NLRB General Counsel Issues New Challenge to Non-Competes; Asserts Violation of Federal Labor Law in Most Instances

Client Alert

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What You Need to Know

- The NLRB's General Counsel issued a memo asserting that non-competes in employment or severance agreements violate the National Labor Relations Act except in limited circumstances.
- While the General Counsel's memo lacks legal authority, it is significant as a reflection of the NLRB's policy and enforcement priorities related to claims involving non-competes.
- Employers are advised to work closely with their employment counsel to address potential compliance concerns associated with existing non-competes in employment and severance agreements.

By: Maja M. Obradovic

National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo recently sent a memo to all regional directors and officers in which she asserts that the inclusion or enforcement of non-competes in employment or severance agreements violates the National Labor Relations Act (NLRA) except under limited circumstances.

The memo specifies ways in which non-competes "chill employees in the exercise of Section 7 rights" under the NLRA. Those rights are primarily focused on protecting employees' ability to engage in concerted activities aimed at improving their working conditions. The memo explains that a non-compete is overbroad when it can be viewed as impeding employees' rights to quit or change jobs by taking away their access to other employment opportunities.

The memo recognizes that there may be circumstances where a narrowly tailored non-compete protects legitimate business interests and is therefore justified. However, it emphasizes that this will likely not be the case when a non-compete is imposed upon low-wage or middle-wage workers, or when its goal is simply to retain employees or shield the employer's investment in training employees. On the other hand, the imposition of a non-compete may be justified when protecting trade secrets or other proprietary interests, or in connection with a true independent contractor relationship.

Notably, the memo does not have legal authority. It does, however, signal that the NLRB will more closely scrutinize claims that involve non-competes, which may then be prosecuted as unfair labor practices. It also provides insight into the General Counsel's interpretation of federal law governing the validity of non-competes.

It should further be noted that while the NLRA applies to almost all private employers, it covers only non-supervisory employees and will thus not impact most senior level employees and officers.

In light of the still-pending FTC ban on non-competes - and given the growing number of states that now restrict or completely prohibit the use of non-competes - it is imperative that employers and their counsel closely scrutinize any non-competes to determine whether they are overbroad or necessary at all, and revise or eliminate them accordingly to ensure compliance with applicable guidelines.

Please contact the author of this Alert for additional information or to discuss your specific circumstances.

Related Attorneys

Maja M. Obradovic

Partner

732.476.2454

Email