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ALERTS

What Does The NLRB's New Take On Non-Competes Mean For Employers?

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Highlights

According to the NLRB's General Counsel, nearly all non-compete provisions contained in employment agreements are invalid restrictions on employee's rights under the NLRA

Non-competes are only valid in "special circumstances," which do not include desire to avoid competition; to protect confidential information; or to retain talent

The memo itself is not law, but the General Counsel wants cases involving non-competes sent to the Division of Advice to shape precedent and redefine current law

In another unprecedented move (and maybe the most audacious yet), the National Labor Relations Board General Counsel, Jennifer Abruzzo, issued a memorandum to all Regional Directors, Officers-in-Charge, and Resident Officers setting forth her belief that non-compete provisions contained within employment contracts, including severance agreements, are generally unlawful. The memo also requires that all cases involving non-compete provisions now must be submitted to the Division of Advice.

According to Abruzzo, non-compete provisions are unlawful because they

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"reasonably tend to chill employees in the exercise of Section 7 rights" to engage in concerted activity under the National Labor Relations Act. These protections extend to all private-sector employees covered by the NLRA, regardless of whether the employer's workforce is presently unionized or the employee is a member of a union.

Specifically, she claims the denial of access to other employment opportunities interferes with Section 7 activity in a number of ways:

- Employees' bargaining power is undermined in the context of work stoppages and other labor disputes
- Employees cannot threaten resignation knowing that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights
- Employees cannot solicit their former coworkers to work for a competitor and, thus be able to leverage their prior relationships
- Employees cannot seek employment for the purpose of engaging in protected activity such as union organizing or "salting"

While seeking to effectively ban nearly all non-competes (particularly for what the memo called "low wages employees"), Abruzzo does acknowledge that not all non-competes are prohibited. In doing so, she notes that lawful non-compete agreements might only occur in extremely narrow circumstances where the contract concerns an individual's ownership interest in a competitor; true independent contractor relationships; or when "justified by special circumstances."

However, such special circumstances would not include a desire to avoid competition; interests in retaining employees or investments in training employees; or protecting proprietary or trade secret information, which she claims can be protected by other narrowly tailored workplace agreements such as longevity bonuses or confidentiality agreements.

While memos such as this from the General Counsel are not by themselves law, they signal the enforcement priorities of the Board and how the Board is to approach these issues when such cases arrive before it. For example, Abruzzo previously issued a memo attempting to outlaw captive audience meetings with a similar directive requiring that all cases involving captive audience meetings be submitted to the Division of Advice, to which the Associated Builders and Contractors of Michigan filed a lawsuit in March 2023 asking a federal judge to issue an injunction concerning her efforts.

Given this memo includes a similar instruction that Regional Officers send cases involving non-competes to the Division of Advice, there should be little doubt that her office is looking for cases that might be used to pursue binding Board precedent in this area. Employers should consider this memos or risk becoming one of Abruzzo's test cases. According to the memo, she "recently" authorized at least one complaint against an employer for their use of an allegedly overly broad non-compete provision.

While not presently law, Abruzzo has made it clear that she intends to continue to tenaciously advance her pro-labor agenda and her latest memo ensures her office will join the Federal Trade Commission (FTC) in

efforts to curb the use of non-competes nationwide. Given the Board's previous departures from significant and long-standing precedent, coupled with its willingness to create new precedent (for example, a recent Board decision severely restricted the use of confidentiality and non-disparagement provisions in severance agreements), employers must be ready for what is likely to come next – a sweeping prohibition of non-compete agreements across the nation.

With this in mind, anyone considering the use of a non-compete agreements should consider working with counsel familiar with both Abruzzo and the FTC's efforts.

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