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Non-Compete Agreements Declared Unlawful By NLRB General Counsel

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On May 30, 2023, the General Counsel of the National Labor Relations Board, Jennifer Abruzzo, issued GC Memorandum 23-08, asserting that non-compete agreements generally violate the National Labor Relations Act. Much like the FTC's recent proposed regulation banning non-compete agreements and the growing number of state statutes restricting their use, the memorandum is designed to curb the use of employee non-compete provisions, albeit through a different mechanism.

The General Counsel's memorandum is not legally binding on employers. It offers guidance, however, as to how the General Counsel intends to pursue future unfair labor practice cases. Consistent with that, the General Counsel invites the NLRB's Regional Offices to alert her office to unfair labor practice charges that present the issues raised in the memorandum. Those cases will presumably be pursued by the General Counsel's office, and it will then be up to the NLRB to decide those cases, thereby creating Board law. Any attempt by the Board to invalidate non-compete agreements *wholesale*, however, is likely to face significant challenges in the federal courts.

Key Points:

Just three months ago, the NLRB issued its controversial *McLaren Macomb* decision, in which the Board invalidated many confidentiality and non-disparagement provisions in separation agreements. Building on that decision, General Counsel Abruzzo recently announced her view that "the proffer, maintenance, and enforcement" of non-compete agreements violates the NLRA because non-compete agreements "chill employees in the exercise of Section 7 rights." Specifically, the memorandum contends that non-compete agreements may chill employees from, *inter alia*:

1. Concertedly threatening to resign or demanding better working conditions;
2. Concertedly seeking or accepting employment with a local competitor to obtain better working conditions;
3. Soliciting co-workers to work for a local competitor as part of a broader course of protected concerted activity; and
4. Seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace.

The memorandum also states that an employer found liable for violating the NLRA may be subject to remedies, including, for example, lost earnings and benefits from job opportunities an employee could have received if not for the non-competition provision.

Exceptions:

General Counsel Abruzzo offers an exception to her blanket view that non-compete agreements are unlawful. Agreements that are "narrowly tailored to special circumstances justifying the infringement on employee rights," she notes, are not unlawful. The memorandum does not provide examples of such "special circumstances." Instead, it provides examples of situations that do *not* warrant such special circumstances:

- An employer's desire to avoid competition from a former employee is not sufficient;
- Similarly, business interests in retaining employees or protecting employer capital spent in training a workforce are "unlikely to ever justify" a non-compete provision; or
- No employer justification would likely "be considered reasonable" in cases where a non-compete is given to low-wage workers who lack access to trade secrets and other protectable business interests.

On the other hand, the memorandum recognizes a legitimate interest for non-compete agreements that include provisions that "clearly restrict only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationships."

Next Steps:

General Counsel Abruzzo has been aggressive in pushing her agenda. We recommend clients review their restrictive covenants and evaluate the legitimate business interests that justify the restrictions. As a reminder, only non-supervisorial and non-managerial employees are protected by the NLRA.

Many employers have already begun to carefully scrutinize the use and enforceability of non-competes. States such as California, Oklahoma, and North Dakota have banned most non-compete agreements. Minnesota recently passed a similar law, which will be effective on July 1, 2023. Still, other states—not to mention Washington D.C.—have restricted the use of these agreements for low-wage workers.

Regardless of whether the NLRB adopts Abruzzo's position, employers should consider the range of options that may be used to protect their legitimate business interests and intellectual property. Paul Hastings has a leading practice in this area and our attorneys know how to work with companies to craft creative solutions to protect their confidential information and legitimate business interests.

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