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NLRB General Counsel Issues Enforcement Memorandum Targeting Non-Competes

On May 30, 2023, National Labor Relations Board (NLRB) General Counsel (GC) Jennifer Abruzzo issued an enforcement memorandum targeting non-compete provisions in employee contracts and separation agreements.

GC Abruzzo states that non-compete provisions are overbroad, and therefore 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."

GC Abruzzo asserts that these non-compete provisions specifically interfere with employees' legal right to:

- Concertedly threaten to resign to secure better working conditions.
- Carry out concerted threats to resign or otherwise concertedly resign to secure improved working conditions.
- Concertedly seek or accept employment with a local competitor to obtain better working conditions.
- Solicit their co-workers to go work for a local competitor as part of a broader course of protected concerted activity.
- Seek employment, at least in part, to specifically engage in protected activity, including union organizing, with other workers at an employer's workplace.

GC Abruzzo does not go as far as to suggest a blanket ban of all non-compete provisions, stating that such a provision will not violate Section 8(a)(1) of the National Labor Relations Act (NLRA) if "the provision is narrowly tailored to special circumstances justifying the infringement on employee rights." However, the memo is skeptical as to what "special circumstances" would justify such an infringement. For instance, the GC indicated that a mere desire to avoid competition with a former employee would not constitute a legitimate business interest that could support a special circumstances defense. She further reasoned that business interests in retaining employees or protecting special investments in training employees would also be unlikely to justify an overbroad non-compete provision "because U.S. law generally protects employee mobility, and employers may protect training investments by less restrictive means."

GC Abruzzo does note that employers have a legitimate business interest in protecting proprietary or trade secret information, but stated that protecting those interests could be protected by more narrowly tailored agreements.

GC enforcement memos are not binding law; they simply detail the legal theories the GC will utilize to pursue unfair labor practice charges against employers. Under this memo, NLRB regional offices are required to submit cases concerning "arguably unlawful" non-compete agreements and special circumstances defenses to the NLRB Division of Advice. We expect to see NLRB Regional Offices begin to issue Complaints challenging non-compete provisions as being unlawful under the NLRA.

Should the NLRB eventually adopt GC Abruzzo's theory, it will have little if any effect on non-compete agreements in many states where non-competes may be imposed only on supervisory, managerial, executive and other high-level personnel, none of whom meet the definition of an "employee" covered by the NLRA.

Employers should contact their Thompson Hine attorney to assess their use of non-compete agreements and employees' rights under the NLRA.

FOR MORE INFORMATION

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