NLRB's General Counsel Issues Controversial Memo Criticizing Non-Competes

Labor & Employment Law Update

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Following on the proposed rule of the FTC on non-competes, another federal threat to non-competes has emerged, this time from the National Labor Relations Board (NLRB).

The NLRB's General Counsel, Jennifer Abruzzo, issued a memo on May 30, 2023 entitled "Non-Compete Agreements That Violate The National Labor Relations Act" ("Act"). In the memo, which is controversial and at times puzzling, Abruzzo argues that non-compete agreements in employment and severance agreements generally interfere with employee rights protected by Section 7 of the Act. Section 7 applies to virtually all private sector workers with few exceptions (i.e. "Supervisors" as defined under the NLRA).

According to Abruzzo, "the proffer, maintenance, and enforcement of such agreements" are unlawful because they "reasonably tend to chill employees in the exercise" of their right under Section 7 of the Act to take collective action, including organizing, to improve their terms and conditions of employment. Abruzzo believes that non-competes chill worker's rights by making it less likely that they will resign, seek other employment, or engage in other activities that give employees leverage with their current employers.

The term "non-compete" is often used to refer to restrictive covenants generally, including non-solicitation clauses. In the memo, Abruzzo does not appear to be attacking non-solicitation clauses, but rather the classic non-compete - - a provision prohibiting certain competitive employment for a given period of time, in a certain geographic area or industry.

Non-compete agreements are legal in the vast majority of states, provided they are reasonably tailored to protect a legitimate interest of the employer. Many states, such as Illinois, have legislated additional requirements to protect employees, such as income thresholds, notice periods for the employee to obtain attorney review, and others.

The overall thrust of the memo appears to be an attempt to nullify decades of state common law, and dozens of state statutes on the subject of non-competes. Yet, in certain parts of the memo, Abruzzo's intent seems to be less extreme. For

example, she specifically criticizes overbroad non-competes imposed on low or middle-wage employees who lack access to trade secrets or other protectible interests. Yet, such non-competes already are unenforceable, so her position in this regard would not appear to represent a change in existing law.

Abruzzo's interpretation of the NLRA is not binding, but in her role as General Counsel of the NLRB, she has influence over the Board, which adjudicates unfair labor practice cases. She also decides when to file complaints of unfair labor practices. Therefore, she can give the Board the opportunity to accept her interpretation of the NLRA.

In terms of practical implications, the memo directs NLRB regional offices to identify cases concerning "arguably unlawful" non-compete agreements, as well as special circumstances defenses, to the NLRB Division of Advice. Once complaints issue, Abruzzo likely will attempt to persuade the members of the NLRB to adopt her policy that such provisions violate the Act. Thus, employers should be aware that their non-compete agreements are subject to scrutiny by the NLRB. The Board is currently adjudicating a case, *Stericycle Inc*., that presents an avenue for the NLRB to adopt Abruzzo's position.

The NLRB is subject to federal court review, including the Supreme Court. There are many steps that would need to occur before Abruzzo's theory becomes law. Nevertheless, the memo, when considered with the recent actions of the FTC, underscores the need for employers to closely monitor the activities of federal agencies related to non-competes.

We will keep the reader advised of developments on this memo as well as the efforts of other federal agencies such as the FTC to regulate non-compete agreements.