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National Labor Relations Board Eyes Non-Compete Agreements

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The National Labor Relations Board (NLRB) made recent headlines yet again. This time, on May 30, 2023, NLRB General Counsel, Jennifer Abruzzo, eyed a new target-non-compete agreements. General Counsel issued a Memorandum to all NLRB Regional Directors and Officers which effectively put the working world on notice that she believes the "proffer, maintenance, and enforcement" of non-competes may be unlawful. Why? Because to her, they chill employees' rights under Sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA).

Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities." Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

General Counsel Abruzzo's Memorandum is not binding law; however, it is clear intent on how the NLRB under her administration will interpret the NLRA. It is further intent on how she wants the Regional Directors and Officers to investigate and file charges. As General Counsel, Jennifer Abruzzo has lead responsibility for the investigation and prosecution of all unfair labor practice cases nationwide, as well as for the general supervision of the NLRB field offices in the processing of cases. It is her sixth Memorandum this year.

What does the Memorandum Say about Non-competes?

The Memorandum opines that non-compete provisions are unlawful "when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work." The Memorandum identified five specific types of protected activity that unlawful non-competes interfere with:

- They chill employees from concertedly threatening to resign to demand better working conditions.
- They chill employees from carrying out concerted threats of resignation.
- They chill employees from concertedly seeking or accepting employment with a local competitor.
- They chill employees from soliciting their co-workers to go work for a local competitor.
- They chill employees from seeking employment, at least in part, to specifically engage in protected activity with other workers.

Are there Exceptions?

The six-page Memorandum did not shed much light for employers on what non-competes are permissible. Instead, it focused on the aforementioned reasons why General Counsel Abruzzo believes non-competes may interfere with NLRA rights.

However, the Memorandum did note that a non-compete may be lawful if it is "narrowly tailored to special circumstances justifying the infringement on employee rights." It is not clear what that means exactly. Notably, the Memorandum did mention that employers may protect legitimate business interests, proprietary, and trade secret information "by narrowly tailored workplace agreements" that protect those interests. But whether General Counsel includes non-competes as those "narrowly tailored workplace agreements" is unclear. The permissible special circumstances do not include however a desire to avoid competition, business interests in retaining employees, or interests in protecting special investments or training.

The Memorandum concluded by adding those agreements that restrict an individual's subsequent managerial or ownership interests in a competing business may not violate the NLRA, nor potentially a provision prohibiting independent-contractor relationships with competitors.

Hopefully, more guidance comes from the NLRB before it files and prosecutes unfair labor practice charges for (what it believes to be) overbroad non-competes. The NLRB however is not the first agency to target non-competes. We authored an article in January discussing the Federal Trade Commission's proposed rule to ban non-competes. The two agencies announced an agreement last summer to share information and collaborate on training and outreach to combat anticompetitive practices that hurt workers.

As a reminder, while the NLRA applies to all workforces, including non-union workforces, it does not apply to statutory supervisors or managers.

If you have any questions regarding the General Counsel's Memorandum or non-compete best practices, please contact Caleb P. Setlock or any member of the Barley Snyder Labor Law Team.

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