Respondent's proffer of the

[33] This is what happened in *Clark Distribution*. An employee signed a severance agreement, found unlawful by the Board, in which he promised not to "assist in the prosecution of any claims . . . against the company." When the employee was contacted by a Board agent in the course of an unfair labor practice investigation, he subsequently refused to assist a Board agent's investigation, expressing fear that he would lose his severance pay under the agreement and be sued by the employer. 336 NLRB at 748.

[34] See, e.g., *Shamrock Foods Co*., supra, 366 NLRB No. 117; *Clark Distribution Systems*, supra, 336 NLRB 747; *Metro Networks*, supra, 336 NLRB 63; *Phillips Pipe Line Co*., supra, 302 NLRB 732.

The Board applies *Independent Stave*, 287 NLRB 740 (1987), when analyzing the validity of a severance agreement presented as a defense to Board liability. See *A.S.V., Inc.*, 366 NLRB No. 162 (2018); *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007); *Webco Industries*, 334 NLRB 608 (2001), enfd. 90 Fed.Appx. 276 (10th Cir. 2003); *Hughes Christenson Co.*, 317 NLRB 633 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996). However, where, as here, specific provisions of the proffered severance agreement are alleged to be unlawful, the Board analyzes the provisions under the traditional Sec. 8(a)(1) objective test, entirely apart from *Independent Stave*. See *A.S.V., Inc.*, supra, slip op. at 3 ("Separate from the application of *Independent Stave*, the judge also properly found . . . that several of the requirements imposed by the severance agreement would reasonably tend to chill statutorily protected activity, and that the agreements were unenforceable on that independent ground."). Under either analytical approach, the Board will not endorse an agreement containing unlawful provisions that are at odds with the Act or the Board's policies. See *Metro Networks*, supra, 336 NLRB at 66 fn. 17.

[35] See fn. 11, supra.

[36] The Board must carefully scrutinize proffered separation agreements that require the waiver of statutory rights because of the high potential for coercion in these circumstances. When an agreement is proffered as the quid pro quo for receiving severance benefits, it is generally on a take-it-or-leave-it basis and occurs at a time when an employee is particularly vulnerable and unlikely to seek to vary the terms of the agreement.

[37] Similarly, in *Shamrock Foods*, supra, the respondent's presentation of a separation agreement to a discharged employee, which he was not required to sign and did not sign, violated Sec. 8(a)(1) of the Act because terms of the agreement "broadly required [the employee] to waive certain Sec[tion] 7 rights." 366 NLRB No. 117, slip op. at 2-3 & fn. 12. In *Clark Distribution*, supra, the Board adopted the judge's finding that the respondent had violated Sec. 8(a)(1) "by conditioning acceptance of [a] severance package on a requirement that employees not participate in the Board's investigative process." 336 NLRB at 748. As the judge's decision adopted by the Board explained, the General Counsel had "allege[d] that the terms of the severance agreement violated Section 8(a)(1)." Id. at 761. The judge agreed, explaining that the agreement was "an overbroad restriction of the [statutory] rights of employees." Id. at 762. It was the offer that was unlawful.

[38] We are not called on in this case to define today the meaning of a "narrowly tailored" forfeiture of Sec. 7 rights in a severance agreement, but we note that prior decisions have approved severance agreements where the releases waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement. See *Hughes Christensen Co.*, supra, 317 NLRB 633; and *First National Supermarkets*, supra, 302 NLRB 727.

agreement to employees violated Section 8(a)(1) of the Act.

The nondisparagement provision on its face substantially interferes with employees' Section 7 rights. Public statements by employees about the workplace are central to the exercise of employee rights under the Act.[39] Yet the broad provision at issue here prohibits the employee from making any "statements to [the] Employer's employees or to the general public which could disparage or harm the image of [the] Employer"—including, it would seem, any statement asserting that the Respondent had violated the Act (as by, for example, proffering a settlement agreement with unlawful provisions). This far-reaching proscription—which is not even limited to matters regarding past employment with the Respondent—provides no definition of disparagement that cabins that term to its well-established NLRA definition under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, supra, 346 U.S. at 477. Instead, the comprehensive ban would encompass employee conduct regarding any labor issue, dispute, or term and condition of employment of the Respondent. As we explained above, however, employee critique of employer policy pursuant to the clear right under the Act to publicize labor disputes is subject only to the requirement that employees' communications not be so "disloyal, reckless or maliciously untrue as to lose the Act's protection." *Emarco, Inc*., 284 NLRB 832, 833 (1987).[40]

Further, the ban expansively applies to statements not only toward the Respondent but also to "its parents and affiliated entities and their officers, directors, employees, agents and representatives." The provision further has no temporal limitation but applies "[a]t all times hereafter." The end result is a sweepingly broad bar that has a clear chilling tendency on the exercise of Section 7 rights by the subject employee. This chilling tendency extends to efforts to assist fellow employees, which would include future cooperation with the Board's investigation and litigation of unfair labor practices with regard to any matter arising under the NLRA at any time in the future, for fear of violating the severance agreement's general proscription against disparagement and incurring its very significant sanctions. The same chilling tendency would extend to efforts by furloughed employees to raise or assist complaints about the Respondent with their former coworkers, the Union, the Board, any other government agency, the media, or almost anyone else.[41] In sum, it places a broad restriction on employee protected Section 7 conduct.[42] We accordingly find that the proffer of the nondisparagement provision violates Section 8(a)(1) of the Act.[43]

Our scrutiny of the confidentiality provision of the severance agreement leads to the same conclusion. The provision broadly prohibits the subject employee from disclosing the terms of the agreement "to *any* third person." (Emphasis supplied.)[44] The employee is thus precluded from disclosing even the existence of an unlawful provision contained in the agreement. This proscription would reasonably tend to coerce the employee from filing an unfair labor practice charge or assisting a Board investigation into the Respondent's use of the severance agreement, including the nondisparagement provision. Such a broad surrender of Section 7 rights contravenes established public policy that all persons with knowledge of unfair labor practices should be free from coercion in cooperating with the Board.[45] The confidentiality provision has an impermissible chilling tendency on the Section 7 rights of all employees because it bars the subject employee from providing information to the Board concerning the Respondent's unlawful interference with other employees' statutory rights. See *Metro Networks*, supra, 336 NLRB at 67.

[39] See *Valley Hospital Medical Center*, supra, 351 NLRB at 1252.

[40] See *Valley Hospital Medical Center*, 351 NLRB at 1252 ("To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence a malicious motive" or be "maliciously untrue, i.e., if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity") (internal citation omitted).

[41] We observe that the nondisparagement provision left unexamined by the Board in *IGT* is substantially identical to the instant provision in its extreme circumscription of employee Sec. 7 rights:

You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT. [See 370 NLRB No. 50, slip op. at 7.]

[42] *See Shamrock Foods Co*., supra, 366 NLRB No. 117, slip op. at 2-3 & fn.12, and slip op. at 29 (Board adopted judge's finding that agreement was unlawful because it broadly prohibited "mak[ing] any disparaging remarks or tak[ing] any action now, or at any time in the future, which could be detrimental" to the employer).

[43] Comparing our scrutiny of the nondisparagement provision here to the analysis performed in *IGT* brings into sharp relief the insufficiency of the *Baylor* test to protect employees' Sec. 7 rights. In *IGT*, the Board did not offer a flawed interpretation of the challenged nondisparagement provision of the agreement---instead, the Board's analysis did not evaluate the provision at all. In the absence of any evaluation of the provision for its coercive potential, the Board's conclusion in *IGT* that the employee's "free will to accept or decline" such a severance agreement is not "in any way restricted" simply begs the statutory question. See *IGT*, 370 NLRB No. 50, slip op. at 2 fn. 6.

[44] The only exceptions are disclosure to spouse, for obtaining legal counsel or tax advice, or if compelled to do so by a court or administrative agency.

[45] It effectively occasions the same deterrent effect as the explicit non-assistance provision found unlawful in *Clark Distribution*, supra, 336 NLRB at 748–749.

The confidentiality provision would also prohibit the subject employee from discussing the terms of the severance agreement with his former coworkers who could find themselves in a similar predicament facing the decision whether to accept a severance agreement. In this manner, the confidentiality provision impairs the rights of the subject employee's former coworkers to call upon him for support in comparable circumstances. Additionally encompassed by the confidentiality provision is discussion with the Union concerning the terms of the agreement, or such discussion with a union representing employees where the subject employee may gain subsequent employment, or alternatively seek to participate in organizing, or discussion with future co-workers.[46] A severance agreement is unlawful if it precludes an employee from assisting coworkers with workplace issues concerning their employer, and from communicating with others, including a union, and the Board, about his employment. Id. Conditioning the benefits under a severance agreement on the forfeiture of statutory rights plainly has a reasonable tendency to interfere with, restrain, or coerce the exercise of those rights. unless it is narrowly tailored to respect the range of those rights. Our review of the agreement here plainly shows that not to be the case.[47] We accordingly find that the proffer of the confidentiality provision violates Section 8(a)(1) of the Act.[48]

[46] See *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (the guarantee of Sec. 7 "includes both the right of union officials to discuss organization with employees, and the right of employees to discuss organization among themselves").

[47] An employer can have no legitimate interest in maintaining a facially unlawful provision in a severance agreement, much less an interest that somehow outweighs the Sec. 7 rights of employees.

[48] We overrule *Shamrock Foods Co.* and *S. Freedman & Sons* to the extent they are inconsistent with our decision today. In *Shamrock Foods*, the Board found lawful a confidentiality provision that broadly prohibited disclosing "to anyone" the terms of the separation agreement in which the provision was contained, with extremely limited exceptions. See 366 NLRB No. 117, slip op. at 3 fn. 12. That provision, which is substantially similar to the challenged provision here, likewise bars the subject employee from providing information to the Board and communicating with or assisting other employees or a union about such matters. In *S. Freedman & Sons*, the Board found lawful a broadly worded confidentiality provision in a settlement agreement that prevented "any disclosure" of the agreement, and "arguabl[y] . . . affect[ed] [the employee's] right to assist other employees with future claims (in his capacity as a shop steward)." 364 NLRB 1203, 1204 (2016), enfd. 713 Fed. Appx. 152 (4th Cir. 2017). The provision at issue in *S. Freedman* likewise impaired the Sec. 7 rights of the subject employee to the same extent and in the same fashion as in the instant case and in *Shamrock Foods*. (Then-Member McFerran dissented in *Shamrock Food*s and *S. Freedman & Sons* and would have found the respective provisions unlawful.)

VI.

Our main disagreement with the dissent's adherence to *Baylor* and *IGT* is the refusal in those cases to analyze the terms of the severance agreements which are the very subject of the alleged unlawful proffer to recipient employees. The dissent instead focuses solely on other surrounding circumstances as the sole determinant of whether the severance agreement's proffer is unlawful.

The dissent asserts that *Baylor* and *IGT* are not contrary to long-standing Board precedent analyzing the legality of severance agreements. However, as we have explained above, Board precedent from *Phillips Pipe Line* in 1991, to *Clark Distribution Systems* and *Metro Networks* in 2001, through *Shamrock Foods* in 2018, all carefully scrutinized the language of the severance agreements to determine whether their proffer to employees was unlawful. Thus, contrary to our dissenting colleague's assertion otherwise, the case law clearly shows that *Baylor* and *IGT* are at odds with long-standing Board precedent.

Our dissenting colleague attempts to justify the departure from this long-standing precedent by contending that the outcome in those pre-*Baylor* pre-*IGT* cases turned on the presence of unlawful conduct in addition to the proffer of the severance agreement at issue. To the contrary, none of the cases we have cited link the analysis of—in the words of *Metro Networks*—the "plain language" of the severance agreement to the presence or absence of additional unlawful conduct or other circumstances, as we have explained above in full. Rather, the analysis of the lawfulness of the proffer of the severance agreement in these cases was entirely independent of the Board's consideration of other alleged unfair labor practices. See *Shamrock Foods Co*., 366 NLRB No. 117; *Clark Distribution Systems*, 336 NLRB 747; *Metro Networks*, 336 NLRB 63; *Phillips Pipe Line Co*., 302 NLRB 732. [49]

The dissent erroneously contends that the holdings of *Baylor* and *IGT* were limited to severance agreements with "facially neutral" provisions. However, that term appears nowhere in either *Baylor* or *IGT*. Neither of

[49] Our dissenting colleague maintains that *Baylor* and *IGT* did not, in fact, overturn long-standing case precedent analyzing the language of the proffered severance agreement at issue. But it is clear that those cases did overrule prior precedent, as we have set forth above. Moreover, *Baylor* and *IGT* mischaracterized that prior precedent as suggesting that the presence of a non-assistance clause or similar prohibitions in a proffered severance agreement "invariably" was unlawful. *IGT*, slip op. at 2 fn. 9; *Baylor,* slip op. at 2 fn. 6. To the contrary, under the case-law, after careful analysis of the language of the provisions at issue, the proffer of the agreement might be found lawful (like in *Phillips Pipe Line*) or unlawful (like in *Clark Distribution Systems*). Therefore, the dissent errs in claiming that our position—which returns to that precedent—would find unlawful the proffer of any provision "that could possibly be interpreted as interfering with Section 7 rights."

those cases made any distinction among the types of provisions that might be the subject of an unlawful proffer. They did not, and, of course, could not, because they never examined the language of the provisions.

Our dissenting colleague further seeks to distance himself from the limitations *Baylor* and *IGT* placed on the types of unfair labor practices that would warrant finding a proffer unlawful. The *IGT* majority found that an unlawful refusal to bargain over a subcontracting decision—a violation of Section 8(a)(5)—and an unlawful threatening of employees with a loss of overtime—a violation of Section 8(a)(1)—were insufficient to find an unlawful proffer, holding "such violations do not support a finding that the Respondent has discriminated against employees for engaging in Sec[tion] 7 activity." *IGT*, slip op. at 2 fn. 7. That our dissenting colleague in the instant case is willing to find an unlawful proffer based on the Section 8(a)(5) direct dealing violation does not make our analysis of *IGT* and *Baylor* erroneous. As we explained above, *Baylor* and *IGT* would find a violation only where the proffer was made to an unlawfully discharged employee, or where the respondent has discriminated against employees—findings that require a showing of animus directed toward Section 7 activity.[50]

Finally, the dissent claims our analysis of the provisions of the severance agreement proffered to the employees in this case is erroneous because it is a work-rules analysis. We have not applied a work rules analysis here. We have applied long-standing precedent analyzing severance agreements.[51]

In sum, our decision today overrules *Baylor* and *IGT*, restores prior law embodied in cases like *Clark Distribution Systems* which examine the facial language of proffered severance agreement, and finds the proffer of the severance agreement unlawful in this case because the language itself restricts Section 7 rights, without regard to the commission of additional unfair labor practices or other external circumstances. That the dissent declines to pass on the lawfulness of the facial language here, finding it "not necessary to decide the case," entirely ignores that under *Baylor* and *IGT*, the Board will never have occasion to analyze the language of a proffered severance agreement. Contrary to the dissent, our holding today overruling that approach is not dicta, but a return to a principled analysis of the proffer of severance agreements to employees who reasonably may be concerned with their Section 7 rights.[52]

VII.

Baylor granted employers carte blanche to offer employees severance agreement that include unlawful provisions. That cannot be correct under the Act, a statute designed to protect employees in the exercise of their rights. For all the reasons explained above, the Board's approach in *Baylor* must be abandoned.

ORDER

The National Labor Relations Board orders that the Respondent, McLaren Macomb, Mount Clemens, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Furloughing bargaining unit employees in the following appropriate collective-bargaining unit without first notifying the Union and giving it an opportunity to bargain over the decision and its effects:

> **INCLUDED:** All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.

[50] See *Baylor*, slip op. at 2 and fn. 6; *IGT*, slip op. at 2. However, *Baylor* failed to define its reference to undefined "other circumstances" which might provide the basis for finding an unlawful proffer.

[51] While we agree with our dissenting colleague that terms in a severance agreement are not work rules, he misses the mark in asserting that severance agreements are "inherently less coercive" than facially neutral work rules. Overbroad work rules may coerce employees to forego Sec. 7 activity for fear of discipline or discharge. Severance agreements, on the other hand, may coerce the loss of Sec. 7 rights by requiring their forfeiture to obtain offered benefits, at a particularly vulnerable time when the employee is already facing job loss. The maintenance of an unlawful work rule and the proffer of a severance agreement containing unlawful provisions are both coercive, then, though for different reasons, and our analysis does not turn on a comparison between the two. As explained above, the coercion in an unlawful severance agreement is inherent in the agreement itself, which purports to condition benefits on the legal forfeiture of Sec. 7 rights. A broad voluntary waiver of statutory rights undermines the public purposes of the Act, which depend on the freedom of all employees to engage in Sec. 7 activity, to support each other in doing so, and to assist the Board in vindicating employee rights under the Act.

[52] We accordingly do not decide this case under *Baylor* and *IGT*. We do observe that our dissenting colleague finds that even under *Baylor* the severance agreement in this case would not survive legal scrutiny. With this we agree. The severance agreement was part and parcel of the Respondent's unlawful permanent furlough of the 11 employees, and was the product of its unlawful direct dealing with those employees soliciting them to sign the agreement, and entirely bypassing the Union.

EXCLUDED: All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

(b) Bypassing the Union as the exclusive collective-bargaining representative of the bargaining unit described above by directly dealing with employees regarding their terms and conditions of employment.

(c) Presenting the permanently furloughed employees with a severance agreement prohibiting them from making "statements to [the Respondent'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."

(d) Presenting the permanently furloughed employees with a severance agreement prohibiting them from disclosing the terms of the severance agreement "to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(b) On request, bargain with the Union concerning its decision to permanently furlough unit employees and the effects of that decision.

(c) Rescind the permanent furloughs that were unilaterally implemented in June 2020.

(d) Within 14 days from the date of this Order, offer Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor and Mary Valentino whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of their unlawful furloughs in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Compensate Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) File with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed by

agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Roxanne Baker's, Shanon Chapp's, Susan DeBruyn's, Amy LaFore's, Mona Matthews', Brenda Reaves', Patrina Russo's, Tameshia Smith's, Charles Stepnitz's, Linda Taylor's, and Mary Valentino's corresponding W-2 forms reflecting the backpay award.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful permanent furlough of Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino, and within 3 days thereafter notify them in writing that this has been done and that the furloughs will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its facility in Mount Clemens, Michigan, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 10, 2020.[53]

(k) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. February 21, 2023

Lauren McFerran,	Chairman
Gwynne A. Wilcox,	Member
David M. Prouty,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

The Respondent, without giving the Union notice and an opportunity to bargain, permanently furloughed 11 employees while they were already on an unchallenged temporary furlough and, excluding the Union, directly dealt with them to enter into severance agreements. I agree with my colleagues that the Respondent's conduct in these regards violated Section 8(a)(5) and (1).[1] I also agree with my colleagues and the General Counsel that, in light of this unlawful conduct, the Respondent's offering the severance agreements containing the nondisparagement and confidentiality provisions was unlawful under *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020). Despite the fact that

[53] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] In remedying the unlawful furloughs, unlike my colleagues, I would require the Respondent to compensate the affected employees for other pecuniary harms only insofar as the losses were directly caused by the furloughs, or indirectly caused by the furloughs where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with my partial dissent in *Thryv, Inc.*, 372 NLRB No. 22 (2022).

extent law is sufficient to resolve this matter, my colleagues take this opportunity, not raised by the General Counsel until her Brief in Support of Exceptions to the Board, to address circumstances not present in this case and overrule the sound law of *Baylor* and *IGT*. On this aspect of their decision, I dissent.

The Board Should Retain the Analysis Set Forth in *Baylor* and *IGT*

In *Baylor* and *IGT*, the Board addressed whether the mere proffer by an employer of severance agreements containing non-disparagement, non-assistance, and confidentiality provisions interfere with, restrain, or coerce employees in the exercise of their rights under the Act. The Board concluded that, absent outside circumstances that could render the proffers coercive, the mere action of *offering* these agreements to former employees does not constitute a violation of the Act. See *IGT*, 370 NLRB No. 50, slip op. at 2; *Baylor*, 369 NLRB No. 43, slip op. at 1–2.

The Board's analysis in these cases centered on several factors. First, the Board considered whether that the General Counsel was alleging that the severance agreement *itself* was unlawful.[2] *Baylor*, 369 NLRB No. 43, slip. op at 1. Next, the Board concluded that because severance agreements were not analogous to work rules, the analysis for interpreting facially neutral work rules under *Boeing*[3] was not applicable.[4] In so finding, the Board reasoned that employees' decision whether or not to accept severance benefits in these circumstances was entirely voluntary, absent evidence of separate unlawful conduct on the part of the Respondent that would render the proffers unlawful. *IGT*, 370 NLRB No. 50, slip op. at 2; *Baylor*, 369 NLRB slip. op at 2 & fn. 6 ("There is no reason to believe that the [r]espondent harbors animus against Sec. 7 activities," let alone that it would retaliate against employees who exercised those rights.) The Board also recognized that, in the absence of any prior instance in which the employer had attempted to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, there would be no reason for an employee to believe that the employer would invoke the agreement in response to the employee's exercise of her Section 7 rights. This is particularly so given the Board's recognition that employees do not "view every employer document through the prism of Section 7." *IGT*, 370 NLRB No. 50, slip op. at 2 fn. 8 (quoting *L.A. Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019) (citing *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017))). Finally, the Board reasoned that, unlike agreements pertaining to employees' former terms and conditions of employment, severance agreements do not, nor do they have the potential to, affect employees' pay or benefits or any other terms of employment that were in place before the employees were discharged. See *IGT*, 370 NLRB No. 50, slip op. at 2; *Baylor*, 369 NLRB No. 43, slip op. at 1–2. Consistent with my prior votes in *Baylor* and *IGT*, I find that this is the proper standard to apply in deciding whether an employer's *mere proffer* of voluntary severance agreements violates the Act.

My Colleagues' Justification for Overruling *Baylor* and *IGT* Is Based on an Incorrect, or Speculative, Interpretation of those Cases

My colleagues' decision that *Baylor* and *IGT* must be overruled is based on a few fundamental misunderstandings of the Board's holdings in in *Baylor* and *IGT*.

To begin, my colleagues repeatedly assert that *Baylor* and *IGT* must be reversed because they were in conflict with "long-standing precedent." However, none of the cases cited by my colleagues involved the circumstances at issue in *Baylor* and *IGT;* to the contrary, in the three cases they cite where the Board found that an employer violated the Act by proffering a severance agreement, the employer had engaged in unlawful conduct in addition to the proffering of the severance agreement at issue.[5] Accordingly, under *Baylor* and *IGT*, the proffering of those

[2] Unlike in *Baylor* and *IGT*, the General Counsel alleged that the terms of the severance agreement were unlawful here. What the General Counsel did not allege throughout litigation before the administrative law judge, however, is that the mere *proffer* of the severance agreement in the absence of any other coercive conduct violated the Act. Nor did the General Counsel have reason to make such an argument, as my colleagues and I agree that even under *Baylor* and *IGT*, the unlawful circumstance under which the Respondent proffered the agreements renders that action unlawful.

Again, because this case does not involve a scenario in which an employer is presenting a severance agreement in a context where it has never exhibited any proclivity to violate the Act, it was not necessary for my colleagues to reach to address such contexts in deciding this case, my colleagues' holding insofar as it would apply in such contexts is dicta.

[3] *Boeing Co.*, 365 NLRB No. 154 (2017).

[4] My colleagues correctly note that the holdings in *Baylor* and *IGT* were not expressly limited to "facially neutral" severance agreements—i.e., those containing provisions that did not expressly prohibit Sec. 7 activity but rather could be interpreted as unlawfully overbroad. Where my colleagues err, however, is asserting that *Baylor* unquestionably applies to facially unlawful provisions. The Board has not yet been faced with a case presenting those facts, nor need I address that scenario here where the severance agreement at issue is facially neutral.

[5] The other two cases cited by my colleagues as the "long-settled precedent" in this area are clearly distinguishable. See *Phillips Pipe Line Co.,* 302 NLRB 732, 732–733 (1991) (finding that the employer did not violate the Act by proffering a voluntary severance agreement that *did not restrict Sec. 7 rights*); *First National Supermarkets*, 302 NLRB 727, 731 (1991) (involving the settlement of a grievance over vacation pay allegedly *accrued during the employee's employment*).

severance agreements would still be unlawful. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 fn. 12 (2018) (finding maintenance of separation agreement unlawful because, among other reasons, the employee had been unlawfully discharged), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019) (per curium); *Metro Networks*, 336 NLRB 63, 66–67 (2001) (same); *Clark Distribution Systems*, 336 NLRB No. 117 (finding employer that committed additional violations of the Act unlawfully conditioned severance benefits on an agreement not to participate in Board processes). As a result, far from running counter to "long-settled precedent," *Baylor* and *IGT did not overturn* the decisions in those cases, but merely declined to continue to apply the overbroad holdings contained therein to cases involving a significantly different factual scenario.

Next, the majority erroneously asserts that the *Baylor* and *IGT* decisions require an unlawful discharge or other unfair labor practices for the proffer to be a violation. As explained above, however, the standard set forth in *Baylor* and *IGT* examines if there are circumstances external to a severance agreement that render its proffer *objectively* coercive. Unlawful discharges or other unfair labor practices occurring before the severance agreement certainly would be the most likely scenario for finding such an agreement unlawful under *Baylor*, but the standard is not limited in such a way. And nowhere is there any suggestion that an employer *must* exhibit animus against Section 7 activity for there to be a violation.[6] To the contrary, in the instant case, I am finding that the 8(a)(5) and (1) direct-dealing violation committed by the Respondent—a violation that does not require a finding of animus—is sufficient to create an atmosphere in which the Respondent's proffer of the settlement agreements was objectively coercive.

But regardless, the majority's position that an employer's intent is not relevant to determining whether a reasonable employee would be coerced under the Act misses the point. *Baylor* and *IGT* have nothing to do with an employer's intent. Rather, the entire issue is evaluating whether a reasonable employee would find that the *proffer* of the settlement agreement would interfere with, retrain, or coerce them in the exercise of their Section 7 rights. And, as the majority concedes, the presence of prior conduct suggesting a proclivity to violate the Act *would* affect the way in which employees would interpret the severance agreement.

Second, the majority writes from the puzzling assumption that because, in their view, the provisions in the severance agreements are themselves facially unlawful, *Baylor* and *IGT* were absurdly deciding whether the proffer of *unlawful provisions* was unlawful. This is not the case. Neither *Baylor* nor *IGT* analyzed the severance agreements at issue in those cases as if they were equivalent to work rules. My colleagues' analysis searching for coercion in the facial overbreadth of specific severance-agreement provisions is indistinguishable from a work-rules analysis. But, as the Board found in *Baylor* and *IGT*, facially neutral severance agreements are inherently less coercive than facially neutral work rules and warrant a different analysis looking at whether the circumstances of the proffer were coercive rather than analyzing the language itself.[7]

Finally, my colleagues repeatedly state that the holdings in *Baylor* and *IGT* established that "an employer is entirely free to proffer any provision, even a facially unlawful one" and "granted employers carte blanche to offer employees severance agreements that include unlawful provisions." With respect, although my colleagues may speculate about the breadth of the holding in those cases, the Board has never applied those cases to find facially unlawful severance agreement provisions lawful. In both *Baylor* and *IGT*, the severance agreements at issue were facially neutral. Indeed, in *IGT*, the Board expressly addressed this concern, noting that a work rule containing identical language to that contained in the severance agreement had been found lawful in another case. *IGT*, 370 NLRB No. 50, slip. op. at 2 fn.8 (citing Motor City Pawn Brokers Inc., 369 NLRB No. 132, slip op. at 5–7 (2020)). My colleagues' assertion that a future Board would apply *Baylor* and *IGT* to find that employers may lawfully proffer severance agreements that specifically and expressly require the waiver of Section 7 rights is pure speculation. And pure speculation does not provide a reasonable justification for overruling Board precedent.[8]

[6] The *Baylor* decision referenced animus in considering the surrounding circumstances of the severance agreements' proffer. The Board did not, as my colleagues assert, "focus on animus as a significant factor under the *Baylor* test." The Board's decision in *IGT*, that applied *Baylor*, did not even mention animus.

[7] To the extent my colleagues are taking the position that provisions of *voluntary* severance agreements cannot be considered facially neutral like *mandatory* work rules can be, their approach is nothing short of arbitrary. Mandatory work rules that can cause employees to lose their jobs cannot reasonably be regarded as less coercive than agreements that offer a benefit not arising from their former employment to employees who no longer work for the employer.

[8] My colleagues' reliance on this speculation is especially ironic given that, under their standard, an employer's proffer of any severance agreement containing any term that could *possibly* be interpreted as interfering with Sec. 7 rights would be per se unlawful, without regard for whether a reasonable employee would interpret the term at issue as coercive in the context of either the severance agreement as a whole or their former employer's history in response to activity protected by the Act.

The Majority's Justification for Finding a Violation in this Case Contains Additional Errors

Even assuming that the act of proffering a facially neutral, totally voluntary severance agreement should be analyzed by the same standards as the maintenance of facially neutral work rules, my colleagues arbitrarily fail to apply current Board law in analyzing the severance agreements at issue in this case.[9] The current standard for evaluating whether facially neutral work rules are unlawful is set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). Rather than apply these decisions, my colleagues' analysis appears to be implicitly based on the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which considers whether there is any potential interference with Section 7 rights rather than balancing a rule's tendency to interfere with Section 7 rights against the legitimate interests supporting the rule. Although my colleagues have signaled their intention to reverse *Boeing* and *LA Specialty* in the Notice and Invitation to File Briefs in *Stericycle, Inc.*, 371 NLRB No. 48 (2022), they must apply current Board law until such time as those cases are overruled. Under *Boeing* and *LA Specialty*, it is clear that the non-disparagement and confidentiality provisions in the severance agreements at issue would be lawful to maintain. See *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 2–3 (2021) (confidentiality rule lawful); *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132, slip op. at 5-7 (2020) (nondisparagement rule lawful).

Furthermore, throughout most of their decision, my colleagues analyze this case by determining whether the Respondent's proffer of the severance agreements was merely coercive. But, despite my colleagues' protestations to the contrary, the General Counsel litigated this case on a different theory—that the severance agreements constituted an unlawful *threat*. The allegations in the Amended Complaint state that the Respondent violated the Act because it "*threatened* its employees with loss of benefits described in permanent furlough agreements." (Emphasis added.) And, in her brief in support of exceptions, the General Counsel continued to assert that the Respondent violated the Act by threatening its employees with the loss of benefits set forth in the severance agreement.

But clearly there was no threat here. Former employees were presented with a facially neutral severance agreement and informed that it was entirely their choice whether or not to sign. There is no evidence that the Respondent indicated that any term and condition of employment would be affected based on any employee's decision whether or not to sign the agreement. Accordingly, the mere proffer of the agreement did not constitute a threat to take action against protected Section 7 activity; rather it indicated that, should an employee choose to sign the agreement, they would have to abide by the facially neutral terms of the agreement.[10]

CONCLUSION

Baylor and *IGT* were sound, pragmatic decisions fully consistent with the Act, and my colleagues have failed to establish sufficient grounds for overturning those decisions. Contrary to my colleagues' assertions, the holdings in *Baylor* and *IGT* did not conflict with "longstanding precedent." None of the cases cited by my colleagues found that an employer, never having suggested any proclivity to violate the Act, violated the Act by proffering a severance agreement that could possibly be interpreted as limiting Section 7 rights. Indeed, the instant case does not present those circumstances. Nevertheless, my colleagues have used this case to overrule extant law that was consistent with finding the violation in this case in order to change the law, in effect, for cases *not* involving the facts presented in this case. Not only does this new standard go beyond what is necessary to decide this case but, for the reasons I have discussed, my colleagues' finding of a threat violation under this new standard is neither correct under Board law nor consistent with the General Counsel's complaint and litigation of this matter. Accordingly, I must respectfully dissent from this aspect of my colleagues' decision.

Dated, Washington, D.C. February 21, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

[9] Because the question whether the Respondent's proffer of the severance agreement was unlawful based solely on the language of the settlement agreement is not necessary to decide the case, I decline to pass on that question.

[10] My colleagues, seeming to recognize that the Respondent's proffer of the severance agreement did not constitute an unlawful threat, "correct" the General Counsel's theory of the case and find the violation on a different basis. Although of course it is preferable not to make the General Counsel's case for her, the Board can be justified in taking such action when otherwise it would not be able to enforce a violation of the Act. Here, however, there is no such problem; the Board is already finding that the Respondent's proffer of the severance agreement was unlawful under *Baylor* and *IGT*. Under such circumstances, I do not believe that it is in the Board's best interest, as a neutral decisionmaker, to find the violation here under a different theory than that proffered by the General Counsel.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT furlough our bargaining unit employees in the following appropriate collective-bargaining unit without first notifying the Union and giving it an opportunity to bargain over the decision and its effects:

INCLUDED: All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.

EXCLUDED: All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT bypass the Union as the exclusive collective-bargaining representative of the bargaining unit described above by directly dealing with our employees regarding their terms and conditions of employment.

WE WILL NOT present our permanently furloughed employees with a severance agreement containing an unlawful nondisparagement provision prohibiting them from making "statements to [our] 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."

WE WILL NOT present our permanently furloughed employees with a severance agreement containing an unlawful confidentiality provision prohibiting them from disclosing the terms of the severance agreement "to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the

Union as the exclusive collective-bargaining representative of our employees in the bargaining unit described above.

WE WILL, on request of the Union, bargain with it concerning our decision to permanently furlough unit employees and the effects of that decision.

WE WILL rescind the permanent furloughs that were unilaterally implemented in June 2020.

WE WILL, within 14 days from the date of the Board's Order, offer Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino whole for any loss of earnings and other benefits resulting from their permanent furlough, less any net interim earnings, plus interest, and WE WILL make these employees whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful layoffs, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed either by agreement or Board Order, or such additional time as the Regional Director may allow for good cause shown, a copy of Roxanne Baker's, Shanon Chapp's, Susan DeBruyn's, Amy LaFore's, Mona Matthews', Brenda Reaves', Patrina Russo's, Tameshia Smith's, Charles Stepnitz's, Linda Taylor's, and Mary Valentino's corresponding W-2 forms reflecting the backpay awards

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful permanent furloughs of Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the permanent furloughs will not be used against them in any way.

MCLAREN MACOMB

The Board's decision can be found at www.nlrb.gov/case/07-CA-263041 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Larry Smith, Esq., for the General Counsel.
Dennis M. Devaney and *Brian D. Shekell, Esqs. (Clark Hill PLC),* for the Respondent.
Scott A. Brooks, Esq. (Gregory, Moore, Brooks & Clark, PC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard on June 21, 2021. The complaint alleged, inter alia, that McLaren Macomb (McLaren) violated: §8(a)(1) by having employees sign furlough agreements containing confidentiality and non-disclosure provisions; and §8(a)(5) by directly dealing with employees over their furloughs and failing to give Local 40, RN Staff Council, Office and Professional Employees International Union (the Union) notice or a chance to bargain over the furloughs. On the record, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

McLaren provides inpatient and outpatient medical care. Annually, it derives gross revenues exceeding $250,000, and purchases and receives at its Michigan hospital goods exceeding $5000 directly from outside of Michigan. It is, as a result, engaged in commerce under §2(2), (6), and (7) of the Act. The Union is a §2(5) labor organization.

II. UNFAIR LABOR PRACTICES

A. Unionization at McLaren

On August 28, 2019, these McLaren employees voted to un-

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations, and undisputed evidence.

ionize (the Unit):

> **INCLUDED:** All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.
>
> **EXCLUDED:** All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

On December 9, 2019, the Board certified the Union as the Unit's exclusive collective-bargaining representative. The parties are presently negotiating a first contract for the Unit.

B. Furloughs

In June and July 2020, McLaren approached several Unit employees about their selection for permanent furloughs. The Union was neither notified nor included in these discussions. These Unit employees (the furloughed workers) consequently signed *Severance Agreement, Waiver and Release* agreements terminating their tenure (the severance agreements):

Employee	Date	Severance Amount	Exhibit
Roxanne Baker	July 24, 2020	$1,892.38	GC Exh. 2
Shanon Chapp	July 24, 2020	$6,941.45	GC Exh. 3
Susan DeBruyn	June 10, 2020	$2,263.52	GC Exh. 4
Amy LaFore	July 27, 2020	$2,005.51	GC Exh. 5
Mona Matthews	July 31, 2020	$2,284.85	GC Exh. 6
Brenda Reaves	June 10, 2020	$5,140.80	GC Exh. 7
Patrina Russo	July 21, 2020	$928.80	GC Exh. 8
Tameshia Smith	July 29, 2020	$3,783.48	GC Exh. 9
Charles Stepnitz	July 30, 2020	$2,043.55	GC Exh. 10
Linda Taylor	July 29, 2020	$288	GC Exh. 11
Mary Valentino	July 25, 2020	$1,676.23	GC Exh. 12

The severance agreements contained these confidentiality and non-disparagement clauses, which have been alleged to be unlawful:

> **6. <u>Confidentiality Agreement</u>.** The Employee acknowledges that the … Agreement … [is] confidential and agrees not to disclose … [it] to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> **7. <u>Non-Disclosure</u>.** … [T]he Employee … agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer ….

(GC Exhs. 2–12.)

Laura Gibbard, Regional Vice-President of Human Resources, credibly indicated that the COVID-19 pandemic began severely impacting McLaren's operations in March 2020, when the hospital terminated its outpatient services and began solely admitting trauma, emergency and COVID-19 patients. This

prompted McLaren to decide to permanently furlough its non-essential staff in June 2020, including the furloughed Unit employees at issue herein. She described a crisis scenario at that time, which required the hospital to simultaneously juggle a COVID-stricken staff, a PPE shortage, a shutdown of its non-essential services, a dramatic expansion of in-patient COVID services, and increased mortalities associated with COVID. McLaren applied its *Severance Pay and Benefits Related to Workforce Reduction* policy to the furlough (GC Exh. 15), and its *Reduction in Force* policy (R. Exh. 2).

Vice-President Gibbard contended that COVID-19 created exigent circumstances, which excused McLaren from discussing the furloughs with the Union. She added that, to date, the Union has never sought bargaining over the furloughs or raised it during contract negotiations.

III. ANALYSIS

A. 8(a)(1) Allegations

The confidentiality and non-disclosure provisions in McLaren's severance agreements were lawful. In *Baylor University Medical Center*, 369 NLRB No. 43 (2020), the Board held that the employer lawfully included confidentiality and non-disclosure provisions in separation agreements, where the agreements provided severance monies and benefits that the affected employees would not have otherwise received. In making this finding, the Board noted that the severance agreements were voluntary, the confidentiality and non-disclosure provisions only applied to postemployment activities, and an employee's decision to enter into a separation agreement had no impact on their receipt of previously accrued benefits. Id.*;* see also *International Game Technology*, 370 NLRB No. 50, slip op. at 2 (2020) (finding that a separation agreement containing a non-disparagement was valid, where the employee's entry was voluntary, previously vested benefits were unaffected and the "case does not involve 8(a)(3) allegations or evidence of other unlawful discrimination, nor is there evidence that the Respondent proffered the Agreement under circumstances that would reasonably tend to interfere with the separating employees' . . . Section 7 rights or those of their coworkers.").

The confidentiality and non-disclosure provisions in McLaren's severance agreements were lawful. The agreements were voluntary, only offered to separated workers, and did not impact their previously accrued benefits. This case also does not involve "[§]8(a)(3) allegations" or other circumstances interfering §7 rights as cited by *International Game Technology*.

B. 8(a)(5) Allegations

1. Permanent furloughs

McLaren violated §8(a)(5), when it unilaterally offered furlough agreements to Unit employees without giving the Union notice or an opportunity to bargain. It is well established that furloughs and layoffs are mandatory subjects of bargaining, which require notice and bargaining. See, e.g., *Thesis Painting, Inc*., 365 NLRB No. 142, slip op. at 1 (2017); *Eugene Iovine, Inc*., 353 NLRB 400 (2008), reaffirmed 356 NLRB 1056 (2011), affd. 371 Fed. Appx. 167 (2d Cir. 2010), vacated on other grounds 562 U.S. 956 (2010); *Tri-Tech Services, Inc*., 340 NLRB 894, 894 (2003).[2] Additionally, because the parties had not reached an impasse in their first contract bargaining, McLaren cannot defend its actions on this basis. It, thus, must show that its unilateral furloughs were somehow privileged. *Fresno Bee*, 339 NLRB 1214, 1214 (2003).

McLaren's actions were not privileged by the COVID-19 pandemic. It is well-settled that bargaining is excused only where "extraordinary" and "unforeseen" events "having a major economic effect" demand that a business "take immediate action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995), quoting *Hankins Lumber Co*., 316 NLRB 837, 838 (1995); see also *Ardit Co.*, 364 NLRB 1836, 1840 (2016). For example, in *Ardit Co*., the Board found that unilateral layoffs were not justified even though the company "lost a major contract" after a stop-work order and "its bid for another contract was unsuccessful." 364 NLRB 1836, 1840. Moreover, the Board has found that adverse business circumstances such as "loss of significant accounts or contracts" and "operation at a competitive disadvantage" are insufficient to obviate a bargaining obligation, unless the evidence establishes "a dire financial emergency." *RBE Electronics of S.D.*, 320 NLRB at 81, citing *Farina Corp*., 310 NLRB 318, 321 (1993) (loss of a customer account); *Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994), enf'd. 136 F.3d 727 (11th Cir. 1998).

McLaren failed to establish that its actions were privileged. It failed to show that the unforeseen events associated with the COVID-19 pandemic had a "major economic effect," which required immediate action. Although it demonstrated that COVID-19 presented a horrendous crisis that required it to temporarily divert its health care resources and encounter several difficult and unexpected social and operational changes, it failed to show that this turbulence caused a "major economic effect" requiring the immediate layoff of a dozen Unit workers from a workforce of 2300 employees. McLaren failed to offer a single balance sheet or other financial statement, which supported its contention that economic necessity privileged an immediate furlough. In addition, it is hard to imagine that this very tiny, isolated Unit furlough would have provided a sizeable economic impact to a large hospital. Lastly, the fact that McLaren found time to bargain with the Union over the first collective-bargaining agreement and simultaneously handle other labor relations duties suggests that it could have found a narrow window to engage in pre-decision bargaining over these permanent furloughs. In sum, it failed to show that it was excused from bargaining over these furloughs.

2. Direct dealing

McLaren violated §8(a)(5), when it engaged in direct dealing with Unit employees in connection with the furloughs. An employer engages in direct dealing when: it communicates directly

[2] Even though McLaren's decision was dually based upon the COVID-19 pandemic and the economics of eliminating non-clinical personnel, the Board has held that even decisions that are partially motivated by economic reasons remain mandatory subjects of bargaining. See, e.g., *Pan-American Grain Co*., 351 NLRB 1412, 1413–1414 (2007) (layoffs due to both economic reasons and automation were a mandatory subject of bargaining).

with union-represented employees; its discussion was to establish or change wages, hours, and terms and conditions of employment or to undercut the union's role in bargaining; and the communication was made to the exclusion of the union. *El Paso Electric Co*., 355 NLRB 544, 545 (2010). In this case, McLaren communicated directly with the furloughed Unit workers over their separations (i.e., which were mandatory bargaining topics) to the exclusion of the Union; this constituted direct dealing.

CONCLUSIONS OF LAW

1. McLaren is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.
2. The Union is a §2(5) labor organization.
3. At all material times, the Union has been the designated bargaining representative of McLaren's employees in the following appropriate bargaining unit:

> **INCLUDED:** All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.
>
> **EXCLUDED:** All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

4. Between June and July 2020, McLaren violated §8(a)(5) by permanently furloughing Unit employees without first notifying the Union and giving it an opportunity to bargain about its furlough decision and its effects.
5. Between June and July 2020, McLaren violated §8(a)(5) by bypassing the Union and dealing directly with Unit employees by soliciting them to enter into furlough agreements.
6. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

REMEDY

Having found that McLaren committed unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that McLaren violated §8(a)(5) by permanently furloughing Unit employees without first notifying the Union and giving it an opportunity to bargain, it shall offer affected Unit employees full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of their unilateral furloughs. Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, McLaren shall compensate the furloughed workers for any adverse tax consequences of receiving a lump-sum backpay award, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In accordance with *King Soopers, Inc*., 364 NLRB 1153 (2016), enfd. 859 F.3d 23 (D.C. Cir. 2017), McLaren shall compensate the furloughed workers for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. McLaren shall remove from its files all references to the unlawful furloughs and notify the affected workers in writing that this has been done and they will not be used against them in any way. It shall also post a notice under *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the

entire record, I issue the following recommended[3]

ORDER

McLaren Macomb, Mount Clemens, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Permanently furloughing bargaining unit employees in the following appropriate collective bargaining unit without first notifying the Union, as the exclusive collective-bargaining representative of these employees, and without affording the Union a chance to bargaining over this decision and its effects:

> **INCLUDED:** All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.
>
> **EXCLUDED:** All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

(b) Bypassing the Union as the exclusive collective bargaining representative of the Unit described above by dealing directly with employees by soliciting them to enter into individual furlough agreements.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

2. Take the following affirmative action necessary to effectuate the Act's policies.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of employees in the Unit described above, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of these employees.

(b) On request, bargain with the Union concerning its decision to furlough Unit employees and the effects of that decision.

(c) Rescind the Unit furloughs that were unilaterally implemented in June and July 2020.

(d) Offer full reinstatement to furloughed employees Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor and Mary Valentino to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(e) Make the furloughed employees whole for any loss of earnings and other benefits caused by their unlawful furloughs in the manner set forth in the remedy section of this decision.

(f) Remove from its files any reference to the unlawful furloughs and within 3 days thereafter, notify the furloughed employees in writing that this has been done and that the furloughs will not be used against them in any way.

(g) Compensate the furloughed employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(h) File a report with the Social Security Administration allocating backpay for the furloughed employees to the appropriate calendar quarters.

(i) Compensate the furloughed employees for the adverse tax consequences, if any, of receiving lump-sum back awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(j) Within 14 days after service by the Region, post at its Mount Clemens, Michigan facility copies of the attached notice

[3] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 10, 2020.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated Washington, D.C. August 31, 2021

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT furlough our Unit employees in the following appropriate bargaining unit without first giving Local 40, RN Staff Council, Office and Professional Employees International Union (the Union) an opportunity to bargain over our decision and its effects:

INCLUDED: All full-time and regular part-time bed control specialists; administrative assistants, imaging assistants; clerical associate-1s; clerical associate-2s; gift shop clerks; clinical care systems coordinators; office coordinators; dispatchers; couriers; EEG techs; operators; patient liaison meta bariatric; schedulers; surgical boarders; surgical supply specialists; cardiographic techs; critical care techs; lab assistants; perioperative techs; pharmacy tech-ls; pharmacy tech-2s; patient access representative-1s; patient access representative-2s; patient access representative-3s; patient experience representatives; respiratory equipment techs; staffing coordinators; patient bed sitter-2s; patient safety coordinators and systems specialists.

EXCLUDED: All biomedical tech-ls; biomedical tech-2s; biomedical tech- 3s; Accountant II; cardiovascular invasive specialist reg; case manager RN; clinical information specialist; clinical pharmacy specialist; clinical specialty coordinator; computer tomography techno; coordinated emergency preparedness; computer tomography techno lead; clinical transformation specialist; coordinated metabolic bariatric; coordinated surgical board; cytotechnologist; educator diabetes RN; educator patient care services; educator patient care service lead; executive assistant; executive assistant senior; exercise physiologist; imaging services instructor; infection preventionist; laboratory marketing rep; lactation consultant; librarian; mammography techno; mammography techno lead; marketing communication specialist; medical staff credentialing specialist; media relations specialist; medical laboratory tech; medical assistant; MRI technologist; MTQIP clinical reviewer; medical technologist; nurse extern; nurse intern; nuclear medicine technologist; nurse navigator breast health; nurse practitioner 3 specialty; OB technician II; occupational therapist; pathologist assistant; pharmacist; pharmacist lead; pharmacy buyer; pharmacy intern; physical therapist; physical therapist assistant; physical therapist assistant lead; physician liaison; polysomnographic technologist; polysomnographic technologist lead; preadmission testing techs; program managers; clinical risk patient safety; quality improvement specialist; radiology technologist; RN first assistant; respiratory intern; respiratory therapist reg; respiratory reg lead; social worker MSW; sonographer; sonographer cardiac; sonographer cardiac lead; sonographer lead; sonographer vascular reg; special procedure technologist; speech language pathologist; surgical tech; trauma data analyst; trauma performance IMP specialist; utilization review AP specialist RN; utilization review specialist; all other employees, managerial employees, temporary employees, contracted employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT bypass the Union as the exclusive collective bargaining representative of the above-described Unit by soliciting employees to enter into furlough agreements.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of Unit employees, notify and, on request, bargain with the Union as their exclusive collective-bargaining representative.

WE WILL, on request, bargain with the Union concerning our decision to furlough Unit employees and the effects of that

[4] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

decision.

WE WILL rescind the furloughs of our Unit employees that were unilaterally implemented in June and July 2020.

WE WILL offer full reinstatement to furloughed employees Roxanne Baker, Shanon Chapp, Susan DeBruyn, Amy LaFore, Mona Matthews, Brenda Reaves, Patrina Russo, Tameshia Smith, Charles Stepnitz, Linda Taylor, and Mary Valentino to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make the furloughed employees whole for any loss of earnings and other benefits resulting from their furloughs, less any net interim earnings, plus interest, and WE WILL also make them whole for their reasonable search-for-work and interim employment expenses, plus interest, regardless of whether those expenses exceed their interim earnings.

WE WILL compensate the furloughed employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL remove from our files any reference to the unlawful furloughs and within 3 days thereafter, notify the furloughed employees in writing that this has been done and that their furloughs will not be used against them in any way.

WE WILL remove from our files any reference to these furloughs, and WE WILL, within 3 days thereafter, notify each of the furloughed employees in writing that this has been done and that the furloughs will not be used against them in any way.

McLAREN MACOMB

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-263041 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.