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Non-compete provisions violate federal law, according to the NLRB General Counsel

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On May 30, 2023, Jennifer Abruzzo, General Counsel at the National Labor Relations Board (NLRB), issued a memorandum concluding that, except in limited circumstances, non-compete provisions violate Section 8(a)(1) of the National Labor Relations Act (NLRA). As a reminder, the NLRB has jurisdiction across unionized and non-unionized workforces, and although the memorandum is not binding law, it is a strong signal that the NLRB will likely limit the enforceability of non-compete agreements in the near future.

Summary of the Memorandum

The memorandum begins with a discussion of the relevant sections of the NLRA. Section 8(a)(1) of the NLRA states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). Those rights guaranteed in Section 7 consist of 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." 29 U.S.C. § 157. According to Abruzzo, a provision in an employment agreement violates Section 8(a)(1) if it "reasonably tends to chill employees in the exercise of Section 7 rights

unless it is narrowly tailored to address special circumstances justifying the infringement on employee rights."

In the memorandum, Abruzzo states that non-compete provisions violate Section 8(a)(1) of the NLRA because they reasonably chill employees in the exercise of their Section 7 rights by denying employees the ability to quit or change jobs. Abruzzo lists five specific types of protected activity under Section 7 of the NLRA that non-compete provisions allegedly violate:

1. They chill employees' ability to demand better working conditions by concertedly threatening to resign because such threats would be futile due to the employees' lack of other employment opportunities.
2. They chill employees from concertedly resigning for the same reasons as in No. 1.
3. They chill employees from concertedly seeking or accepting employment with a local competitor to obtain better working conditions.
4. They chill employees from soliciting their co-workers to work for a local competitor offering improved working conditions.
5. They chill employees from seeking employment to engage in protected activity like union organizing that involves working for multiple employers.

Abruzzo does, however, carve out two exceptions to the per se rule against enforcing non-compete provisions. First, Abruzzo states that non-compete provisions do not violate Section 8(a)(1) if they are "narrowly tailored to special circumstances justifying the infringement on employee rights"

(e.g., to protect proprietary or trade secret information). Significantly, "a desire to avoid competition from a former employee is not, on its own, a legitimate business interest that could support a special circumstances defense," according to the memorandum.

Second, according to Abruzzo, non-compete provisions may not violate the NLRA if they only restrict an individual's managerial or ownership interest in a competing business but do not prohibit employment in such business. This could complicate asset purchases or other merger and acquisition deals where the buyer wants the selling or other key employees to work for the buyer post-closing. The selling shareholder often has dual track non-compete restrictions; one in the purchase agreement and one in the employment agreement, and parties will need to be mindful of these ongoing efforts to reduce the use and effectiveness of non-compete provisions.

Furthermore, although not discussed in the memorandum, not all employees are subject to the NLRA—for example, independent

contractors and high-level managerial employees are excluded from its jurisdiction.

Implications

Although the memorandum is not binding and lacks the force of law until the NLRB rules on a particular case, it nevertheless signals the NLRB's position on the limited permissible uses of non-compete provisions. Moreover, the memorandum represents yet another domino to fall in the nationwide push to outlaw non-compete provisions. Among the current patchwork of state-specific statutory requirements and case law standards governing non-compete provisions, in January, the FTC proposed a new rule to ban employers from using non-compete provisions, which is currently working its way through the rulemaking process. Additionally, in February, a bipartisan group of U.S. Senators reintroduced the Workforce Mobility Act of 2023 that would ban most non-compete provisions as a matter of federal law.

In light of Abruzzo's memorandum, it becomes even more important for employers to protect their trade secrets and use non-solicitation and non-disclosure agreements. As always, consult legal counsel with additional questions and concerns.

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