LITIGATION

CALIFORNIA LAWYERS ASSOCIATION

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2024 Litigation and Appellate Summit

#MeToo Litigation Lookback

Thursday, April 25, 2024
2:15pm - 3:15pm

Speakers: Deborah Dixon, Alreen Haeggquist, Danielle Moore, Jenn French

Conference Reference Materials

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.
>
> 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.

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Attorneys for Plaintiff Draque Clark

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

DRAQUE CLARK, an Individual,

Plaintiff,

v.

24 HOUR FITNESS USA, LLC, a California Corporation; EDDIE DE LA CRUZ, an Individual; and DOES 1-25, Inclusive,

Defendants.

Case No.: 37-2023-00011557-CU-WT-CTL

PLAINTIFF'S OPPOSITION TO DEFENDANTS 24 HOUR FITNESS USA, LLC'S AND EDDIE DE LA CRUZ'S MOTION TO COMPEL ARBITRATION

IMAGED FILE

Date: August 18, 2023
Time: 10:30 a.m.
Judge: Hon. Carolyn Caietti
Dept.: C-70

Complaint Filed: March 20, 2023
Trial Date: None Set

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Plaintiff Draque Clark ("Plaintiff" or "Mr. Clark") respectfully submits his Opposition to Defendants 24 Hour Fitness USA, LLC's ("24 Hour Fitness") and Eddie De La Cruz's ("Mr. De La Cruz") (collectively "Defendants") Motion to Compel Arbitration.

I. INTRODUCTION

During his employment as a Sales Associate at 24 Hour Fitness gym, Plaintiff Draque Clark endured near daily sexually vulgar comments, sexist name-calling, racially degrading impersonations, and sexual and racist insults by his supervisor, Eddie De La Cruz. When Mr. Clark formally complained about Mr. De La Cruz's sexual and racial harassment against him, as well as Mr. De La Cruz's harassment against numerous female employees and gym members, 24 Hour Fitness fired Mr. Clark for alleged attendance and time-reporting issues.

On March 20, 2023, Mr. Clark filed his complaint against 24 Hour Fitness and Mr. De La Cruz asserting ten causes of action, including sexual harassment. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 invalidates and makes unenforceable any arbitration agreement "***with respect to a case*** which is filed under Federal, Tribal, or State law and ***relates to*** . . . the sexual harassment dispute." 9 U.S.C. § 402 (emphasis added).[1] Here, Mr. Clark's case, as well as his individual claims, relate to Mr. De La Cruz's offensive and unwanted sexual harassment against Mr. Clark and other employees and gym members. Accordingly, Defendants' Motion to Compel Arbitration should be denied.

II. STATEMENT OF FACTS

24 Hour Fitness hired Mr. Clark in January 2022 as a Sales Associate at its gym located at 9550 Miramar Road, San Diego (the "Gym"). At the time of his hiring, Mr. Clark signed a Dispute Resolution Agreement ("DRA") providing that disputes related to his employment must be resolved by arbitration. Several months later, 24 Hour Fitness hired Defendant Eddie De La Cruz as the Gym's Sales and Services Manager overseeing Mr. Clark and the Gym's staff. Immediately, Mr. De La Cruz called or referred to Mr. Clark with sexist and homophobic names such as "hoe," "bitch," and "faggot," as well as racial slurs. Approximately every day, Mr. De La Cruz made

[1] Emphasis here, as throughout, has been added unless otherwise indicated.

sexually vulgar and degrading comments to Mr. Clark about young female gym members' bodies and about several of Mr. Clark's female coworkers. On a nearly weekly basis, Mr. De La Cruz performed a racist and sexist impersonation of Asian nail salon workers in front of Mr. Clark, who is of Asian descent. Mr. De La Cruz relentlessly made sexual advances on female employees and gym members, and then forced Mr. Clark to listen to vulgar stories about his "sexual conquests." Throughout Mr. Clark's employment, Mr. De La Cruz threatened Mr. Clark "best not bring his girlfriend" to the Gym or Mr. De La Cruz would have sex with her.

Mr. De La Cruz also routinely spent his work hours at the Gym hitting on young female gym members under the ruse of "training" them. Consequently, Mr. Clark was forced to take over Mr. De La Cruz's duties during their overlapping shifts. Several months after Mr. De La Cruz started working at the Gym, Mr. Clark regularly witnessed Mr. De La Cruz take a female gym member into the general manager's office, then close the door and blinds. Mr. De La Cruz later "bragged" to Mr. Clark that he was cheating on his girlfriend by having sex with the gym member in the general manager's office during these instances. Nearly every afternoon shift, Mr. De La Cruz had sex on the clock with this woman, leaving Mr. Clark to run the entire gym by himself. Mr. Clark's Sales Associate duties required him to close the gym each night—a task which could take up to two hours when Mr. Clark was unable to chip away at his closing tasks because Mr. De La Cruz was shirking his responsibilities. Because Mr. Clark was required to complete closing tasks but was forbidden from working overtime, Mr. Clark frequently clocked out at 10:15 p.m. and worked an extra 15 – 45 minutes per shift, unpaid.

Mr. Clark, as well as several other employees and gym members, reported Mr. De La Cruz's sexual harassment numerous times to the Gym's General Manager, Chris Wilson, but Mr. Wilson took no corrective action. Instead of investigating, punishing, or even discouraging Mr. De La Cruz, Mr. Wilson laughed at Mr. De La Cruz's misconduct, and retaliated against Mr. Clark by criticizing his work performance, micromanaging him, demanding unreasonable sales results, and ultimately terminating him for alleged attendance issues and timecard edits on November 12, 2022.

Thereafter, on March 20, 2023, Mr. Clark filed his Complaint against Defendants asserting ten causes of action: (1) hostile work environment based on race and sex in violation of Government

Code §12940(j)(1); (2) failure to prevent harassment and discrimination in violation of Government Code §12940(k); (3) FEHA retaliation for reporting harassment and discrimination; (4) sexual harassment (hostile work environment) in violation of Government Code §12940(j); (5) general whistleblower retaliation in violation of Labor Code §1102.5; (6) wrongful termination in violation of public policy Code of Civil Procedure §335.1; (7) failure to timely pay all wages due and owing in violation of Labor Code §218; (8) failure to provide accurate wage statements in violation of Labor Code §226; (9) failure to pay all wages due upon separation in violation of Labor Code §203; and (10) failure to provide rest breaks in violation of Labor Code §226.7.

III. DEFENDANTS' MOTION TO COMPEL ARBITRATION SHOULD BE DENIED

On April 24, 2023, Defendants filed a motion to compel arbitration to unlawfully force Mr. Clark to arbitrate his ten claims under the DRA. However, pursuant to the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (9 U.S.C. §§ 401, 402), Plaintiff cannot be forced to arbitration, and Defendants' motion should be denied.

A. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA) Prohibits Arbitration of Plaintiff's Case.

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (the "EFAA"). The EFAA amends the Federal Arbitration Act ("FAA") (9 U.S.C. §§ 1 et seq.) to prohibit employers from enforcing pre-dispute mandatory arbitration agreements "with respect to a case" that "relates to" a sexual harassment or sexual assault dispute that took place after March 3, 2022. The EFAA provides:

> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with ***respect to a case*** which is filed under Federal, Tribal, or State law and ***relates to*** the sexual assault dispute or the sexual harassment dispute.
> 9 U.S.C. § 402(a).

B. Recent Case Law Supports a Broad Interpretation of the EFAA

Given the newness of the law, California appellate courts have yet to apply the EFAA to multi-claim employment cases containing sexual harassment causes of action. However, other jurisdictions have found all causes of action within a single case in which the plaintiff alleges sexual

harassment fall under the EFAA's purview.[2] In *Johnson v. Everyrealm, Inc*. ("*Johnson*"), the Southern District of New York held the EFAA rendered an arbitration agreement unenforceable "***with respect to the entire case*** *relating to that dispute*," including the plaintiff's claims of race discrimination, pay discrimination, whistle blower retaliation, and intentional infliction of emotional distress when the plaintiff alleged a viable claim of sexual harassment. *Johnson v. Everyrealm, Inc.*, WL 2216173, 2023 U.S. Dist. LEXIS 31242, at *42 (S.D.N.Y. Feb. 24, 2023). Considering interpretations of the word "case" based on ordinary usage, Merriam Webster's Dictionary, Black's Law Dictionary, and U.S. Supreme Court precedent, the *Johnson* court determined the EFAA's plain language to be "clear, unambiguous, and decisive as to the issue" that the EFAA's use of the word "case" refers to the "overall legal proceeding," as opposed to an individual claim. *Id*. at 41-43; *see also Steinberg v. Capgemini Am., Inc.*, No. 22-489, 2022 U.S. Dist. LEXIS 146014 at *2 (E.D. Pa. Aug. 16, 2022) (holding the EFAA "unequivocally ends the era of employers being able to unilaterally compel arbitration in sexual harassment ***cases***.")

Several California superior courts, including this court, adopted *Johnson's* holding in recent motion to compel arbitration proceedings. For instance, in a parallel employment lawsuit against 24 Hour Fitness brought by former employee, Danielle Ohumukini (*Ohumukini v. 24 Hour Fitness USA LLC*, 37-2023-00006424-CU-OE-CTL, 2023 Cal. Super. (San Diego Super. Ct. June 30, 2023)), Judge Mohr cited *Johnson* and found that "upon the plain wording of sections 401 and 402, the EFAA applies, ***precluding arbitration of all of [plaintiff's] causes of action"*** including sex discrimination, battery, wrongful termination, and failure to prevent harassment, discrimination, and retaliation. *Id*. at 3. Likewise, a Los Angeles Superior Court recently found "persuasive the reasoning in *Johnson"* and followed it in *Doe v. Second St. Corp*. No. 23SMCV00653, 2023 Cal. Super. LEXIS 33975, at *15 (L.A. Super. Ct. May 23, 2023). In that case, the Los Angeles court

[2] In the less than 18-month period since the EFAA came into effect, there are less than 50 California and federal cases discussing the Act. Of these cases, nearly all concern whether claims that accrued before March 3, 2022 trigger EFAA application. Only a handful of courts have addressed the EFAA's scope as it is related to non-sexual harassment causes of action. Nonetheless, the limited case law supports Plaintiff's position, and California trial courts have adopted broad interpretation of the EFAA in motion to compel arbitration rulings.

determined the "entire case" was covered by the EFAA, and all of the plaintiff's claims – ***including claims of libel, slander, unfair business practices, intentional infliction of emotional distress, and entirely unrelated wage and hour violations*** – were exempted from arbitration. *Id*. at 15. Most recently, another Los Angeles superior court cited to *Johnson* in *Acosta v. Cheesecake Factory Restaurants*, denying a motion to compel arbitration as to all causes of action, including ***disability discrimination, failure to accommodate a disability, and disability harassment***. *Acosta v. Cheesecake Factory Restaurants*, No. 23SMCV00170, 2023 Cal. Super. LEXIS 34642, at *8 (L.A. Super. Ct. June 6, 2023).

C. Mr. Clark's Entire Case Falls Within the Purview of the EFAA

In their motion, Defendants concede that a plaintiff's sexual harassment cause of action, if sufficiently pled, is covered by the EFAA and may not be forced to arbitration. As such, Mr. Clark's fourth cause of action for sexual harassment in violation of Government Code §12940(j) is undeniably covered by the EFAA. Additionally, just like in *Johnson v. Everyrealm, Inc*., *Ohumukini v. 24 Hour Fitness USA LLC*, *Doe v. Second St. Corp*., and *Acosta v. Cheesecake Factory Restaurants*, Mr. Clark's racial discrimination, retaliation, wage and hour, failure to prevent, and wrongful termination causes of action are considered "relate[d] to" his sexual harassment dispute because they are raised in the same suit. Thus, following the case law, Plaintiff's entire case "relates to" the acts of sexual harassment by Mr. De La Cruz, and all causes of action asserted in Plaintiff's case must proceed outside of arbitration.

In their motion, Defendants deny the EFAA covers Mr. Clark's entire case but fail to identify *any* case law substantiating their position. Rather, Defendants cite two unrelated cases: *Levy v. AT&T Services*, No. 21-11758(FLW), 2022 U.S. Dist. LEXIS 50758, WL 844440 (D. New Jersey March 22, 2022) and *Pepe v. New York Life Insurance Co*., No. 22 Civ.4005(SSV), 2023 U.S. Dist. LEXIS 20992, WL 1814879 (E.D. Louisiana Feb. 7, 2023). *See* Def.'s Mem., 8. In both cases, the plaintiffs did not allege ***any*** claim of sexual harassment or sexual assault within their employment

suits, and, as a result, the plaintiffs were forced to arbitrate their claims.[3] These holdings bear no significance to Mr. Clark, who specifically pled sexual harassment, thus triggering the EFAA.

Without any case law in their favor, Defendants attack Mr. Clark's position by raising a legislative intent argument—that if Congress "intended" for the EFAA's protections to encompass multi-claim employment cases where sexual harassment is alleged, "it would have explicitly said so." Def.'s Mem., 10. Yet, Congress ***did*** explicitly say so. Throughout their motion, Defendants repeatedly ignore the plain language of the EFAA—that arbitration is invalid "***with respect to a case***" that relates to sexual harassment. And as further evidence of legislative intent, Congress' official website reinforces Mr. Clark's reading of the EFAA by summarizing the EFAA's bill as:

> [Legislation that] invalidates arbitration agreements that preclude a party from filing a ***lawsuit*** in court ***involving*** sexual assault or sexual harassment, at the election of the party alleging such conduct.[4]

In no way do Congress' statements suggest an intent that sexual harassment and assault victims divide their cases into separate causes of action. Rather, the EFAA covers Mr. Clark's entire "case" or "lawsuit," which is comprised of ***all*** his claims.

D. Mr. Clark Sufficiently Pleads Sexual Harassment

Without case law in their favor, Defendants next try to evade application of the EFAA by arguing Mr. Clark "failed to state a plausible claim of sex harassment." Def.'s Mem. at 7-8. However, Defendants' efforts to undermine Mr. Clark's sexual harassment cause of action fail because each of Defendants' points are premised on a mischaracterization of Mr. Clark's allegations and/or misstatements of law.

First, Defendants contend Mr. Clark's sexual harassment claim against Mr. De La Cruz is "largely based on hearsay, not Plaintiff's personal knowledge." Def.'s Mem., 7. This is completely

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[3] The plaintiff in *Levy* alleged only age discrimination. *Levy,* 2022 U.S. Dist. LEXIS 50758, at *1 n.1. The Plaintiff in *Pepe*, a pro se litigant, alleged various non-sexual harassment claims appearing to be based on paranoia, including "electric surveillance," "illegal covid tests," "a cyber-attack," and "impersonation of government authorities." *Pepe*, 2023 U.S. Dist. LEXIS 20992, at *10 n.19.

[4] H.R.445 – 117th Congress (2021-2022): Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R.4445, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/4445.

false. As described in detail in his Complaint, Mr. Clark personally endured sexual harassment at the hands of Mr. De La Cruz on a daily basis, including being called a "bitch," "hoe", and "faggot," being forced to listen to vulgar stories, being subjected to threats to sleep with Mr. Clark's girlfriend, and being bombarded with degrading comments about women's bodies. Considering these facts, Defendants' "hearsay" argument is meritless.

Next, Defendants argue that Mr. Clark failed to sufficiently plead sexual harassment because Mr. De La Cruz's harassing conduct was "not directed" at Mr. Clark, rather it was directed at ***females***. Def.'s Mem., 8. However, "[h]arassing conduct ***need not be motivated by sexual desire*** to support an inference of discrimination on the basis of sex. Sexual harassment occurs when . . . ***sex is used as a weapon to create a hostile work environment***." *Singleton v. United States Gypsum Co.*, 140 Cal. App. 4th 1547, 1564 (2006). Here, Mr. De La Cruz constantly boasted, made objectifying comments, and told vulgar stories to Mr. Clark (and other male coworkers) based on the stereotype that men enjoy and accept this type of locker room talk. Similarly, Mr. De La Cruz attacked Mr. Clark's masculinity and prowess as a romantic partner through sexist slurs and threats. *See e.g. Id*. at 1553 (holding defendant's harassment to be gender-based because defendant's comments "challenged [plaintiff] as a man.") Although not specifically motivated by sexual desire toward Mr. Clark, Mr. De La Cruz's harassing conduct was indeed based on Mr. Clark's status as a male and created a hostile work environment.

In a final attempt to undermine Mr. Clark's sexual harassment claim, Defendants allege Mr. De La Cruz's conduct did meet the threshold of severe and pervasive because, by itself, crude or inappropriate gender-related language does not constitute a hostile work environment. Def.'s Mem., 8. Defendants' argument once again fails because Defendants vastly understate Mr. Clark's allegations. Mr. Clark's complaint recounts numerous instances of sexual harassment of ***all types*** perpetrated by Mr. De La Cruz throughout his employment—among other examples, demeaning jokes; sexist and racial slurs; sexist and racist impersonations; inappropriately touching female coworkers; inappropriately touching female gym members; leering at women; shirking his responsibilities to hit on women; announcing which employees and gym members he planned to have sex with; and taking women into the general manager's office to have sex during work hours.

Mr. De La Cruz's sexual harassment was so severe and pervasive that Plaintiff, as well as ***at least*** two other 24 Hour Fitness employees and two female gym members, raised complaints about Mr. De La Cruz. Defendants' efforts to downplay Mr. De La Cruz's misconduct emblemize the very reason the EFAA was passed in the first place: to ensure employers address unlawful sexual misconduct in the workplace resulting in "corporate harms and abuse [that] go unchallenged."[5]

In total, Defendants' attempts to poke holes in Mr. Clark's sexual harassment cause of action fail. And because Mr. Clark has sufficiently pled a viable claim of sexual harassment, Mr. Clark's case "relates to" the acts of sexual harassment by Mr. De La Cruz, and Mr. Clark's claims cannot be compelled to arbitration.

E. Each of Mr. Clark's Claims Are Related to His Sexual Harassment Claim, and Thus Cannot Be Compelled to Arbitration

Under the plain language of the EFAA, this Court need not draw a line between Mr. Clark's sexual harassment claim and each of his individual causes of action. *See Johnson*, 2023 U.S. Dist. LEXIS 31242, at *43. Nonetheless, if this Court interprets the EFAA to require each of Mr. Clark's individual claims to "relate to" his sexual harassment dispute, Mr. Clark's entire case is still protected by the EFAA. This is because the each of Mr. Clark's ten causes of action stem from, in whole or in part, the offensive and unwanted acts of sexual harassment by Mr. De La Cruz.

1. Mr. Clark's First Cause of Action for Hostile Work Environment Based on Sex and Race Relates to Sexual Harassment

In Mr. Clark's first cause of action, he alleges hostile work environment based on sex and race in violation of Government Code §12940(j)(1). This claim is premised upon many of the same facts used to plead sexual harassment, including, but not limited to the following: Mr. De La Cruz regularly called Mr. Clark a "faggot," "gay," "hoe," and "bitch;" forced him to listen to extremely vulgar stories about his sexual conquests; performed racist and sexist impersonations of an Asian nail salon worker; and made sexually degrading jokes about female coworkers—as well as additional facts related solely to race. As such, the facts giving rise to Mr. Clark's first cause of

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[5] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, https://www.congress.gov/bill/117th-congress/house-bill/4445.

action are closely intertwined with his sexual harassment dispute. [6]

2. Mr. Clark's Second Cause of Action for Failure to Prevent Harassment and Discrimination Relates to Sexual Harassment

As his second cause of action, Mr. Clark alleges failure to prevent harassment and discrimination in violation of Government Code §12940(k). To succeed on his failure to prevent claim, Mr. Clark's must prove he endured sexual harassment. *See Dickson v. Burke Williams, Inc.*, 234 Cal. App. 4th 1307, 1314 (2015). In fact, in every EFAA case involving a failure to prevent claim and a sexual harassment claim, the court has shielded both claims from arbitration – including this Court against Defendants in *Ohumukini v. 24 Hour Fitness* USA, LLC.[7] Accordingly, there can be no question that Mr. Clark's second claim relates to the sexual harassment dispute.

3. Mr. Clark's Fourth Cause of Action Is for Sexual Harassment

For his fourth cause of action, as discussed above, Mr. Clark viably pled sexual harassment (hostile work environment) in violation of Government Code §12940(j). This claim is undeniably related to the sexual harassment dispute.

4. Mr. Clark's Third, Fifth and Sixth Causes of Action for Retaliation and Wrongful Termination Relate to Sexual Harassment

As his third, fifth, and sixth causes of action, Mr. Clark alleges FEHA retaliation for reporting harassment and discrimination, whistleblower retaliation in violation of Labor Code §1102.5, and wrongful termination in violation of public policy. Each of these causes of action is premised upon Defendants' retaliatory actions against Mr. Clark for reporting Mr. De La Cruz's relentless sexual harassment against Mr. Clark and others. As such, these claims "relate to" the sexual harassment dispute.

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[6] *See e.g. Johnson*, 2023 U.S. Dist. LEXIS 31242, at *47 (finding the plaintiff's claim of race discrimination to be covered by the EFAA); *Ohumukini*, 2023 Cal. Super., at *2-3; *Doe*, 2023 Cal. Super. LEXIS 33975, at *16 (holding the EFAA shielded the plaintiff's sex discrimination cause of action from forced arbitration); *Walters v. Starbucks Corp*., 623 F. Supp. 3d 333 (S.D.N.Y. Aug. 25, 2022) (implying that discrimination and retaliation claims are subject to the accrual deadline, and thus subject to the EFAA's scope).

[7] *See Ohumukini*, 2023 Cal. Super., at *2-3.

5. Mr. Clark's Seventh, Eighth, Ninth and Tenth Causes of Action for Wage and Hour Violations Relate to Sexual Harassment

Mr. Clark raises various wage and hour violations in his seventh, eighth, ninth and tenth causes of action that stem from unpaid hours Plaintiff worked, in part because of Mr. De La Cruz shirking his management responsibilities to sexually harass women at the Gym. As stated in Mr. Clark's Complaint, Mr. De La Cruz left for long periods of his shift to have sex with women and hit on women. Mr. De La Cruz's inappropriate behavior not only created a hostile working environment, but it also caused Mr. Clark to miss meal periods, stay late, and work unpaid hours. Thus, Mr. Clark's wage and hour claims relate to the dispute of sexual harassment.

F. Defendants' Contention that Mr. Clark's Case Centers Upon Race Discrimination Is Not Only a Mischaracterization of Mr. Clark's Claims, but Inconsequential When Applying the EFAA

Defendants erroneously argue that this case is "primarily a race discrimination/harassment" case and "not a sexual harassment case," and that including a sexual harassment allegation is an attempt to "evade" arbitration or "manipulat[e]" the Court. Def.'s Mem., 10. Defendants' argument is both false and ineffective. Indeed, the defendants in *Johnson* attempted a similar argument, claiming that by including sexual harassment claims, the plaintiff had "cast aside" the "theme" of the action, which focused on racial discrimination.[8] The *Johnson* court disregarded such arguments, finding that defendants had "wrongly characterized" the plaintiff's decision to bring a sexual harassment claim as a "ploy to bring this case within the EFAA and avoid arbitration." Rather, an individual who has been sexually harassed has a right to his day in court under the EFAA; the presence of racial discrimination claims alongside sexual harassment claims does not negate this right.

Additionally, Defendants' piecemeal approach to separating harassment based on race and sex is inappropriate given the circumstances surrounding Mr. De La Cruz's unlawful conduct. Mr.

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[8] *Johnson* concerned allegations that a supervisor made both sexually suggestive and racially discriminatory comments targeting plaintiff, a Black man, including that he was the "whitest Black guy she [had] ever met" and that having a "stupid Black person on the team" was worse than not having any Black employees. *Johnson*, 2023 U.S. Dist. LEXIS 31242, at *5, 13.

De La Cruz's racial and sexual harassment are intertwined: his racist and sexist characterizations of Asian nail salon workers and comments pairing racial slurs with sexually derogatory names exemplify such interconnectedness. Further, Mr. Clark reported all of Mr. De La Cruz's conduct – his racial discrimination, his vulgar commentary, and his having sex on the job – in a comprehensive formal report to Mr. Wilson on October 13, 2022. This report of both sex and race harassment led to Defendants' retaliation and eventual wrongful termination of Mr. Clark. It is impossible to separate such claims as both laid the groundwork for Defendants' retaliation against Mr. Clark. As such, Mr. Clark's allegations of racial discrimination and harassment relate to the sexual harassment dispute.

G. Defendants' Public Policy Argument Ignores the EFAA

In their final attempt to force Mr. Clark's case to binding arbitration, Defendants raise a policy argument. Def.'s Mem., 15. Specifically, Defendants state, "to the extent that there is any doubt as to enforceability, the Court should resolve it in favor of arbitration" pursuant to the FAA's and California law's policy in favor of enforcing arbitration agreements. Here, Defendants' argument conveniently overlooks the EFAA. In enacting the EFAA, Congress expressly rejected any preference for arbitration with respect to cases related to sexual harassment and sexual assault disputes. Importantly, the EFAA's stated legislative purpose is to "improve access to justice for survivors of sexual assault and harassment,"[9] and because arbitration offers advantages to employers – including choice of arbitrator, favorable evidentiary rules, and cost distribution schemes – forced arbitration funnels employees into a process that "lacks transparency and the precedential guidance of the justice system," "depriv[ing] millions of Americans of their day in court." *Id*. In passing the EFAA, Congress undeniably recognized the secretive nature of arbitration has "prevent[ed] victims from sharing their stories" which, in turn, "allow[ed[for the growth of office cultures that ignore harassment, . . . prevent[ed] future victims from being warned about dangerous companies and individuals and create[ed] incentives for the corporate protection of rapists and serial harassers." *Id*.

[9] Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, https://www.congress.gov/bill/117th-congress/house-bill/4445.

Here, Mr. Clark has sufficiently alleged sexual harassment by his supervisor. Public policy supports allowing victims of sexual harassment, including Mr. Clark, litigate cases involving sexual harassment to bring to light the consequences of sexual misconduct, which are otherwise shielded in the secretive process of arbitration.

IV. MR. CLARK'S CLAIMS SHOULD NOT BE STAYED PENDING ARBITRATION

Mr. Clark's claims should be protected by the EFAA. However, if this court compels any of Mr. Clark's claims to arbitration, the EFAA requires Mr. Clark's remaining claims not be stayed pending arbitration.

Congress enacted the EFAA to remove barriers to legal rectification for individuals who have experienced sexual harassment or sexual assault. Forcing Mr. Clark to arbitrate some causes of action, while putting his sexual harassment claim on hold for an indefinite period would be antithetical to the statute. In fact, such a holding may create a convenient loophole for employers who tolerate sexual harassment. Namely, if an employee raises any other claims besides sexual harassment or sexual assault, the employer may drag the employee through time-consuming and expensive arbitration efforts before ever facing the sexual harassment allegations in court. In sum, the EFAA was designed to help plaintiffs pursue sexual harassment cases in the public arena; to stay such claims pending arbitration would effectively transform the EFAA into a statute that renders litigation of sexual harassment endlessly postponed.

V. CONCLUSION

Mr. Clark's entire case, as well as his individual claims, relates to Mr. De La Cruz's severe and pervasive sexual harassment against Mr. Clark under the EFAA. As such, Plaintiff respectfully requests that this court deny Defendants' Motion to Compel Arbitration.

Dated: August 7, 2023

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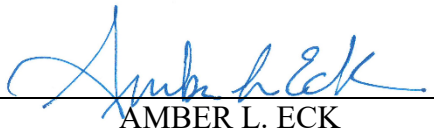
By: 
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

L.R., an Individual,

Plaintiff,

v.

VIBRANT AMERICA, LLC, a Delaware Corporation; ZYMEBALANZ LLC, a Delaware corporation; CESAR LOPEZ, an Individual; and DOES 1-25, Inclusive,

Defendants.

Case No.: 23STCV28018

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

IMAGED FILE

Date: April 10, 2024
Time: 8:30 a.m.
Judge: Hon. Rupert A. Byrdsong
Dept.: 28

Complaint Filed: November 15, 2023
FAC Filed: December 22, 2023
Trial Date: None Set

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Plaintiff L.R.[1] ("Plaintiff" or "L.R.") respectfully submits her Opposition to Defendants Vibrant America LLC's ("Vibrant America"), Zymebalanz, LLC's ("Zymebalanz"), (Vibrant America and Zymebalanz will collectively be referred to as "Vibrant America"), and Cesar Lopez's ("Mr. Lopez") (collectively "Defendants") Motion to Compel Arbitration.

I. INTRODUCTION

Approximately a year after L.R. began working as a Marketing Account Manager for Zymebalanz in January 2021, she was sexually assaulted by Mr. Lopez, one of Vibrant America's regional sales managers and a serial predator with a long track record of inappropriate sexual conduct. After getting L.R. intoxicated, Mr. Lopez followed her back to her hotel room, and proceeded to undress and sexually assault L.R. under the guise of a massage. Despite being horrified, ashamed, and fearful of retaliation, L.R. reported Mr. Lopez to Vibrant America's Human Resources Department after learning she was not his first victim, and his conduct predated her arrival at the company. Instead of taking action, Vibrant America again excused Mr. Lopez's behavior, claiming they could not do anything since alcohol was involved. Due to the intolerable working conditions, and Vibrant America's failure to protect L.R. from her assaulter, L.R. was forced to resign, and was constructively terminated on December 8, 2023.

On November 15, 2023, L.R. filed her complaint against Defendants asserting four causes of action, including sexual harassment, and on December 22, 2023, L.R. filed a First Amended

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[1] Defendant's counsel has improperly utilized L.R.'s name throughout their Motion to Compel. In Plaintiff's December 22, 2023 letter, counsel informed Defense counsel that ***pseudonyms are permitted*** in various circumstances where a "legitimate privacy concern" exists, i.e., ***"when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity***." *Starbucks Corp. v. Superior Ct.*, 168 Cal. App. 4th 1436, n. 7 (2008) (emphasis added, here and throughout, unless otherwise indicated). Indeed, the judicial use of "Doe plaintiffs" to protect legitimate privacy rights has gained wide currency. *Id.* Here, Defendants face no prejudice, there is no public interest in revealing L.R.'s identity, and safeguarding a victim of sexual assault from additional embarrassment, stigma, and trauma is an utmost legitimate concern. Thus, Defendants' insistence on outing L.R. through this improper motion is both harassing and improper. Defendants must traverse the appropriate channels to object to L.R.'s use of a pseudonym.

Complaint ("FAC") adding a claim of Constructive Discharge in Violation of Government Code §12940(a). *See* Declaration of Amber Eck in Support of Plaintiff's Opposition to Defendants' Motion to Compel Arbitration ("Eck Decl.") ¶¶4, 7. Defendants now improperly move to compel arbitration. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFAA") invalidates and makes unenforceable any arbitration agreement "***in cases alleging sexual harassment or sexual assault***" and applies to "any dispute or claim that ***arises or accrues on or after" March 3, 2022***. 9 U.S.C. §401.

Case law clearly provides that for purposes of the EFAA, a Plaintiff's claims accrue "the day her employment was constructively terminated," not the last day the harassment occurred. *See Doe v. Second St. Corp.*, No. 23SMCV00653, 2023 Cal. Super. LEXIS 33975, at *11 (Los Angeles Super. Ct., May 23, 2023). Here, while L.R.'s assault occurred in December 2021, Mr. Lopez continued to harass L.R. and ***she was wrongfully constructively terminated on December 8, 2023, well after the EFAA's effective date.*** Accordingly, Defendants' Motion to Compel Arbitration must be denied.

II. STATEMENT OF FACTS

Vibrant America hired L.R. on January 13, 2021 for a fully remote Marketing Account Manager position with its subsidiary entity, Zymebalanz. FAC ¶17. As part of her onboarding, L.R. signed an Arbitration Agreement ("the Agreement") on December 25, 2020. In or around November 2021, Regional Sales Manager Mr. Lopez invited L.R. to assist his tight-knit group on a few projects. *Id.* ¶19. Shortly after L.R. began working for Mr. Lopez, they attended the annual A4M conference in Las Vegas in December 2021 together. *Id.* ¶21. On December 8, 2021, after a long night of socializing and drinking with coworkers, Mr. Lopez insisted on walking L.R. to her room and forcing his way inside, stating "your feet must hurt from all that dancing, let me help, you need a foot rub." *Id.* ¶¶22-31. As L.R. later recounted in her letter to HR on December 14, 2022, she "never asked [Mr. Lopez] to come into [her] room, nor did [she] make it seem like there was an invitation." Once inside, Mr. Lopez systematically undressed and massaged L.R., who was too shocked and scared to resist. *Id.* ¶¶32-33. While he assaulted her, Mr. Lopez asked questions about how much L.R. made, telling her about the influence he had with Chief Operations Officer Jayaraman Vasanth

("COO Vasanth"). *Id.* ¶33. Eventually L.R. worked up the courage and mindset to firmly demand Mr. Lopez leave. *Id.* ¶¶33-34. Sometime after this, Mr. Lopez called L.R., claiming he convinced COO Jayaraman to give L.R. a commission on various sales, asking, "How would an extra $7,000 a month sound to you?" *Id.* ¶38.

Unfortunately, L.R. was not Mr. Lopez's first victim, and he had a long and sordid history of sexually harassing and assaulting young female employees. *Id.* ¶¶40-46. For example, in 2017 Mr. Lopez improperly plied a doctor at a conference with alcohol and tried to take advantage of her in the hot tub; Mr. Lopez even assaulted one of his 22-year-old employees in her hotel room, giving her wine and a massage (this female employee made a formal complaint in December 2022 which practically mirrored L.R.'s experience, and as a result, no action was taken against Mr. Lopez, but this female employee was fired in January 2023); Mr. Lopez was notorious among his employees and clients for being flirty, inappropriate, and touchy as well as volatile and capricious when rebuffed. *Id.* Over the months, L.R. began realizing she was neither the first nor the last victim and that Vibrant America had known about Mr. Lopez's predatory behavior for at least ***six years.*** *Id.* ¶¶40-48. Although numerous employees filed complaints against Mr. Lopez to Vibrant America's COO Mr. Jayaraman, they were all were dismissed, discredited, or ignored. *Id.*

On December 14, 2022, a few days after the one-year anniversary of the A4M conference where L.R. was assaulted, L.R. mustered the courage to finally file an ***official complaint*** about her assault with Vibrant America's HR Department. *Id.* ¶49. During Vibrant America's sham investigation, Mr. Lopez was placed on a leave of absence, but continued to access Vibrant America's system, attend Zoom meetings, and instruct his team to perform work for him. *Id.* ¶¶50-59. Specifically, on April 17, 2023, L.R. noticed Mr. Lopez was active on the Customer Relationship Management software and saw he had been active on the system six days before May 3, 2023. *Id.* ¶56. L.R. reported this to Marina George in HR, but nothing was done. *Id.* On May 16, 2023 L.R. received a call from Ms. George and was told after interviewing current and past employees, "the investigator was unable to corroborate L.R.'s claim because 'too much alcohol was involved.'" *Id.* ¶58.

L.R. immediately retained counsel, and the Parties attended an unsuccessful pre-litigation

mediation on October 25, 2023. Eck Decl. ¶3. L.R. filed her complaint on November 15, 2023. *Id.* ¶4. After the investigation's conclusion, HR informed L.R. that Mr. Lopez would be returning but was instructed not to interact or communicate with her. FAC ¶62. But on August 24, 2023, L.R. was presenting over Zoom about a Zymebalanz platform and Mr. Lopez unexpectedly joined the meeting. *Id.* Due to the intolerable working conditions, and the Vibrant American's failure to protect L.R. from her assaulter, L.R. was forced to resign, and was constructively terminated on December 8, 2023. *Id.* ¶¶61-65.

On December 22, 2023, L.R. responded to her exit interview questions and sent her responses to Vibrant America HR, COO Vasanth, and *jjrajasekaran@vibrantsci.com*. Eck Decl. ¶8. In her exit interview, L.R. stated she was leaving because she was ***"sexually harassed and assaulted by Cesar Lopez"*** and ***"after [she] complained and a sham investigation was conducted, [she] was constructively told to simply soldier on and continue working as if nothing had happened."*** *Id.* L.R. Continued on to state that, "Despite Vibrant America's assurances that [L.R.] would not be required to continue working with Mr. Lopez, [she] often saw him online, observed him pop into Zoom calls, and heard he was still moving up the corporate ladder" and "despite [L.R.'s] best efforts to move past the sexual assault [she] experienced—and Vibrant America's poor handling of the same--the ***workplace environment has simply become too detrimental to [her] physical and mental health."*** *Id.*

III. PLAINTIFF PROVIDED CASE AUTHORITY TO DEFENDANTS DEMONSTRATING ANY MOTION TO COMPEL ARBITRATION WAS UNFOUNDED

On December 20, 2023, Defense counsel sent an initial "meet and confer" letter to Plaintiff's counsel, asking to "meet and confer" about the Agreement and contending Plaintiff's use of a pseudonym was improper. Eck Decl. ¶5. On December 22, 2023, Plaintiff's counsel responded, disagreeing and providing clear case authority that the EFAA preempted arbitration because L.R. was constructively terminated on December 8, 2023, well after the EFAA's effective date. *Id.* ¶6. This letter also laid out Plaintiff's legal and factual justifications for the use of a pseudonym. *Id.* On January 4, 2024, Defense counsel emailed a responding letter, disagreeing that Plaintiff's claims would escape arbitration and threatening that Plaintiff must disclose her full name "unless the parties

agree to litigate this case in arbitration." *Id.* ¶9. That same day on January 4, 2024, Plaintiff's counsel responded in a letter which reiterated Plaintiff's legal and factual contentions and warned Defense counsel that "any motion to compel arbitration on your part would be frivolous and grounds for sanctions." *Id.* ¶10.

IV. DEFENDANTS' MOTION TO COMPEL ARBITRATION SHOULD BE DENIED

On January 23, 2024, Defendants filed a motion to compel arbitration to improperly force Plaintiff L.R. to arbitrate her claims. However, pursuant to the EFAA (9 U.S.C. §§401, 402), Plaintiff's claims are exempt from arbitration, and Defendants' motion must be denied.

A. The Agreement Is Unenforceable

In determining whether to compel a party to arbitrate, the court must determine: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Kilgore v. KeyBank, Nat'l Ass'n,* 718 F.3d 1052, 1058 (9th Cir. 2013). Here, a signed agreement exists, but does not encompass the disputed issues.

B. The EFAA Applies to L.R.'s Sexual Harassment Claims

L.R.'s claims are exempt from arbitration under the EFAA which states in relevant part that "no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and ***relates to . . . [a] sexual harassment dispute."*** 9 U.S.C. §402(a). The EFAA defines a "sexual harassment dispute" as one "relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law." 9 U.S.C. § 401(4). When a valid sexual harassment claim is pled, ***all related claims are exempt from arbitration under the EFAA***. *See Turner v. Tesla, Inc*., No. 23-cv-02451-WHO, 2023 U.S. Dist. LEXIS 169581, at *11 (N.D. Cal. Aug. 11, 2023)); *see also Johnson v. Everyrealm, Inc*., 657 F. Supp. 3d 535, 559 (2023).

Here, L.R.'s FAC alleges sexual assault and battery in violation of Civil Code §1708.5, sexual harassment in violation of Government Code §12940(j), failure to prevent sexual harassment in violation of Government Code §12940(k), and constructive discharge in violation of Government Code §12940(a). Thus, the claims L.R. has pled are covered by the EFAA.

C. The EFAA Applies to Claims that Arise or Accrue After March 3, 2022

L.R.'s claims fall well within the temporal scope of the EFAA, which applies to "any dispute or claim that arises or accrues on or after" March 3, 2022. 9 U.S.C. §401(4). Generally, a cause of action accrues when a suit may be maintained. *Avitia v. Heerdt*, No. 22VECV00827, 2022 Cal. Super. LEXIS 48194, at *6 (L.A. Super. Ct. Aug. 22, 2022). FEHA employment-related claims accrue on the date of discharge as that is when the facts giving rise to the cause of action have occurred, and harassment claims specifically accrue when the harassment is "brought to an end." *Richards v. CH2M Hill*, *Inc.*, 26 Cal.4th 798, 823 (2001).

Several Los Angeles Courts have held within the last year that for ***purposes of the EFAA,*** a ***Plaintiff's claims accrue "the day her employment was constructively terminated," not the last day the harassment occurred.*** *See Doe v. Second St. Corp.*, No. 23SMCV00653, 2023 Cal. Super. LEXIS 33975, at *11 (L.A. Super. Ct., May 23, 2023) (Arbitration is preempted by the EFAA because "Plaintiff's ***constructive termination occurred*** on May 13, 2022, ***after EFAA went into effect.*** Therefore, the EFAA applies here and ***voids*** the arbitration agreement.

Likewise, in *Acosta v. Cheesecake Factory*, No. 23SMCV00170, 2023 Cal. Super. LEXIS 34642, at *10-14 (L.A. Super. Ct., June 6, 2023), the Los Angeles Superior Court held that even though plaintiff's sexual harassment ended in 2021, before the enactment date of the EFAA, ***Plaintiff's claims accrue on the date of termination***, and ***"the arbitration agreement is invalidated as to the entire case,"*** not just ***the wrongful termination claim***. *Id.*

Similarly, in *Aguilar v. Hrb Green Resources*, No. 23-STCV-07947, 2023 Cal. Super. LEXIS 62370, at *5 (L.A. Super. Ct., Aug. 21, 2023), the Los Angeles Superior Court held that Plaintiff's claims "accrued when plaintiff was terminated after the EFAA was enacted," even though the harassment ended on February 5, 2022, before the enactment date of the EFAA.

Most recently, in *Kader v. S. Calif. Med. Ctr., Inc*., 99 Cal. App. 5th 214, 317 (2024), the Court of Appeal held that even though the harassment occurred before the enactment of the EFAA, Plaintiff's claims accrued when she ***filed charges with the DFEH,*** after the EFAA was enacted and thus the arbitration agreement was invalid. *Id.*

D. The EFAA Applies Because L.R.'s Claims Continued to Accrue Until Her Constructive Termination Under the Continuing Violations Doctrine

As with the multitude of relevant, recent, and instructive case law above, the EFAA covers disputes or claims arising or accruing after March 3, 2022, and under the continuing violations doctrine, L.R.'s causes of action accrued after March 3, 2022. The continuing violation doctrine permits a plaintiff to treat a pattern of reasonably frequent and similar acts as an indivisible course of conduct actionable in its entirety. *Aryeh v. Canon Business Solutions*, 55 Cal. 4th 1185, 1197-98 (2013). In determining whether the continuing violations doctrine applies, courts look to whether Mr. Lopez's actions inside and outside the limitations period are sufficiently similar in kind; those actions occurred with sufficient frequency; and those actions had not acquired a degree of permanence. *Wassmann v. S. Orange Cnty. Cmty. Coll. Dist*., 24 Cal. App. 5th 825, 850–51 (Cal. Ct. App. 2018) (citing *Richards*, 26 Cal. 4th at 802). Harassment claims may be based on acts occurring outside of the time period, so long as at least one act contributing to the claim occurred within the time period. *National R.R. Passenger Corp. v. Morgan*, 536 US 101, 118, (2002); *Porter v. Calif. Dept. of Corrections*, 419 F3d 885, 894 (9th Cir. 2005) (acts within Title VII time period need not be as egregious as earlier acts.)

i. Mr. Lopez's Actions Are Sufficiently Similar in Kind

First and foremost, Mr. Lopez's and Vibrant America's actions outside of the limitations period are sufficiently similar in kind. The similarity prong is not to be taken literally and Courts should be mindful of the variety of different forms acts of harassment can take in evaluating the similarity prong. *Birschtein v. New United Motor Manufacturing, Inc*., 92 Cal. App. 4th 994, 1005 (2001) (citing *Richards*, 26 Cal. 4th at 823). In *Birschtein*, harassment began with a series of overtly sexual remarks in the fall of 1995, and continued as a staring campaign, which occurred intermittently through 1996 and 1997. *Id.* The court found this was sufficiently related and ongoing to constitute a "continuing course of unlawful conduct." *Id.*

Here, Mr. Lopez sexually assaulted L.R. in December 2021, thereafter, L.R. attempted to soldier on, but this became impossible as more of his prior sexually inappropriate actions came to light, and L.R. reported his conduct in December 2022. During the investigation, L.R. was again

exposed to harassing and intimidating conduct when Mr. Lopez joined her private Zoom presentation in August 2023, sent various emails on which L.R. was cc'd, and continued to be online in May 2023 despite purportedly being placed on a "leave of absence." As in *Birschtein*, 'similar' does not mean 'identical' and the subsequent train of events and acts were directly related to, indeed assertedly ***grew out of***, L.R.'s antecedent unlawful sexual assault and harassment.

ii. Mr. Lopez's Actions Occurred with Adequate Frequency

Mr. Lopez's harassment of L.R. occurred with adequate frequency. *See, Birschtein*, 92 Cal. App. 4th at 1006 (employee raised triable issue on frequency prong where discriminatory acts were "intermittent and discontinuous" in part.) Again, the court in *Birschtein* found the continuing violation doctrine may apply where coworker made a series of overtly sexual remarks in the fall of 1995, followed by intermittent acts of staring from 1996 through 1997. *Id.* The court clarified the male employee's acts of staring at the female employee were sufficiently allied with his prior acts of sexual harassment to constitute a continuing course of unlawful conduct. *Id.*

Here, while there was an admitted gap between L.R.'s sexual assault and the report, investigation, further harassing acts, and constructive termination, they are sufficiently allied with Mr. Lopez's prior bad acts to constitute a continuing violation. Indeed, after L.R.'s assault and the enactment of the EFAA, L.R. reported to Vibrant America HR, which opened an investigation, during which Mr. Lopez continued to make his presence known to L.R. despite being on a leave of absence and L.R. was constructively terminated. If intermittent sexual comments and staring over a three-year period is appropriately frequent, L.R.'s claims of continued harassment are as well.

iii. The "Last Act" that Is Part of the Hostile Work Environment Is Plaintiff's Constructive Termination

Defendants cite *Olivieri* for the contention that Plaintiff's claims, for the purposes of the EFAA, "accrue on the day of the last act" that is part of the hostile work environment. *See* Exhibit C, attached to Declaration of Kaleb N. Berhe in Support of Defendants' Motion to Compel Arbitration and Stay Further Proceedings; *Olivieri v. Stifel*, No. 21-CV-0046 (JMA) (ARL), 2023 U.S. Dist. LEXIS 57001, at *12 (E.D.N.Y. Mar. 31, 2023). Because the "last act" occurred when L.R. was constructively terminated on December 8, 2023—after enactment of the EFAA—the

Agreement is invalid and does not apply. *See Doe v. Second St. Corp.*, No. 23SMCV00653, 2023 Cal. Super. LEXIS 33975, at *11 (L.A. Super. Ct., May 23, 2023).

V. SANCTIONS

Finally, Plaintiff respectfully requests that this Court impose monetary sanctions pursuant to C.C.P. §128.7. The Court is authorized to impose sanctions pursuant to section 128.7 if it concludes a pleading was filed for an "improper purpose or was indisputably without merit, either legally or factually." *Bucur v. Ahmad*, 244 Cal. App. 4th 175, 189 (2016); *Guillemin v. Stein*, 104 Cal. App. 4th 156, 167 (2002). Plaintiff's counsel clearly and repeatedly informed Defense counsel a motion to compel arbitration was unfounded and legally frivolous. Regardless, Defense counsel insisted on filing this objectively unreasonable motion, which Plaintiff's counsel has spent time and money opposing. As such, Plaintiff respectfully requests this Court order sanctions in the total amount of $1,500, which represents a significant discount from the total amount of reasonable attorney's fees and costs associated with bringing this Opposition. Eck Decl. ¶12-13.

VI. CONCLUSION

The EFAA applies to invalidate Vibrant America's arbitration provision in the Agreement because L.R.'s claims accrued the day her employment was constructively terminated—December 8, 2023—well after the EFAA's effective date or March 3, 2022. Therefore, Defendant's Motion to Compel Arbitration must be denied, and Plaintiff respectfully requests Defendants pay sanctions in the amount of $1,500, as Plaintiff clearly informed Defendants prior to filing that their motion had no legal basis.

Dated: March 27, 2024

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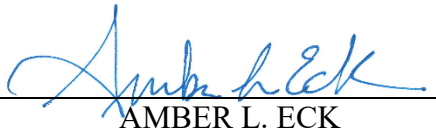
By: 
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SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 1022 (Skinner)
Version: April 1, 2024
Hearing Date: April 9, 2024
Fiscal: Yes
Urgency: No
AWM

SUBJECT

Enforcement of civil rights

DIGEST

This bill provides that the director of the Civil Rights Department (CRD) may file a group or class complaint alleging a violation of the California Fair Employment and Housing Act (FEHA) within a period of 10 years or fewer before the date of the alleged violation, or longer if the court determines the longer window is reasonable, and adds periods during which the CRD's time frame to issue a right-to-sue notice and an individual's time frame to sue following the receipt of a right-to-sue notice are tolled.

EXECUTIVE SUMMARY

California's FEHA establishes the mechanism by which Californians can seek relief from invidious discrimination in employment and housing. The FEHA requires all potential FEHA plaintiffs to file an administrative complaint with the CRD before proceeding to a civil action. The CRD is tasked with conducting an investigation and may opt to proceed with a suit in the name of the plaintiff; if the CRD elects not to sue in the plaintiff's name, the plaintiff may file a lawsuit against the employer or housing provider. If the CRD determines that an administrative complaint relates to a class or group of similarly situated individuals, the CRD may also elect to proceed with a class or group claim.

This bill makes a number of changes to the provisions governing the FEHA's administrative timelines. The most significant of these changes permits the CRD to file a group or class civil action alleging violations that date back 10 years from the date the initial administrative complaint was filed, or for longer than 10 years if a court determines the longer look-back is reasonable. The bill also establishes tolling periods during the period in which the CRD must conduct its investigation and issue a right-to-sue notice, and during which a plaintiff has to file suit after receiving a right-to-sue notice, to include tolling during the pendency of an agreement between the CRD and

the defendant, during the time when a plaintiff is appealing the CRD's denial to pursue a claim, and during the pendency of a class action brought by the CRD that relates to the individual claim. These tolling periods are intended to bring greater efficiency to the claims process and avoid the filing of duplicative lawsuits. The bill also makes other changes to clarify the scope of class actions and provisions of the housing portions of FEHA. The author has agreed to amendments reducing the CRD's class action statute of limitations to seven years and eliminating the possibility of a court extending the statute of limitations further.

This bill is sponsored by Equal Rights Advocates, Equality California, and Legal Aid at Work, and is supported by 15 organizations, including legal aid, immigrant rights, and LGBTA+ rights organizations. This bill is opposed by 20 organizations, including the California Chamber of Commerce, trade organizations, and business organizations.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the California Fair Employment and Housing Act (FEHA). (Gov. Code, tit. 2, div. 3, pt. 2.8, §§ 12900 et seq.)

2) Declares that:
    a) It is the public policy of this State that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, reproductive health decisionmaking, or military and veteran status.
    b) It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.
    c) The practice of discrimination because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information in housing accommodations is declared to be against public policy.
    d) It is the purpose of FEHA to provide remedies that will eliminate these discriminatory practices, and FEHA shall be deemed an exercise of the police power of the state for the protection of the welfare, health, and peace of the people of this State. (Gov. Code, § 12920.)

3) Establishes the Civil Rights Department (CRD) and the Civil Rights Council (Council) within the CRD to effectuate and enforce FEHA, as specified. (Gov. Code, §§ 12901-12907.)

4) Makes it an unlawful employment practice in California, unless based upon a bona fide occupational qualification or, except where based on applicable security regulations established by the United States or this State, for employers and labor organizations to engage in discrimination and other negative employment actions on the basis of the characteristics listed in 2)(a), subject to certain exemptions. (Gov. Code, § 12940.)

5) Sets forth procedures for the prevention and elimination of practices made unlawful under 4), including:
    a) Any person claiming to be aggrieved by an alleged unlawful practice may file a complaint with the CRD, as specified. (Gov. Code, § 12960.)
    b) Upon receipt of a complaint alleging facts sufficient to constitute a violation of 4), the CRD must make a prompt investigation of the allegations. (Gov. Code, § 12963.)
    c) The CRD may bring an action in the name of the CRD and on behalf of the person claiming to be aggrieved, if it determines the circumstances warrant and the parties did not resolve the dispute in the CRD's internal dispute resolution division. The CRD may file the suit in any county in which the CRD has an office, in a county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices, in the county of the defendant's residence or principal office. (Gov. Code, § 12965(a).)
    d) If the CRD does not file a civil action within 150 days after the filing of a complaint, or the CRD determines earlier that it will not bring a civil action, the CRD shall promptly notify the person claiming to be aggrieved that the CRD shall issue, on request, a right to sue notice. (Gov. Code, § 12965(c).)
    e) If the person who filed the complaint does not request a notice, the CRD shall issue the notice upon completion of its investigation, which must be no later than one year after the complaint was filed (or two years, for complaints treated as group or class complaints). These time periods are tolled during a mandatory or voluntary dispute resolution proceeding. (Gov. Code, § 12965(c).)
    f) Upon receipt of a right to sue notice, an aggrieved person may file a civil action in a superior court in any county in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained or administered, in the county in which the aggrieved person would have worked or would have had access to the public

accommodation but for the alleged unlawful practice, or in the county where the defendant has their residence or personal office, as specified. (Gov. Code, § 12965(c).)

g) The aggrieved person may, if the unlawful practice adversely affects a group or class of persons, or raises questions of law similar to a group or class, file the complaint on behalf of and as representative of a group or class. (Gov. Code, § 12961.)
h) A court may, at its discretion, award a prevailing plaintiff, including the CRD, reasonable attorney fees and costs; notwithstanding Code of Civil Procedure section 998, a court shall not award a prevailing defendant fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so. (Gov. Code, § 12965(c)(6).)

6) Provides statutes of limitations for actions brought pursuant to 5), and for those time frames to be extended or tolled for certain periods, including:
   a) The statute of limitations for an individual to file a complaint with the CRD is one year for a violation of the Unruh Civil Rights Act, two years for specified wage violations, three years for specified sexual harassment and FEHA violations, and up to ten years for a victim of human trafficking. (Gov. Code, § 12960(e).)
   b) The limitations window for filing a complaint with CRD is extended for specified reasons, including for 90 days if the person allegedly aggrieved first obtained knowledge of the facts during that 90-day period; for up to one year if the person needs to make a substitute identification of an actual employer; and for up to one year after the aggrieved person attains the age of minority. (Gov. Code, § 12960(e)(6).)
   c) The one-year window in which a person may bring a civil action following the CRD's issuance of a right to sue notice is tolled when the aggrieved person has also filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and it conducts its own investigation, as specified. (Gov. Code, § 12965(f).)
   d) For suits filed by the CRD, the filing deadlines are tolled during a mandatory or voluntary dispute resolution conducted by the CRD's dispute resolution division. (Gov. Code, § 12965(a).)

7) Authorizes, where an unlawful practice alleged in a verified complaint under 5) that adversely affects a group or class of persons in a similar manner or raises questions of law common to a group or class, the aggrieved individual or the CRD to file the complaint on behalf of and as representative of such group or class. (Gov. Code, § 12961(a).)
   a) The CRD may investigate a complaint as a group or class complaint. (Gov. Code, § 12961(b).)

   b) The director of the CRD shall communicate in writing its determination to treat a complaint as a group or class within one year of the filing of the complaint to each person or entity alleged in the complaint to have committed the unlawful practice. (Gov. Code, § 12961(c).)
   c) The CRD may bring a group or class action in any county in the state. (Gov. Code, § 12965(a)(4).)

8) Establishes procedures for the prevention and elimination of discrimination in housing under FEHA which are generally similar to those for unlawful employment practices, including permitting the Attorney General or the director of the CRD to make, sign, and file complaints citing practices that appear to relate to housing discrimination, as specified. (Gov. Code, § 12980.)

9) States that no complaint for housing discrimination under FEHA may be filed after the expiration of one year from the date upon which the alleged violation occurred or terminated. (Gov. Code, § 12980(b).)

10) Provides that, when CRD brings a housing complaint in the public interest, the civil action shall be filed in any county in the state where the unlawful practice is alleged to have been committed, in the county in which the records relevant to that practice are maintained or administered, or the county in which the aggrieved person would have resided in the housing accommodation. (Gov. Code, § 12981.)

This bill:

1) Defines, within FEHA, "group or class complaint" as including any complaint alleging a pattern or practice; and states that this definition is declarative of, and clarifies, existing law.

2) Provides that a complaint filed by the director of CRD, or the director's authorized representative, or an unlawful employment practices complaint treated by the director or the director's representative, as a group or class complaint may allege any violation of FEHA that occurred within a period of 10 years or fewer before the date the complaint was filed, or more than 10 years before the complaint was filed if a court determines that the longer period is reasonable.

3) Modifies the time during which an individual's time frame to bring a FEHA action following the filing of a complaint is tolled, to run until either (1) when CRD files a civil action for the alleged violation, or (2) one year after CRD issues either the written notice that the CRD is not electing to file a lawsuit on behalf of the complainant or, if the complainant timely appeals the CRD's closure of their complaint, written notice that the complaint remains closed following the appeal. Under the existing language of the statute, the new tolling—during the complainant's appeal of the CRD's closure of the case—would apply retroactively.

4) Modifies the time during which the director of CRD's time frame to bring a FEHA civil action following the filing of a complaint is tolled, to include:
    a) The amount of time specified in any written agreement between CRD and the respondent executed before the expiration of the applicable timeline.
    b) The length of time for which the CRD's investigation is extended due to the pendency of a petition to compel, as specified.
    c) During a timely appeal with the CRD of the CRD's closure of the complaint.

5) Requires the CRD, if it determines, in its discretion, that an individually filed unlawful employment practice complaint relates in whole or in part to a complaint filed in the name of the director or as a group or class complaint for the purposes of investigation, conciliation, mediation, or civil action, to issue a right-to-sue notice either in response to a request from the complainant or after the director's or group or class complaint has been fully and finally disposed of and all civil actions, appeals, or related proceedings have terminated.

6) Modifies the time during which the CRD's time frame to issue a right-to-sue notice to an individual complainant is tolled, to include:
    a) The amount of time specified in any written agreement between CRD and the respondent executed before the expiration of the applicable timeline.
    b) The length of time for which the CRD's investigation is extended due to the pendency of a petition to compel, as specified.
    c) During a timely appeal with the CRD of the CRD's closure of the complaint.

7) Clarifies that no complaint in a housing discrimination action may be filed after the expiration of one year from the date upon which the alleged violation occurred or terminated, and removes this term from the subdivision relating to housing discrimination actions filed by the Attorney General or the director of the CRD.

8) Eliminates the requirement that the CRD bring a civil action for housing discrimination in a county in the state in which the unlawful practice is alleged to have been committed, a county in which the relevant records are maintained and administered, a county in which the aggrieved person would have resided in the housing, or a county in which the defendant resides or maintains its principal office.

COMMENTS

1. Author's comment

According to the author:

> The California Civil Rights Department ("CRD") is the institutional centerpiece of California's defense against discrimination, harassment, and other civil rights violations. Each year, CRD serves the public interest by investigating thousands

of complaints of civil rights violations, mediating and settling many of those complaints, and prosecuting high-impact civil actions for the purposes of protecting the rights of a large number of Californians. SB 1022 would clarify the law that allows the CRD to effectively investigate and prosecute violations of Californians' civil rights by ensuring that courts can address systemic abuses in the workplace that stretch back for years and give appropriate relief to victims. SB 1022 empowers CRD to effectively address systemic discriminatory practices impacting racialized, gender, LGBTQ+, and other forms of workplace, housing and other discrimination.

2. The FEHA complaint and investigation process

California's FEHA governs claims involving workplace harassment, discrimination, and civil rights-related retaliation.[1] Under the FEHA, such claims cannot be filed directly in court. Instead, workers alleging that they have been harassed, discriminated against, or retaliated against in the workplace must first exhaust their administrative remedies by filing a claim with CRD.[2] Aggrieved persons have from one year to ten years after the alleged violation to file a claim, depending on the nature of the claim.[3] FEHA violations and certain sexual harassment violations have a three-year statute of limitations; [4] the three-year window was put in place in 2021, when it was extended from one year.[5] The statute of limitations may be tolled under specified conditions, such as where the victim was a minor or the identity of the employer was rebutted.[6] Claims for housing discrimination must be brought within one year of the alleged violation.[7]

After the claim is filed with CRD, CRD investigates the claim; it must finish the investigation within one year, or two years for a group or class complaint.[8] If CRD determines that a FEHA violation took place, then the department has discretion to file a civil action in court on behalf of the worker, either individually or as a class complaint.[9] Alternatively, if CRD is unable to determine that a violation took place, or if the worker requests it at any time, then the department will provide the worker with a right-to-sue letter.[10] Only upon receipt of the right-to-sue letter may the worker proceed

[1] Gov.Code, § 12940.
[2] *Id.*, §§ 12965, 12980
[3] *Id.*, § 12960(e).
[4] *Id.*, § 12960.
[5] SB 807 (Wieckowski, Ch. 278, Stats. 2021).
[6] Gov. Code, § 12960.
[7] *Id.*, § 12980.
[8] *Id.*, § 12965.
[9] *Id.*, §§ 12960, 12961.
[10] *Id.*, § 12965(c).

to file a civil action in court.[11] The worker has one year from the date of the right-to-sue letter to do so.[12]

3. The dispute over CRD's statute of limitation for FEHA "pattern and practice" class actions

In 2021, after a two-year investigation, the CRD filed a class action against Activision Blizzard for alleged unlawful employment practices on the basis of sex under FEHA and the California Equal Pay Act.[13] CRD alleged that "women across the company are assigned to lower paid and lower opportunity levels… receive lower starting pay and also earn less than male employees for substantially similar work," and were promoted more slowly and terminated more quickly than their male counterparts.[14] CRD also alleged that Activision Blizzard "fostered a pervasive 'frat boy' workplace culture," in which "[m]ale employees proudly come into work hungover, play video games for long periods of time during work while delegating their responsibilities to female employees, engage in banter about their sexual encounters, and talk openly about rape."[15] Female employees had to "continually fend off unwanted sexual comments and advances by their male co-workers and supervisors and being groped" at various company events.[16]

In 2022, after approximately three years of investigation, CRD filed a class action complaint against Tesla for alleged unlawful employment practices on the basis of race under FEHA. The complaint alleged that Black and/or African American workers were underrepresented in Tesla's leadership ranks and racist harassment was rampant.[17] According to the complaint:

> As early as 2012, Black and/or African American Tesla workers have complained that Tesla production leads, supervisors, and managers constantly use the n-word and other racial slurs to refer to Black workers. They have complained that swastikas, "KKK," the n-word, and other racist writings are etched onto walls of restrooms, restroom stalls, lunch tables, and even factory machinery. They have complained that Black and/or African American workers are assigned to more physically

[11] *Id.*, § 12960(f).
[12] *Ibid.*
[13] *See Department of Fair Employment and Housing v. Activision Blizzard, Inc.*, First Amended Complaint (Aug. 23, 2021), Case No. 21STCV26571. The Department of Fair Employment and Housing changed its name to CRD in 2022. (*See* SB 189 (Budget Committee, Ch. 48, Stats. 2022).)
[14] *Id.* at pp. 3-4.
[15] *Id.* at p. 4.
[16] *Id.* at pp. 4-5.
[17] *See Department of Fair Housing and Employment v. Tesla, Inc.*, Complaint (Feb. 9, 2022), Cse No. 22CV006830, p. 4.

> demanding posts and the lowest-level contract roles, paid less, and more often terminated from employment than other workers.[18]

The complaint further stated that Tesla "turned, and continued to turn, a blind eye to years of complaints from Black workers who protest the commonplace use of racial slurs on the assembly line," and that Tesla's workplace investigations did not comply with legal requirements.[19]

In both suits, CRD sought to hold the companies liable for the violations that occurred during the companies' entire "pattern or practice" of wrongdoing and argued that CRD is not bound by FEHA's "administrative statute of limitations," which requires an administrative complaint to be filed with the CRD within a certain time of the violation.[20] (The administrative statute of limitations was changed from one year to three years in 2021.)[21] Instead, CRD argued that the statute authorizing it to bring class or group claims permits it to bring such claims dating back as far as the pattern or practice of the violations could be proven. Activision and Tesla argued that CRD is, in fact, bound by the same administrative statute of limitations as an individual plaintiff. In both cases, the judges sided with the defendant and limited the scope of the CRD's actions to one year prior to when CRD commenced its investigation.

Following those rulings, the CRD entered into a consent decree with Activision.[22] Activision agreed to pay up to $45,750,000 to a covered class of female employees that ran from October 12, 2015, until December 31, 2020, and another $9,125,000 in attorney fees and costs; and to injunctive relief requiring Activision to take certain steps to avoid violations going forward.[23]

The Tesla suit is ongoing, with CRD able to prosecute class claims dating back to June 19, 2018.[24]

4. <u>This bill adds an express administrative statute of limitations for CRD group or class action claims</u>

To avoid further litigation or confusion over how far the CRD may look back in a group or class action claim, this bill adds an express administrative statute of limitations for those claims. Specifically, this bill gives CRD, for actions filed as group or class claims, a minimum of 10 years to look back from the date the administrative complaint was filed,

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[18] *Ibid.*
[19] *Id.* at p. 5.
[20] *See* Gov. Code, § 12960.
[21] SB 807 (Wieckowski, Ch. 278, Stats. 2021).
[22] *See California Civil Rights Department v. Activision Blizzard, Inc.*, Order on Consent Decree (Jan. 17, 2024), Case No. 21STCV26571, p. 3.
[23] *Id.* at pp. 9, 17-19.
[24] *See Department of Fair Housing and Employment v. Tesla, Inc.*, Order re: Ruling on Submitted Matter (Nov. 18, 2022), Case No. 22CV006830, p. 5.

or longer if the court determines that a longer window is reasonable. The language allowing a judge to determine a longer lookback window comes from one line of federal district court cases ruling that the EEOC does not have a statute of limitations for "pattern and practice" class actions filed under Title VII.[25]

Statutes of limitations have two related purposes: to "protect defendants from the stale claims of dilatory plaintiffs" and to "stimulate plaintiffs to assert fresh claims against defendants in a diligent fashion."[26] Nevertheless, a statute of limitations generally creates a hard line, meaning that "a cause of action brought by a plaintiff outside such period is barred, even if the [plaintiff was] diligent."[27] Statutes of limitations thus represent a tension in two "equally strong" policy interests: repose on the one hand, and allowing claims to be disposed of on the merits on the other.[28]

According to the author, a longer lookback is appropriate in the rare cases where CRD brings a class action on the basis of a longstanding practice of prohibited employment practices. Under this theory, it would be arbitrary to cut off recovery at three years from the date of the filing of the administrative complaint, and CRD should be able to vindicate the rights of a broader scope of similarly situated employees. The bill's opponents argue that the 10-year statute of limitations, with the possibility of a further extension from the court, will disadvantage employers who have to defend against actions that took place years before.

The author has agreed to amend the bill to reduce the CRD's class action statute of limitations to seven years, and to eliminate the provision allowing a court to grant a longer lookback.

5. <u>This bill adds events that toll certain FEHA deadlines</u>

FEHA has several time-sensitive requirements after an administrative complaint has been filed. There's the one-year or two-year time window for CRD to investigate the claim; the 150-day window before CRD has to issue a right-to-sue notice to the claimant upon request; the mandate that CRD issue a right-to-sue notice to the claimant when its investigation is complete and CRD declines to bring a case on behalf of the claimant; and the one-year window for a claimant to bring a civil action following the issuance of

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[25] *See, e.g., E.E.O.C. v. Mitsubishi Motor Mfg. of America, Inc.* (C.D.Ill. 1998) 990 F.Supp. 1059, 1087-1088 (ruling that, in the absence of a statute of limitations for EEOC pattern and practice cases, "the solution to this problem is to let the evidence of a pattern determine the relevant 'limits' for the lawsuit."). There is another line of federal district court cases ruling that the EEOC's pattern and practice cases are subject to the same statute of limitations that applies to the EEOC's cases brought on behalf of individuals: no more than 300 days from when the administrative complaint was filed. (*See, e.g., U.S. E.E.O.C. v. Global Horizons, Inc.* (D. Hawai'i, 2012) 904 F.Supp.2d 1074, 1092.) Surprisingly, no federal Court of Appeals has weighed in on this issue, so there is no binding precedent one way or the other.

[26] *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395.

[27] *Ibid.*

[28] *Ibid.*

a right-to-sue notice. Current law allows all of these time frames to be tolled during the pendency of certain events.

The bill adds new events that toll some of the administrative deadlines within the FEHA process, with the goal of streamlining the process and avoiding duplicative litigation.

First, the bill tolls the complainant's one-year window to file a civil action following the issuance of a right-to-sue notice for the duration of a claimant's timely appeal of the CRD's decision to close the case. Under the current set of guidelines, even if an appeal were successful, the CRD would not be able to proceed with a suit on behalf of the complainant—the combination of the investigation time limit and the filing time limit strip the CRD of the ability to do so. This change, along with the change below that tolls the CRD's investigation time window during the pendency of an appeal, are therefore intended to allow the CRD to file a civil action on behalf of a complainant if the appeal is successful.

Next, the bill adds events that toll the CRD's one- or two-year window to conduct an investigation following the filing of an administrative complaint. These events are:

- For the amount of time specified in any written agreement between the CRD and a respondent executed before the expiration of the applicable deadline.
- For the length of time for which the CRD's investigation is extended due to the pendency of a petition to compel the respondent to provide information.
- During a timely appeal within the CRD of the closure of the complaint.

Tolling the investigation window for a period stipulated to by the respondent, or during the pendency of a petition to compel information from an uncooperative respondent, is intended to give the CRD more space to complete an investigation without having to rush to file a civil action.

The bill also adds, to the list of events that toll the CRD's obligation to issue a right-to-sue notice at the end of an investigation, the same three events that toll the CRD's investigation window. Adding these same three events ensures that the CRD's obligations are in harmony with one another, e.g., by not requiring the CRD to issue a right-to-sue notice while its investigation is ongoing.

Finally, the bill permits the CRD to hold off on issuing a right-to-sue notice in a case where the CRD determines that a complaint is related to an ongoing complaint filed by the CRD as a group or class complaint for purposes of an investigation, conciliation, mediation, or civil action. Under this change, the CRD would still have to issue a right-to-sue notice after 150 days to a complainant who requests the notice, but CRD would not be required to issue the notice to a non-requesting complainant until the CRD's group or class complaint has been fully and finally disposed of. This provision is intended to avoid duplicative litigation while a class claim is pending: if the CRD is

required to issue right-to-sue notices to individual claimants who are also the members of a pending class action, the individuals would then have to file individual lawsuits within one year of receiving the notice or lose their claims. By allowing CRD to hold off on issuing the notices until the end of the class, or until the individual requests the notice, CRD will be able to limit the number of placeholder suits filed.

6. This bill makes additional changes to the FEHA procedures

In addition to the changes above, the bill makes a number of smaller modifications to the FEHA procedural statutes. These include:

- Defining "group or class complaint" to include any complaint alleging a pattern or practice, and stating that this definition is declarative of, and clarifies, existing law. This appears uncontroversial.
- Moving a provision in the housing discrimination procedural statute that requires a complaint to be filed no more than one year from the expiration of the date of the alleged violation occurred into the subdivision for individual claims. According to stakeholders, this limitation has always been understood to apply to individual claims, even though it is housed in the subdivision addressing actions filed by the Attorney General or CRD. The intent is to keep the individual statute of limitations as-is.
- Removing the venue limitations for housing actions filed by the CRD. Similar changes were made to the venue provisions in the employment context in SB 807 (Wieckowski, Ch. 278, Stats. 2021).

7. Amendments

As discussed in Part 4, the author has agreed to amendments to reduce the CRD's statute of limitations for class or group actions. The amendments are as follows, subject to any nonsubstantive changes the Office of Legislative Counsel may make:

Amendment 1

At page 12, in line 20, replace "10" with "seven".

Amendment 2

At page 12, in line 21, add "." after "filed" and strike the remainder of lines 21-23.

8. Arguments in support

According to the sponsors of the bill:

> Based on our experiences working closely with clients and the CRD, we know firsthand how impactful the prosecutorial arm of the agency can be in achieving

meaningful results for claimants. The ability of the Department to address and correct discriminatory policy and practice at large employers, for example, as well as the ability to deliver relief to groups of harmed workers, without the formal constraints of civil class actions, are incredibly important tools. Just last year, CRD reached a $54 million settlement for workers suffering gender discrimination and equal pay violations at a Santa Monica video game company, which will provide relief to women who were employees or contract workers in California between October 12, 2015 and December 31, 2020.

However, CRD remains limited in its capacity to thoroughly and effectively prosecute systemic discrimination complaints. Although many complaints initiated by CRD, as well as complaints affecting a class or group, involve discriminatory practices that go back years, the department must adhere to the same statute of limitations as an individual claimant–one year. Similarly, CRD must complete their investigations of these claims within one year, despite the reality that information gathering in these investigations, particularly for group/class complaints, takes considerable time. This one-year investigation deadline is inadequate for a thorough investigation of claims, and leads to administrative inefficiency within the department–when individuals file complaints that are already the subject of ongoing CRD group/class investigations, they cannot be easily aggregated into ongoing investigations but rather must complete on their own individual timelines.

SB 1022 would address these concerns by allowing CRD to more fully rectify long-running civil rights violations and provide redress to as many victims as possible by clarifying that certain deadlines applicable to individual complainants do not apply to CRD actions to remedy systemic discrimination. This change would align California law with federal interpretations of the timelines applicable to CRD's counterpart agency, the U.S. Equal Employment Opportunity Commission (EEOC)–that it is not subject to Title VII's deadlines for individual workers. Further, SB 1022 would allow CRD to pause investigations of administrative complaints that may be resolved by actions CRD is already pursuing, so that thorough investigations can occur to resolve the maximum number of claims pertaining to the same discriminatory practices.

In addition, SB 1022 would clarify that the deadlines for CRD to complete its investigation and file a civil action may be tolled by voluntary agreement, a well-recognized tool to facilitate settlement. Finally, it will remedy a conflict in FEHA created by a recent amendment to the statute regarding venue for CRD civil actions alleging housing discrimination.

9. Arguments in opposition

According to the coalition of organizations in opposition:

> Not only do statutes of limitations ensure memories and evidence are fresh, but they also ensure illegal behavior is promptly reported and vanquished. This is why, for most civil claims, the statute of limitations will be between two and five years. For example, most personal injury lawsuits have a two-year statute of limitations. For contract cases, it varies from two-to-four years. For property damage, it is generally three years. For claims against a government entity, claims must be filed within in as little as six months. The default statute of limitations for laws without a specified statute of limitation is three years. *See* Code of Civil Procedure Sections 312, 338, 345. State entities filing claims are subject to these statutes of limitations as well. *See, e.g., People v. Overstock.com, Inc.* (2017) 12 Cal. App. 5th 1064, 1076-1078 (applying UCL four-year statute of limitations to case brought by the Attorney General); Code of Civil Procedure Section 345 ("The limitations prescribed in this chapter apply to actions brought in the name of the state or county or for the benefit of the state or county, in the same manner as to actions by private parties.")
>
> It is unclear why the CRD requires such a significant statute of limitations. For example, this proposed statute of limitations is *more than three times* the statute of limitations presently afforded to an individual employee or CRD to bring an action for an alleged unlawful employment practice.
>
> A ten-year period undermines the very purpose of a statute of limitations. The evidence available to confirm or refute a claim will shrink. Memories will fade. Former employees will change jobs, retire, or, in some cases, pass on. The very methods by which we maintain data may become inaccessible or unavailable. As the available information about an event shrinks the claim becomes harder to defend. The defendant will be forced to assess what is the better option – pay the expensive attorney's fees to litigate a claim where a plaintiff claims perfect memory and no other witnesses or evidence remains … or just pay the plaintiff a settlement because defending the claim without evidence would be impossible.
>
> It is also concerning that a court may extend that statute of limitations any time it decides that it is "reasonable" to do so. Existing doctrines used to look back further than an existing statute of limitations are limited and grounded in principles like situations where someone did not become aware of conduct until later. Under this language, there is no reason why the CRD shouldn't ask for an extended liability period for every single case. There is nothing to lose by doing so. Every defendant will therefore also be required to spend time and money litigating this side issue.

SUPPORT

Equal Rights Advocates (co-sponsor)
Equality California (co-sponsor)
Legal Aid at Work (co-sponsor)
APLA Health
California Rural Legal Assistance Foundation
California Work & Family Coalition
Center for Immigrant Protection – the Asylum Project and Parivar Bay Area
Central California LGBTQ+ Collaborative
Courage California
East Bay Sanctuary Covenant
National Asian Pacific American Families Against Substance Abuse
Public Counsel
San Joaquin Pride Center
Solano Pride Center
The Transgender District, San Francisco
Transgender Health & Wellness Center
Transgender Resource, Advocacy and Network Service
Youth Leadership Institute

OPPOSITION

Acclamation Insurance Management Services
Allied Managed Care
California Association of Joint Powers Authorities
California Association of Sheet Metal and Air Conditioning Contractors National Association
California Association of Winegrape Growers
California Chamber of Commerce
California Employment Law Council
California Farm Bureau
California Financial Services Association
California league of Food Producers
California Retailers Association
California State Council for the Society of Human Resource Management
Civil Justice Association of California
Coalition of Small and Disabled Veteran Businesses
Construction Employers' Association
Family Business Association of California
Flasher Barricade Association
Housing Contractors of California
Public Risk Innovation, Solution, and Management
Western Electrical Contractors Association

RELATED LEGISLATION

Pending Legislation: SB 1137 (Smallwood-Cuevas, 2024) clarifies that FEHA and the Unruh Civil Rights Act prohibit discrimination on the basis of an intersection of characteristics covered by those acts, as well as on the basis of a single characteristic. SB 1137 is set to be heard in this Committee on the same day as SB 1022.

Prior Legislation:

SB 807 (Wieckowski, Ch. 278, Stats. 2021) among other things, modified the statutes of limitations for a person to file a claim with the CRD; authorized the CRD to bring actions in any county in which the CRD has an office or, for class or group claims, in any county in the state; and clarified certain tolling provisions.

AB 9 (Reyes, Ch. 709, Stats. 2019) extended the statute of limitations for filing a FEHA claim with the CRD from one year to three years.

****

CONFIDENTIAL SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

This Confidential Settlement Agreement and Release of All Claims (the "Agreement") is made and entered into between «Client_First_Name» «Client_Last_Name» ("Employee"), on the one hand, and «Defendant_Name__Company» ("Employer" or "Company") on the other hand. Employee and Employer are referred to collectively as the "Parties" and individually as a "Party."

RECITALS

On _____, Employee submitted an internal complaint to Employer and subsequently sent Employer a pre-litigation demand letter on _____ ("Claim");

Employer denies and disputes any and all of Employee's alleged claims and allegations in the Claim, denies any wrongdoing, denies it is subject to any liability and contends that Employee has not incurred any damages in connection with «Client_Pronouns__HisHer» employment with Employer;

Employer is willing to provide Employee with certain consideration described below, which it is not ordinarily required to do, provided Employee releases Employer and the Releasees in this Agreement from any claims and allegations Employee has made or might make arising out of the facts and circumstances alleged in the Claim and «Client_Pronouns__HisHer» employment with Employer, and agrees to comply with the other promises and conditions set forth in this Agreement; and

The Parties wish to avoid the substantial expense, inconvenience and uncertainties of alternative dispute proceedings or litigation and desire to resolve any and all claims alleged in the Claim, or that could be alleged, arising out of or in connection with Employee's employment and the cessation thereof.

AGREEMENT

In consideration of and exchange for the promises, covenants, representations, undertakings and releases contained in this Agreement and the other valuable consideration described herein, the sufficiency of which is hereby acknowledged by the Parties, the Parties agree as follows:

1. Settlement Payment. In consideration of the commitments made herein, Employer agrees to pay the total sum of [spell out settlement amount] ($_____) ("Settlement Payment"), to be paid as set out below, in full compromise and settlement of all claims released herein. The Settlement Payment shall be made as follows:

a. By one check in the sum of $_____ payable to "«Client_First_Name» «Client_Last_Name»" as payment for wages subject to applicable withholdings and deductions. Employer will issue a W-2 for this payment.

b. By a second check in the sum of $_____ made payable to "«Client_First_Name» «Client_Last_Name»" for personal injuries, non-wage damages and emotional distress.

c. By a third check in the sum of $_____ payable to "Haeggquist & Eck, LLP" as payment for attorneys' fees and costs.

This agreement shall be "Effective" once the Parties sign the Agreement. The settlement checks shall be sent to counsel for Employee within thirty calendar (30) days after Employer's receipt of: (1) this Agreement signed by Employee, and (2) a completed Form W-9 for Employee and Employee's Counsel. Upon delivery of the Settlement Payment, Employer will have fully met its obligations under this Agreement and will not be liable in any manner for the distribution, division or payment of any portion of the Settlement Payment to or between any legal counsel that Employee may have retained and/or consulted relating to the Claim, including, but not limited to, Haeggquist & Eck, LLP. By execution of this Agreement, Employee authorizes payment to be made as set forth in this paragraph.

2. Separation Date. On _____, by Employee and Employer's mutual agreement, Employee's employment at Employer ended, and Employer agrees not to dispute any claim Employee makes to the EDD for any future unemployment benefits.

3. No Representations Regarding Taxability. Employee understands and agrees that Employee is responsible for payment of any taxes which are required to be paid by the Employee to the State of California, the United States Government, or any other entity as a result of this settlement and the Settlement Payment above. Employee acknowledges that no representations regarding the tax consequences of the Settlement Payment have been made by Employer or its counsel to Employee or her Counsel.

4. Employee's Release of Claims. In consideration for the Settlement Payment referenced in Paragraph 1 of this Agreement, Employee hereby irrevocably and unconditionally releases, acquits, and forever discharges Employer and its subsidiaries, parents, predecessors, successors, and all persons acting by, through, under, and/or in concert with any of them, and each of their respective heirs, successors, and assigns (hereinafter collectively referred to as "Releasees" or "Released Parties"), or any of them, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, and expenses (including attorney's fees and costs actually incurred) of any nature whatsoever, known or unknown, suspected or unsuspected, filed or unfiled, based upon, relating to, arising out of, in connection with, or in any way involving the Claim, Employee's employment with Employer and cessation thereof and/or including, but not limited to, employment claims, rights arising out of alleged violations of any contracts, express or implied, any covenant of good faith and fair dealing, express or implied, or any tort including defamation, or any federal, state or other governmental statute, regulation or ordinance, including, without limitation: (1) the Civil Rights Act of 1964, as amended; (2) 42 U.S.C. §1981; (3) the California Fair Employment and Housing Act (which Acts prohibit discrimination based upon race, religion, sex, sexual orientation, age, color, national origin, disability, medical condition, and marital status); (4) Section 503 of the Rehabilitation Act of 1973; (5) the Fair Labor Standards Act (including the Equal Pay Act); (6) the California Constitution and the United States Constitution; (7) the California Labor Code and the Private Attorney General Act pursuant to Labor Code §2699, *et seq.*; (including any and all provisions authorizing Employee to seek civil penalties against Employer for wage-hour violations and/or relief under California Labor Code §132(a)); (8) the California Business and Professions Code §17200, *et seq.*; (9) the Employee Retirement Income Security Act, as amended; (10) the Family and Medical Leave Act; (11) the California Family

Rights Act; (12) the Americans with Disabilities Act; (13) the California Pregnancy Discrimination Act; (14) the Worker Adjustment and Retraining Notification Act; (15) the National Labor Relations Act; (16) the Immigration Reform and Control Act; (17) the California Government Code; (18) the California Wage Orders; (19) California's Occupational Safety and Health Act, or the Federal equivalent; and (20) the Families First Coronavirus Relief Act (hereinafter collectively referred to as "Claim" or "Claims"), which Employee now has, owns or holds, or claims to have, own or hold, or which Employee at any time had, owned or held, or claimed to have, own or hold against any of the Releasees up to and including, as of the Effective date of this Agreement as set forth above (with all of the foregoing included in the definition of the Claim).

5. Employer's Release of Claims. In consideration for Employee's full general release of claims and the benefit of this Agreement, Employer unconditionally, irrevocably and absolutely releases and discharges Employee and Employee's attorneys, insurers, administrators, successors and assigns from all losses, liabilities, claims, charges, demands and causes of action, known or unknown, suspected or unsuspected, arising directly or indirectly out of or in any way connected with Employee's employment with Employer and occurrences between the Parties to date.

6. Waiver of Section 1542. The Parties hereby state that it is the Parties' intention in executing this Agreement that the same shall be effective as a bar to each and every claim, demand, cause of action, obligation, damage, liability, charge, and attorneys' fees and costs released above. The Parties hereby expressly waive and relinquish all rights and benefits, if any, arising under the provisions of Section 1542 of the Civil Code of the State of California, which provides:

> **Section 1542. [Certain Claims Not Affected By General Release.] A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her would have materially affected his or her settlement with the debtor or released party.**

This Release in all respects has been voluntarily and knowingly executed by the Parties with the express intention of effecting the legal consequences provided in the California Civil Code §1541, that is, the extinguishment of obligations herein designated.

Except for any rights created by this Agreement, this Release is intended to be interpreted as broadly as possible and to apply to any and all claims that the Parties may have or have had arising prior to the date of this Agreement. Nothing in this Agreement limits or affects the finality or scope of the releases provided in this paragraph. Employee intends to and agrees to waive any and all rights to collect any monetary recovery in connection with any actions by any federal or state government agency, commission, department, office, or official including the Equal Employment Opportunity Commission and the Department of Fair Employment and Housing. This Release does not extend to those rights which as a matter of law cannot be waived. This Release shall have no effect on any rights Employee may have to Workers' Compensation benefits in accordance with applicable law in conjunction with any possible Workers' Compensation claims, to the extent that Employee may have any.

7. No Pending Claims. Employee agrees and covenants not to file any suit, charge, claim or complaint against Employer in any court or administrative agency, with regard to any

claim, demand, liability, or obligation arising out of Employee's employment with Employer, payment of wages during employment and/or separation from employment and/or the Claim. Employee further represents that other than the Claim, no claims, complaints, charges, or other proceedings are pending in any court, administrative agency, commission, or other forum relating directly or indirectly to Employee's employment with Employer. Since the intent of this Agreement is to bring to an end all claims, controversies, and causes of action Employee may have or claim to have against Employer, Employee agrees to take all necessary steps to dismiss, with prejudice, and/or withdraw any claim, charge, complaint, or cause of action that may be contemplated, filed, or pending against the Employer and/or Releasees.

8. No Amounts Owing, No Admissions. Employee agrees and acknowledges that the Settlement Payment is not required to be paid by Employer, by Employer's policies and procedures, or otherwise, and hereby agrees that «Client_Pronouns__HeShe» has received all potentially disputed compensation or remuneration of any kind due or owed from Employer, including, but not limited to, all wages, premiums, penalties, commissions, bonuses, advances, vacation pay, and any other incentive-based compensation to which Employee is or may become entitled or eligible, and that Employer shall owe Employee nothing further for anything that occurred prior to the date «Client_Pronouns__HeShe» signs this Agreement once Employee receives the Settlement Payment set forth in Paragraph 1 above.

Employee hereby acknowledges that the amount owed to «Client_Pronouns__HimHer», if anything, is disputed in good faith and that «Client_Pronouns__HeShe» would not otherwise receive the full amount of the Settlement Payment as set forth in this section were it not for «Client_Pronouns__HisHer» covenants, promises, and releases set forth hereunder. As a result, Employee agrees that California Labor Code §206.5 is not applicable. Employee hereby waives any protection that may exist under §206.5 which provides, in pertinent part, as follows: "An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made."

It is understood and agreed by the Parties that the promises and payments and consideration of this Agreement shall not be construed to be an admission of any liability or obligation by any Party to another Party or any other person.

9. Attorneys' Fees And Costs. Employee and Employer each agree that they will bear their own attorneys' fees and costs incurred in connection with the subject matter of this Agreement.

10. Confidentiality. Employee represents and agrees that Employee has and will keep the terms, Settlement Payment, and facts of this Agreement completely confidential, and that Employee will not hereafter disclose any information concerning this Agreement to anyone; provided, however, that Employee may make such disclosure to Employee's professional representatives (e.g., attorneys, accountants, auditors, tax preparers, therapists). If any disclosures are made as provided in this paragraph, each individual shall first be informed of and agree to be bound by this confidentiality clause, or other such disclosures required by law to enforce this Agreement.

Employee and Employee's Counsel represent and agree that they have not and will not

issue any public announcement, publication, or otherwise disclose this Agreement or the terms thereof, to anyone, including the press, media, websites, or any service which reports litigation, verdicts, or settlements. The Parties acknowledge that California Government Code §12964.5 does not apply to this Agreement because this Agreement is considered a negotiated settlement as defined by California Government Code §12964.5(d)(2).

The Parties agree that this Confidentiality provision is not intended to violate California Code of Civil Procedure §§1001 or 1002 and should be interpreted as requiring confidentiality only to the extent not prohibited by that statute or any other applicable statute of similar effect. Unless otherwise prohibited by law, disclosures covered by this Confidentiality clause shall first require the recipient to the disclosure to be informed of this Confidentiality clause and to agree to be bound by its terms. Nothing herein is intended to interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing federal or state laws and/or cooperating with said agency in its investigation. Employee, however, shall not be entitled to receive any recovery or monies in connection with any complaint or charge waived by this Agreement, without regard to who brought any such claim, and Employee agrees not to assert a claim to such recovery or monies.

11. Dismissal with Prejudice. Employee agrees that «Client_Pronouns__HeShe» will file a request for dismissal of any outstanding claims, complaints, charges, demands, or actions covered by this Agreement, ***with prejudice***, to the extent applicable, no later than five (5) days after receipt of the Settlement Payment.

12. Voluntary Agreement. This release in all respects has been voluntarily and knowingly executed with the express intention of effecting the legal consequences provided in the California Civil Code §1541, that is, the extinguishment of obligations herein designated.

13. Satisfaction of Liens. Employee hereby agrees, represents, and warrants that Employee shall have sole responsibility for the satisfaction of any and all liens or assignments in law, equity, or otherwise, against any of the matters released herein, and that Employee will fully satisfy all liens, if any, immediately upon receipt of the Settlement Payment. Employee further represents, agrees, and warrants that Employee shall hold Employer and/or Releasees harmless from, and indemnify Employer and/or Releasees from, any liabilities or costs which they may incur as a result of any liens of any nature and/or Employee's failure to satisfy any liens.

14. No Assignment of Claims. Employee expressly warrants that Employee has not transferred to any other person or entity any of the rights or causes of action released in this Agreement.

15. Binding Nature. This Agreement and all the terms and provisions herein shall bind the heirs, personal representatives, successors, and assigns of the Parties, and inure to the benefit of each Party, its respective agents, directors, officers, employees, servants, successors, and assigns.

16. Effect of Illegality. Should any part, term, or provision of this Agreement be declared or determined by any Court of competent jurisdiction to be wholly or partially illegal, invalid, or unenforceable, the legality, validity, and enforceability of the remaining parts, terms or provisions of this Agreement shall not be affected thereby. Said illegal, invalid, or unenforceable

part, term, or provision shall be deemed not to be a part of this Agreement.

17. Attorneys' Fees. If any Party to this Agreement brings any sort of action to enforce any provision of this Agreement or for any breach of this Agreement, then the prevailing Party in that action shall be entitled to recover reasonable attorneys' fees and costs incurred in such action.

18. Interpretation of Agreement. Employee agrees that any legal rule to the effect that ambiguities shall be resolved against the drafting Party shall not apply in any interpretation of this Agreement.

19. Governing Law and Jurisdiction. This Agreement shall be interpreted under the law of the State of California, both as to interpretation and performance.

20. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be considered an original Agreement but all of which together shall constitute one and the same instrument. Facsimile or electronic reproductions of original signatures shall be binding for the purpose of executing and enforcing this Agreement.

21. Entire Agreement. This Agreement embodies the entire agreement of all the Parties hereto who have executed it and supersedes any and all other agreements, understandings, negotiations, or discussions, either oral or in writing, express or implied, between the Parties to this Agreement except for any agreements Employee may have signed during Employee's employment with Employer regarding maintaining the confidentiality of proprietary or confidential information of Employer. The Parties to this Agreement each acknowledge that no representations, inducements, promises, agreements, or warranties, oral or otherwise, have been made by them, or anyone acting on their behalf, which are not embodied in this Agreement; that they have not executed this Agreement in reliance on any representation, inducement, promise, agreements, warranty, fact, or circumstances, not expressly set forth in this Agreement; and that no representation, inducement, promise, agreement, or warranty not contained in this Agreement including, but not limited to, any purported settlements, modifications, waivers, or terminations of this Agreement, shall be valid or binding, unless executed in writing by all of the Parties to this Agreement. This Agreement may be amended, and any provision herein waived, but only in writing, signed by the Party against whom such an amendment or waiver is sought to be enforced.

22. Compliance with Terms. The failure to insist upon compliance with any term, covenant, or condition contained in this Agreement shall not be deemed a waiver of that term, covenant, or condition nor shall any waiver or relinquishment of any right or power contained in this Agreement at any one time or more times be deemed a waiver or relinquishment of any right or power at any other time or times.

23. Acknowledgment of Authority. The undersigned hereby acknowledge and warrant that they, and each of them, are fully competent to enter into this Agreement and have the authority to bind the entity or individual on behalf of whom they are signing to the terms of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as follows:

Dated: _____

_____
«Client_First_Name» «Client_Last_Name», Employee

Dated: _____

«Defendant_Name__Company»
Employer

By: _____

_____
Print Name

_____
Title

Additional Resources

Harvard Implicit Bias Test – https://implicit.harvard.edu/implicit/

EEOC Releases Annual Performance Report for Fiscal Year 2023 – https://www.eeoc.gov/newsroom/eeoc-releases-annual-performance-report-fiscal-year-2023

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 – https://www.congress.gov/bill/117th-congress/house-bill/4445/text

SB-1022 Enforcement of civil rights – https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB1022

SB-1300 Unlawful employment practices: discrimination and harassment – https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1300