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Non-Compete Agreements Come Under More Fire

Human Resources & Employment

On May 30, 2023, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued a memo advising NLRB regional directors that non-compete agreements generally infringe on employees' rights under Section 7 of the National Labor Relations Act (NLRA). As a result, employers should examine their existing restrictive covenant agreements for "Section 7" concerns and understand that such agreements may carry legal risk going forward.

The General Counsel's View on Non-Compete Agreements

In the May 30 memo, General Counsel Abruzzo advised that, with limited exception, employers commit unfair labor practices (ULPs) in violation of the NLRA by proffering, maintaining or enforcing non-compete agreements because "[g]enerally speaking, this denial of access to employment opportunities chills employees from engaging in Section 7 activity."

Section 7 of the NLRA protects employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Employers violate the NLRA when they "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."

General Counsel Abruzzo opined on numerous ways non-compete agreements could interfere with protected Section 7 activities, including by:

- Chilling employees exercise of their rights to organize to improve working conditions with their knowledge of greater difficulty replacing lost income if discharged for exercising such rights;
- Undermining employees' bargaining power in the context of lockouts, strikes and other labor disputes;
- Preventing former employees from reuniting at a local competitor's workplace, and thus leveraging prior relationships; and
- Chilling five specific activities protected by Section 7:
 1. Concertedly threatening to resign to demand better working conditions;
 2. Carrying out concerted threats to resign in demand of better working conditions;
 3. Concertedly seeking or accepting employment with a local competitor to obtain better working conditions;
 4. Soliciting co-workers to go work for a local competitor as part of a broader course of protected concerted activity; and
 5. Seeking employment, at least in part, to specifically engage in protected activity with co-workers.

The Memo's Applicability

Because Section 7 applies regardless of whether a workplace is unionized, the memo, if enforced, could apply to many workplaces. However, not all workers have Section 7 rights under the NLRA. For example, Section 7 does not apply to independent contractors, managers, most supervisors, public sector employees and some agricultural workers. In addition, the General Counsel stated that the NLRA does not prohibit non-competes that merely concern an individual's managerial or ownership interests in a competing business.

Further, the General Counsel advised that there could be circumstances in which “a narrowly tailored non-compete agreement’s infringement on employee rights is justified by special circumstances.” However, the memo does not detail or provide examples of what would be “narrowly tailored” or “justified by special circumstances.”

Applicability to Other Restrictive Covenants

The memo only refers to “non-compete agreements,” not other types of restrictive covenants such as non-solicitation and confidentiality agreements.

However, companies should note that the NLRB has recently targeted other restrictive covenants, including confidentiality and non-disparagement agreements when such agreements (and provisions) interfere with Section 7 rights.

Despite the memo’s silence on the validity of non-solicitation agreements, language in the memo seems to indicate the NLRB would target such agreements to the extent they prohibit employees from soliciting or recruiting coworkers to leave for another employer.

Alternatives to Non-Competes

Employers generally use non-compete agreements to protect the company’s legitimate business interests, such as trade secrets, intellectual property and other proprietary information.

Confidentiality agreements can be an alternative to non-compete agreements. Confidentiality agreements prevent employees from disclosing a company’s proprietary information. While confidentiality agreements fall short of the protection offered by non-compete agreements (in that employees can work for a competitor), those employees would be prohibited from using their prior employer’s proprietary information.

Another alternative to non-compete agreements is a “garden leave” agreement. Garden leave agreements generally state that employees will remain employed by the company for a certain amount of time after giving notice of resignation but will not actually perform any services. During garden leave, because they remain company employees, employees continue to have a duty of loyalty to the company and therefore would be barred from performing services for a competitor. Because General Counsel Abruzzo’s memo is concerned with the ability to resign or threaten to resign without salary replacement, garden leave clauses that ensure an employee’s income may be a valid (but to date untested) workaround.

Impact on Employers

While the memo does not have the force of law, it does provide policy and guidance for the NLRA’s Regional Offices, which investigate and prosecute ULPs. The memo also offers a basis for employees or former employees to file such charges. Indeed, the memo encourages Regional Offices to seek “make-whole” relief based on demonstrable lost opportunities from non-competes.

While the memo excepts “narrowly tailored” non-compete agreements “justified by special circumstances,” there is currently no precedent or guidance related to what those special circumstances will be. In light of the memo, companies that maintain restrictive covenant agreements with employees may want to:

- Evaluate the necessity of their non-compete agreements applied to non-managerial or supervisory employees and weigh the risks of such agreements against the benefits.
- Ensure that all restrictive covenants explicitly delineate the company’s legitimate business interests in the agreements.
- Determine whether there are less restrictive means of protecting the company’s legitimate business interests and whether confidentiality agreements and garden leave clauses could present an acceptable alternative.
- Review their trade secret and intellectual property policies and procedures and retrain employees on safeguarding confidential information.
- Confer with legal counsel to analyze and evaluate their non-compete agreements and weigh the risks against their objectives and needs.

For more information or questions about the General Counsel's memo or restrictive covenants, please contact a member of Gould & Ratner's [Human Resources and Employment Law Practice](#).