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Labor & Employment Alert

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The NLRB General Counsel targets non-competition agreements

By Stephanie M. Caffera and Michael J. Lingle

Employers should be aware of this new line of attack on non-competition agreements.

What's the Impact?

- General Counsel Jennifer Abruzzo asserts that non-competition agreements impede "protected concerted activity" under the National Labor Relations Act and signals her intention to bring this issue before the NLRB.
- Employers should review their use of non-competition agreements and consult with legal counsel on the scope of their non-compete restrictions.

In a move foreshadowed by the General Counsel of the National Labor Relations Board in prior guidance concerning the enforceability of certain clauses in severance agreements, the General Counsel has now squarely taken aim at striking down non-competition agreements.[1]

In Memorandum GC 23-08, General Counsel Jennifer Abruzzo continues to push the scope of "protected concerted activity" under the National Labor Relations Act (the Act). Abruzzo opines

[1] The General Counsel joins the Federal Trade Commission in its effort to ban non-competition agreements.

that broad non-competition provisions, which employees reasonably could view as preventing them from quitting or changing jobs, "chill" five specific types of activity protected by the Act:

- **Threatening to resign to demand better working conditions—**According to the General Counsel, employees with non-competes would find threatening to resign "futile" due to the lack of other employment opportunities and the fear of retaliatory legal action by the employer for threatening to breach their non-competition agreements.
- **Carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions**—The General Counsel opines that such a right follows from established law, although she admits the Board law does not "unequivocally" recognize that right.
- **Concertedly seeking or accepting employment with a local competitor to obtain better working conditions**—A typical non-compete agreement would directly prohibit this type of activity.
- **Soliciting coworkers to resign to work for a local competitor**—The General Counsel believes a chilling effect on this activity is likely because employees cannot accept such employment without breaching their non-competition agreements and due to fear of retaliation.
- **Seeking employment to specifically engage in protected activity with other workers at an employer's workplace**—In some cases, according to the General Counsel, "mobility" is required for some forms of activity, such as union organizing, which involves obtaining work with multiple employers in a specific trade and geographic region.

As a result, the General Counsel ultimately opines, "the proffer, maintenance, and enforcement of a non-compete provision that reasonably tends to chill employees from engaging in Section 7 activity as described above violate Section 8(a)(1) unless the provision is narrowly tailored to special circumstances justifying the infringement on employee rights."

The General Counsel acknowledges that there are limited circumstances where non-competition agreements would not violate the Act. Agreements that only restrict managerial or ownership interests in a competing business, rather than employment, for example, would not implicate Section 7. Abruzzo also accepts the possibility that "special circumstances" might justify infringement of employees' Section 7 rights, although she does not elaborate on what those circumstances might be. Significantly, however, the General Counsel notes that "a desire to avoid competition from a former employee" and "protecting special investments in training" do not justify broad non-competition agreements. In addition, she comments that "[i]t is unlikely an employer's justification would be considered reasonable in common situations where overbroad non-compete provisions are imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectible interests, or in states where non-compete provisions are unenforceable."

Until the Board adopts the General Counsel's position, the GC Memorandum has no independent legal effect, but instead, it encourages regional leadership to bring challenges to such provisions, increasing the likelihood of future enforcement activity. In essence, Abruzzo's Memorandum is a directive to the NLRB Regional Directors to issue complaints about non-competition agreements as a way to bring this issue before the Board. We will have to wait and see whether the General Counsel's position gains traction with the Board and, if so, whether it survives nearly certain judicial scrutiny.

In the meantime, employers should be aware of this new line of attack on non-competition agreements and be on the lookout for future developments. In light of efforts by the Federal Trade Commission to ban non-competition agreements and now the General Counsel's attack on such agreements, employers may wish to take this opportunity to review their use of non-competition agreements with lower wage workers in particular and consult with legal counsel on the scope of their non-compete restrictions.

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