NLRB Signals That Non-Compete Provisions May Violate Labor Law

June 13, 2023 Adam Sencenbaugh, Rebecca Dettmers, Sean Lewis

PRACTICES Traditional Labor Law, Employment Litigation, Labor and Employment

On May 30, 2023, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo released a memorandum (the Memorandum) outlining her stance that non-compete agreements generally violate federal labor law because they tend to "interfere with employees' exercise of rights under Section 7 of the National Labor Relations Act (the Act or NLRA)." According to the Memorandum, the proffer, maintenance, and enforcement of non-compete agreements generally violates Section 8(a)(1) of the Act because such agreements "reasonably tend to chill employees" from exercising their Section 7 rights to quit or change jobs by cutting off their access to other employment opportunities. While Abruzzo recognized one limited exception for "provisions that clearly restrict only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationships," the bounds of that exception remain unclear.

In her Memorandum, Abruzzo explains that non-competes generally violate the NLRA because they chill employees from: (1) concertedly threatening to resign; (2) carrying out such concerted threats; (3) seeking or accepting jobs with a competing employer; (4) soliciting coworkers to work for a competitor; and (5) seeking employment for, at least in part, the purpose of engaging in protected activity.

Many companies mistakenly believe that the NLRA only applies to unionized employees. However, Section 7 of the Act grants non-unionized workers the same protections as unionized workers when engaging in *concerted activity* to improve their working conditions. General Counsel Abruzzo's Memorandum goes one step further, stating that employers must consider the Section 7 rights of *former* employees (both union and non-union) as well as current employees.

The Memorandum represents the latest step by the Biden Administration to strike down trade restrictions that it believes are unfair for workers. In January 2023, the Federal Trade Commission (FTC) proposed a new rule that, if adopted, would ban nearly all non-compete provisions in employment agreements. While the FTC's final rule on non-compete agreements has not yet been issued, Abruzzo's Memorandum reflects the Administration's stated goal to increase competition in the labor market by making it easier for employees to change jobs.

Abruzzo's Memorandum also accords with other recent authority from the NLRB. In a separate memorandum dated October 31, 2022, Abruzzo urged the NLRB to protect employees from "intrusive and abusive" employer surveillance, which she believes interferes with employees' Section 7 activity. And on February 21, 2023, the NLRB held in its *McLaren Macomb* decision that employers could violate the NLRA by merely *proffering* severance agreements with non-disparagement and confidentiality provisions that could restrict employees' post-employment Section 7 rights.

Although General Counsel Abruzzo's Memorandum is not legally binding, employers should anticipate the NLRB will use its enforcement powers to target non-compete provisions in employment agreements, particularly those impacting low wage workers. In fact, Abruzzo

encouraged NLRB attorneys to send the Office of the General Counsel cases involving “arguably unlawful” non-compete provisions to use as precedent before the broader NLRB.

Haynes Boone will continue to monitor agency guidance and decisions. In the meantime, we encourage you to reach out to a member of the Haynes Boone Labor and Employment Practice Group to ensure that employment agreements containing restrictive covenants or confidentiality provisions are drafted in accordance with applicable law.