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The National Labor Relations Board (NLRB) Takes a Shot Across the Bow at Non-compete and Employee Non-solicit Agreements

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As we previously covered, in July of 2021 President Biden announced a "Whole-of-Government" review of competition law, directing multiple agencies to use the powers at their disposal to promote competition. The Federal Trade Commission and the Department of Justice have followed through on this directive by proposing a ban on most non-competes and by launching criminal prosecutions aimed at no-poach agreements. The NLRB is the latest agency to join the fray.

In a memo disseminated on May 30, 2023, NLRB General Counsel Jennifer Abruzzo expresses the opinion that many non-compete (and employee non-solicit) provisions run afoul of Section 7 of the National Labor Relations Act, which protects employees' rights to take certain collective actions.

The NLRB Memo

The memo by General Counsel Abruzzo was sent to all regional directors, officers-in-charge, and resident officers of the NLRB. In the memo, Ms. Abruzzo set forth her opinion that "[e]xcept in limited circumstances … the proffer, maintenance, and enforcement of [non-compete] agreements violate Section 8(a)(1) of the [National Labor Relations Act]." Although it does not constitute a complete ban on non-compete agreements, the memo reflects the current administration's policy of severely restricting when such agreements will be enforceable in workplaces subject to NLRB jurisdiction (which covers a wide variety of union and non-union private employers (including non-profits) engaging in inter-state commerce).

Essentially, the memo takes the position that any contractual provision which limits an employee's ability to obtain new employment, or limits an employee's ability to discuss resigning or moving to another company with co-workers, runs afoul of the NLRA. Thus, the memo describes a wide variety of activities which can be included within a non-compete or non-solicit agreement, all of which are deemed to violate an employee's right to take collective action. These activities include:

- Limiting access to other employment opportunities
- Limiting employees' ability to encourage others to move to a competitor
- Limiting employees' ability to act in concert to resign\Limiting employees' ability to move en masse to a competitor

Consistent with most existing non-compete jurisprudence, the memo takes the position that the desire to avoid competition from a former employee is "not a legitimate business interest" that could support a non-compete agreement. However, the memo also asserts that business interests that are currently viewed in many jurisdictions as sufficient to support a non-compete or employee non-solicit agreement – such as protecting good-will and customer relationships – are "unlikely" to support agreements which are generally described as "overbroad." Instead,

the memo explains that some business interests can be protected in other ways such as by offering longevity bonuses (to protect investments in training employees) and narrowly tailored workplace confidentiality agreements (to protect proprietary or trade secret information).

By labelling all of the aforementioned activities as violations of Section 7 of the NLRA, the memo would preempt and supersede state laws which otherwise allow narrowly tailored non-compete agreements.

Exceptions

The memo explains that non-competes which restrict only an individuals' managerial or ownership interest in another business would not violate the NLRA because such agreements do not prohibit an employee's acceptance of another employment opportunity. Additionally, although unaddressed by the memo, the policy articulated in the memo would not apply to certain managerial employees who are deemed "supervisors" and thus are not governed by Section 7 of the NLRA. And, as noted above, the memo does not appear to restrict the use of other post-employment restrictive covenants such as confidentiality agreements and narrowly tailored non-solicitation of client agreements.

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