CLIENT ALERTS & INSIGHTS

NLRB's General Counsel (Once Again) Limits Employment Agreements

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In a recent memorandum to all Regional Directors, Officers-in-Charge, and Resident Officers, the National Labor Relations Board's ("NLRB") General Counsel, Jennifer Abruzzo, sets forth her view that the proffer, maintenance, and enforcement of non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act ("Act"), except in limited circumstances.

Following the NLRB's recent ruling in *McLaren Macomb* (barring confidentiality and non-disparagement provisions in severance agreements, analyzed) and Abruzzo's follow-up guidance memorandum explaining that she believes such nondisclosure and non-disparagement restrictions violate federal labor law (see analysis here and here), Abruzzo is at it again. In fact, Abruzzo even references *McLaren Macomb* as a recent, similar NLRB action to support her current memo. Now, Abruzzo argues that a non-compete "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 reasonably tailored."

In Abruzzo's memorandum, Abruzzo explains that overbroad non-compete agreements are unlawful because they "chill employees" from exercising their rights under Section 7 of the Act. She lists five specific types of activity that could be stymied by non-competes:

1. They chill employees from concertedly threatening to resign to demand better working conditions;
2. They chill employees from carrying out concerted threats to resign or otherwise concertedly resign to secure improved working conditions;
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 go work for a local competitor as part of a broader course of protected concerted activity; and
5. They chill employees from seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace.

In her opinion, "business interests in retaining employees or protecting special investments in training employees are unlikely to ever justify an overbroad non-compete provisions."

Abruzzo creates the impression that she recognizes the enforceability of non-compete agreements by referencing potential "narrowly tailored" discretionary exceptions; however, this is not defined. Generally, Abruzzo states that exceptions to her broad proposed prohibitions may be justified by "special circumstances" but does not elaborate. She also states that "provisions that clearly restrict only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationship" *may* not violate the Act, apparently forgetting that the Act *already specifically excludes* supervisory employees and independent contractors from coverage, rendering that "exception" presented by Abruzzo a meaningless façade regarding workers over which she and the NLRB do not have jurisdiction in the first place.

Finally, Abruzzo notes that she is committed to an interagency approach to restrictions on the exercise of employee rights, including limits to workers' job mobility. Last year, the NLRB entered into a memorandum of understanding with the Federal Trade Commission and the Department of Justice's Antitrust Division, both of which have addressed the anticompetitive effects of non-compete agreements. She also requests cases from the various NLRB Regions that would enable her to pursue actions against such agreements.

Despite some already apparent weaknesses in the recent memo, given the antagonistic nature of the NLRB's position, employers should continue to ensure that their non-compete agreements protect a legitimate business interest, such as proprietary or trade secret information, as they should even before this memo. Additionally, employers should limit the use of non-compete agreements to managers (or other high-level employees) and use narrower non-solicit or non-disclosure agreements where appropriate for lower-level employees.

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