The NLRB and FTC Agree to Collaborate: What This Means for Employers

Labor & Employment Law Update

By Peter Hansen and John Hayes on August 4, 2022

If we were to tell you that the Federal Trade Commission (FTC) and National Labor Relations Board (NLRB) recently entered into a Memorandum of Understanding (MOU) "Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest," your response may well be "What? Why? And what 'Common Regulatory Interest' could they possibly share?" Well, good questions.

In brief, the FTC is signaling a clear intent to get more involved in traditional labor issues. Per the FTC's press release, the agencies' agreement "will bolster the FTC's efforts to protect workers by promoting competitive U.S. labor markets and putting an end to unfair practices that harm workers" – specifically focusing on the "gig economy" and other alternative work arrangements. An MOU between two agencies is basically a signal to the public that there may be a new area of focus and inquiry where the two agencies overlap. This MOU identifies areas of mutual interest for both agencies, as touted by the NLRB, including labor market developments relating to the "gig economy" such as misclassification of workers and algorithmic decision-making, the imposition of one-sided and restrictive contract provisions such as noncompete and nondisclosure provisions, the extent and impact of labor market concentration, and the ability of workers to act collectively.

This MOU is just the latest in a series of developments where new angles are being pursued by both the federal and state governments in the alleged pursuit of "workers' rights." Indeed, the Illinois Attorney General recently filed two separate lawsuits against several temporary staffing agencies and their common clients alleging they entered into "no poaching" and wage-fixing agreements in supposed violation of the Illinois Antitrust Act. Perhaps a sign of things to come from the FTC.

Additionally, as discussed in a previous blog, in a similar vein the United States Department of Justice (DOJ) entered into a MOU with the Department of Labor "to protect workers from employer collusion, ensure compliance with the labor laws, and promote competitive labor markets and mobility." That MOU is in conjunction with the DOJ pursuing several *criminal* antitrust cases across the country against employers for alleged wage-fixing and no-poaching agreements.

Taken together, this is all part of the Biden administration's emphasis on addressing labor concerns through a "whole-government" approach, especially in the anti-trust arena.

Here, the FTC also appears focused on restrictive covenants (noncompete and nonsolicit agreements, etc.), "the impact of algorithmic decision-making on workers," "the classification and treatment of workers," and "mergers that may harm competition in U.S. labor markets." In fact, the FTC Chair stated, "I'm committed to using all the tools at our disposal to ensure that workers are protected from unfair methods of competition and unfair or deceptive practices. This agreement will help deepen our partnership with the NLRB and advance our shared mission to ensure that unlawful business practices aren't depriving workers of the pay, benefits, conditions, and dignity that they deserve." So, there is a fairly wide net that extends outside the areas typically associated with the FTC --- or, for that matter, the NLRB.

While this is uncharted territory for the FTC, it is certainly a topic that employers should be aware of – particularly those who operate in the gig economy, use independent contractors, or have alternative-work-arrangements with their workforce. This may be an ideal time for you to review your restrictive covenant agreements, any agreements not to hire or poach employees, and non-solicitation agreements, and to brush up on your understanding of the "do's and don'ts" of unfair labor practices under the National Labor Relations Act, regardless of whether you are unionized.