Patterson Belknap

Employment Law Alert
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Joining Other Government Regulators, NLRB GC Seeks to Curb Most Non-Compete Agreements

On May 30, 2023, National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo took yet another step to ban restrictive covenants in the employment context. In a memo issued to all regional offices, she set forth her view that nearly all non-compete provisions, with very limited exceptions, violate the National Labor Relations Act ("NLRA"). Although GC Abruzzo's memo is not binding law, as we've previously reported, the issuance of the memo is the latest in a series of aggressive governmental efforts, including from the Federal Trade Commission and the Department of Justice's Antitrust Division, to curb the use of non-compete agreements, which typically restrict employees from working for a competitor or opening a competing business.

GC Abruzzo's memo explains her position that "overbroad" non-compete agreements are impermissible because they prevent employees from exercising their rights under Section 7 of the NLRA to take collective action to improve their working conditions. This position is based on the view that non-compete agreements "chill" employees from engaging in protected activities, such as concertedly seeking or accepting employment with a local competitor to obtain more favorable working conditions. In the General Counsel's view, then, the "proffer, maintenance, and enforcement" of such agreements violates the NLRA "[e]xcept in limited circumstances."

Notably, the memo suggests that certain narrowly tailored non-compete agreements would be permissible if "special circumstances" exist that "justify[] the infringement on employee rights." For example, agreements that clearly restrict only an individual's managerial or ownership interest in a competing business, or true independent-contractor relationships, would pass muster. While not explicit, the memo appears to suggest that such circumstances would also exist when, for example, the employer seeks to prevent the employee from appropriating valuable trade secret information or existing customer relationships built on experience with the employer. But, according to the memo, merely seeking to "avoid competition from a former employee" is not a "legitimate business interest" justifying a non-compete agreement.

Indeed, the memo offers several recommendations as to how employers might achieve the objectives of a non-compete agreement through less restrictive means. For example, the memo suggests that employers may protect their investments in training employees by offering a "longevity bonus." Similarly, employers can protect their trade secrets and other proprietary information by executing "narrowly tailored" workplace agreements that protect those interests. Such efforts, according to the memo, achieve the same ends as a non-compete agreement without impermissibly restricting employee mobility.

GC Abruzzo's memo comes on the heels of earlier efforts this year to invalidate other supposedly "overly broad" restrictive covenants in the employment context. In February 2023, the NLRB issued a decision in *McLaren Macomb*, 372 NLRB No. 58, ruling that employers could not offer employees severance agreements requiring employees to broadly waive their rights under the NLRA. Specifically, *McLaren Macomb* held that employers could not use blanket non-disparagement or confidentiality clauses in severance agreements because, among other things, such clauses tend to prevent employees from engaging in protected concerted activity and could inhibit employees from filing charges with the NLRB.

In the wake of the *McLaren Macomb* decision, GC Abruzzo issued guidance in March 2023, taking the position, among others, that *McLaren Macomb* applies retroactively to already-executed agreements and that former employees could invoke its protections. The General Counsel also adopted the view that merely including a disclaimer sentence—*i.e.*, a clause disclaiming intent to infringe NLRA rights—would not "save" an otherwise impermissible non-disparagement or confidentiality provision. And the March Memo declared the General Counsel's stance that maintaining a previously-executed severance agreement with terms that violate *McLaren Macomb* could be a continuing violation of the NLRA for purposes of the applicable six-month statute of limitations, meaning that the NLRB could take action even if more than six months have passed since the proffer of the agreement.

Several open questions remain following the issuance of both the March guidance concerning confidentiality and non-disparagement clauses and the new memo issued this week regarding the permissibility of non-compete agreements. At a minimum, employers should closely scrutinize their use of such restrictive covenants in light of existing administrative rulings and guidance. Similarly, employers using such covenants will need to be alert to the potential that such provisions may be unenforceable.

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