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Client Advisory

NLRB Signals Intent to Invalidate Many Employee Non-Compete Agreements

The National Labor Relations Board (NLRB)'s General Counsel, Jennifer Abruzzo, sent a strong signal that the Board will be attempting to invalidate many employee non-compete agreements, as part of its power to enforce the National Labor Relations Act ("NLRA"). Although it remains to be seen if this position will be upheld in litigation, the message is clear that the NLRB plans to try and invalidate most employee non-compete agreements entered into with non-supervisors or non-managers.

Section 7 of the NLRA protects employees by allowing them to organize themselves into unions, but it also includes the right in non-union workplaces to engage in "concerted activities." As a result, the NLRB has jurisdiction in non-union environments to prohibit employers from taking action that would "chill" or infringe upon employees' right to take concerted (i.e., group) activity against an employer's policies or actions. So, any employer policy or agreement can violate Section 7 or Section 8 of the NLRA if it improperly infringes on those rights.

Why do employee non-compete agreements matter in the scope and breadth of the NLRA? The NLRB's General Counsel is the lead person charged with prosecuting alleged violations of the NLRA, and her recent memo concluded that non-compete provisions are overbroad, and thus violate Section 8(a)(1) in most instances. Specifically, she opined that non-compete agreements violate the NLRA in most circumstances because "the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work."

An important point, not raised in the memo, is that the NLRB's position on non-compete agreements should not apply, in most circumstances, to supervisors or managers. Supervisors and managers are not within the scope of Section 7 of the NLRA, so the Board should not have jurisdiction to invalidate non-compete agreements with supervisors and managers. A significant caveat, however, is that employers cannot take adverse action against anyone who supports an employee's rights under Section 7, so that supervisors and managers cannot be disciplined for providing assistance to employees exercising their Section 7 rights. This means that, although a supervisor's non-compete agreement should be permissible under the NLRA, an employer cannot (for example) fire a supervisor who refuses to force an employee to sign a non-compete agreement that violates Section 7.

As far as non-supervisors and non-managers, the memo does state that some non-compete agreements may be valid, although it seems that is a very narrow set of agreements. The memo advised NLRB staff that a non-compete agreement would violate the NLRA "unless it is narrowly tailored to address special circumstances justifying the infringement on employee rights." The memo did not give an exhaustive list of what those "special circumstances" are, but did give a limited number of examples which strongly suggest the exceptions are few and far between, i.e., restricting an employee's managerial or ownership interest in a competing business or where the person is truly an independent contractor and not an employee.

The limited exceptions are further underscored by the memo's language which details other alternatives employers have to non-compete agreements, none of which provide any room to argue that other business reasons would justify the non-compete for non-supervisors and non-managers. That is, the General Counsel stated that a desire to avoid competition from a former employee, the burden of retaining employees, or protecting special investments in training employees are all insufficient reasons to justify a non-compete. The memo stated that those concerns can be remedied by bonuses or incentives for employees to remain employed with that employer. Similarly, the General Counsel stated that protecting propriety or trade secret information is a legitimate business interest, but that this can be protected through narrowly tailored workplace agreements, which would not include a non-compete provision.

The General Counsel memo is not law, and indeed the NLRB itself may reach a different conclusion if a case is brought before it, just as a court reviewing the NLRB's action may find that this position violates the NLRA. But, given the NLRB's prosecutorial authority, employers should be extremely careful in requiring its non-supervisors and non-managers to sign non-compete agreements. And, this NLRB memo is the latest federal and state trend to seek to limit non-compete agreements. Employers are encouraged to seek the advice of counsel in determining how to approach their current or future non-compete provisions. If you have any questions about this NLRB memo or non-compete agreements generally, please contact Peter L. Frattarelli, Chair of Archer & Greiner's Labor and Employment Group, at pfrattarelli@archerlaw.com or 856-354-3012.