CLIENT ALERTS & INSIGHTS

Michigan Rolls Back its "Right-To-Work" Law; NLRB's Top Lawyer Provides Post-McLaren Macomb Guidance

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As of today, so-called "right-to-work" ("RTW") laws are effective in 27 states. These laws ensure that no worker can be required, as a condition of employment, to join or not join, nor pay dues to, a labor union, as permitted by Section 14(b) of the National Labor Relations Act (NLRA). In other words, RTW laws effectively bar the inclusion of union security provisions in collective bargaining agreements in those states. Such provisions enable unions to collect dues from workers that unions are legally required to represent but who choose not to be union members. Because dues are often the primary funding source for union operations, these provisions are heavily favored by unions.

Next year, however, the number of states with RTW laws will decrease by at least one. On March 24, 2023, Michigan Governor Gretchen Whitmer (D) signed legislation repealing the Wolverine State's RTW law. Michigan becomes the first state in nearly 60 years to repeal its RTW law, which was implemented in 2013 under then-Governor Rick Snyder (R). The repeal is viewed as a major victory for union organization which reached an all-time low in 2022. "Today, we are coming together to restore workers' rights, protect Michiganders on the job, and grow Michigan's middle class," said Gov. Whitmer in a statement. "It's a new day here in Lansing," spoke Michigan Senate Majority Leader Winnie Brinks (D). "It's time to once again make Michigan known as a place where workers want to come."

While the legislation is mostly met with enthusiasm by Michigan's Democrat-controlled legislature, its opponents fear that it will cause the state to lose attractiveness in the eyes of business and will compel union membership. "These wide swings in public policy, this whiplash effect that we're possibly seeing here in Michigan isn't helpful for a stable economic climate or for growing jobs in Michigan," according to Wendy Block of the Michigan Chamber of Commerce. The new legislation becomes effective 90 days after the end of the Michigan legislature's current session, which will be April 2024. Employers with unionized workforces in Michigan should anticipate unions, emboldened by the new legislation, to include union security provisions in future collective bargaining agreements.

Abruzzo Pens Guidance Memorandum After *McLaren Macomb*

In an aftershock of the earthquake caused by the National Labor Relations Board's (NLRB) recent ruling in *McLaren Macomb*, which we analyzed here, NLRB General Counsel Jennifer Abruzzo issued a guidance memorandum last week explaining that the maintenance and enforcement of severance agreements with wide-reaching nondisclosure and non-disparagement restrictions is violative of federal labor law.

Abruzzo's memorandum attempts to dispel confusion in *McLaren Macomb*'s wake, as that decision overturned a pair of Trump-era decisions which had held that nondisclosure and non-disparagement provisions in severance agreements were lawful. The memorandum advises employers to narrowly tailor confidentiality provisions "to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications." Non-disparagement provisions should be "limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity." Abruzzo acknowledged that disclaimers, similar to the example we recommended in our prior analysis of *McLaren Macomb* ("*Nothing in this agreement is intended or shall be interpreted to restrict the employee's rights under Section 7 of the National Labor Relations Act, including to prevent the employee from discussing employee's wages and other terms and conditions of employment as permitted by the National Labor Relations Act.*"), could be used to keep such provisions lawful if they specifically focus on employees' rights to organize under the NLRA. The memorandum provides that the NLRB will seek to void only the unlawful provisions in any severance agreement, rather than seeking to invalidate the agreement entirely.

Coupling the NLRB's ruling in *McLaren Macomb* and the General Counsel's roadmap for reviewing confidentiality and non-disparagement provisions in severance agreements going forward, employers should carefully review their past severance agreements for any enforceability risks and should craft future agreements within the bounds of the General Counsel's guidance.

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