Tales from the NLRB: General Counsel to Treat Most Non-Compete Agreements as Unfair Labor Practices

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On May 30, 2023, Jennifer Abruzzo, the General Counsel of the National Labor Relations Board (Board), issued a guidance memo (the ?Memo?) stating that non-compete agreements or similar restrictive covenants in settlement agreements between the employer and its employees violate Section 7 of the National Labor Relations Act (NLRA). The Memo goes on to direct that cases where non-compete agreements or provisions are overbroad must be prosecuted and submitted to the Board.

Under Section 7 of the NLRA, employees ?have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively?, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.? However, for the first time since the inception of the NLRA in 1935, the General Counsel is taking the position that a non-compete agreement, absent narrow tailoring, constitutes an Unfair Labor Practice (ULP) under Section 7.

In the Memo, Abruzzo declared ?[n]on-compete provisions are overbroad, that is, they reasonably tend to chill employees in the exercise of Section 7 rights, 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 Board applied a similar standard to confidentiality and non-disparagement agreements in its recent decision in *McLaren Macomb*. Abruzzo has argued that this standard should apply to work rules in *Stericycle, Inc.*, but the Board has yet to decide the case.

Abruzzo identified five activities protected under Section 7 that she contends non-compete agreements or provisions infringe upon. These include employees ?threatening to resign to demand better working conditions,? ?carrying out? threatened resignation or ?resigning to secure improved working conditions,? ?seeking or accepting employment with a local competitor to obtain better working conditions,? ?soliciting ? co-workers to go work for a local competitor as part of a broader course of protected concerted activity,? and ?seeking employment ? to specifically engage in protected activity

with other workers at an employer?s workplace.? The Memo indicates that a non-compete agreement or similar provision infringing upon any of these activities would likely constitute a ULP and that ?a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense.? The Memo also states retaining employees or protecting training investments are unjustifiable reasons for an overbroad non-compete agreement.

The Memo identifies three categories of non-compete agreements that *might* be permissible under its standard. Those include non-compete agreements that ?clearly restrict only individuals? managerial or ownership interests in a competing business,? ?true independent-contractor relationships,? and where a narrowly tailored non-compete agreement or provision is justified by unidentified special circumstances. The Memo does caveat the independent-contractor relationships category by saying a non-compete agreement may constitute a ULP in ?industries where employees are commonly misclassified as independent contractors.?

Although the enforceability of non-compete agreements has traditionally been a matter left to the states, this is not the only effort to restrict non-compete agreements by the Biden Administration or its appointees. As the Memo notes, the Board has ?entered into a memoranda of understanding with the Federal Trade Commission and the Department of Justice?s Antitrust Division.? The Federal Trade Commission (FTC) issued a Notice of Proposed Rulemaking on January 5, 2023 that would make non-compete agreements an unfair method of competition in most circumstances. The proposed rule is still in the notice and comment period, and the FTC has not yet indicated when it might issue a final rule.

While the Memo is not legally binding, Abruzzo has already begun advancing these arguments before the Board and stated she has already authorized a complaint ?alleging unlawful maintenance of an overbroad non-compete provision.? The Board is likely to consider these arguments once a non-compete agreement case is brought before it. Employers should be mindful of what language is used in their non-compete agreements or such provisions found in employment contracts. Employers are encouraged to consult with labor and employment attorneys to ensure that such non-compete agreements are narrowly tailored, as well as to ensure compliance with other recent Board decisions.

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