NLRB Takes Aim at Non-Compete Agreements

By Ellie Quinby, Preti Flaherty

Five months after the Federal Trade Commission proposed a new rule banning noncompete clauses, the National Labor Relations Board (NLRB) General Counsel Jennifer A. Abruzzo issued a memo on May 30, 2023 stating her view that most employee non-compete agreements violate Section 7 of the National Labor Relations Act (NLRA). Though the memo is non-binding and does not change existing law, it aligns with the Biden administration's actions to broadly restrain the use of employee non-compete agreements.

Section 7 of the NLRA safeguards employees' "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." It is an unfair labor practice in violation of Section 8(a)(1) for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." The General Counsel argues that 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 narrowly tailored to address special circumstances.

The General Counsel highlighted five types of Section 7-protected activity that non-compete agreements may chill:

1. *Threatening to Resign*: Non-compete provisions discourage employees from concertedly threatening to resign to demand better working conditions, as they may perceive such threats to be futile due to limited access to alternative employment opportunities.
2. *Concerted Resignation*: While not explicitly recognized by NLRA law, the General Counsel asserts that employees have a logical right to engage in concerted threats to resign or concerted resignations to secure improved working conditions.
3. *Seeking Employment with Competitors for Better Working Conditions*: Non-compete provisions deter employees from seeking or accepting employment with local competitors to obtain better working conditions.
4. *Soliciting Coworkers for Competitors*: Non-compete provisions discourage employees from soliciting their coworkers to work for a local competitor as part of a broader course of protected concerted activity, fearing legal action for breaching their non-compete agreements.
5. *Seeking Employment for Protected Activity*: Non-compete agreements limit employees' mobility to engage in specific forms of protected activity, such as union organizing, by impeding their ability to work with multiple employers within a trade and geographic region.

The General Counsel acknowledged that not all non-compete agreements violate the NLRA. Non-compete provisions that reasonably restrain individuals' managerial or ownership interests in competing businesses, or genuinely protect proprietary or trade secret information, may be permissible if narrowly tailored. However, the General Counsel maintained that a desire to avoid competition from former employees is not a legitimate business interest justifying an overbroad non-compete provision, nor is a desire to retain employees. The General Counsel noted that non-compete provisions imposed on low or middle-wage workers who lack access to trade secrets or other protectible interests would likely never be considered reasonable.

The NLRB General Counsel's position is that that the proffer, maintenance, and enforcement of non-compete provisions that reasonably tend to chill employees from engaging in Section 7 activity violate Section 8(a)(1) unless the provision is

narrowly tailored to special circumstances justifying the infringement on employee rights. Though federal law concerning non-compete agreements remains unsettled, and the FTC's vote to ban most non-compete provisions is delayed until at least April 2024, this memo is clearly part of a broader effort at the federal level to ban most employee non-compete agreements. Employers and employment lawyers should take note.

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