CARLTON FIELDS

NLRB Ratchets Up Campaign Against Noncompete Agreements

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On May 30, 2023, the National Labor Relations Board's general counsel, Jennifer Abruzzo, issued an enforcement memorandum asserting that most noncompete provisions in employment contracts and severance agreements violate the National Labor Relations Act.

This is the latest controversial enforcement memo demonstrating an intention to change the workplace. A previous memo had invalidated confidentiality and non-disparagement provisions in severance agreements, and this memo follows the Federal Trade Commission's proposed rule that would ban the vast majority of noncompetes.

General Counsel's Memorandum

The general counsel's memo is not binding law, but it does express how the general counsel will approach and seek to enforce an issue. The memo asserts that most noncompetes "are overbroad" and violate the NLRA "when 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." The general counsel's theory is that noncompetes violate the NLRA by preventing employees from threatening to resign or demanding better working conditions or actually resigning, preventing employees from seeking or accepting employment with local competitors, preventing employees from soliciting fellow employees to work for a competitor, and preventing "employees from seeking employment, at least in part, to ... engage in protected activity with other workers at an employee's workplace."

The general counsel also asserts that a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense and that business interests in retaining employees or protecting special investments in training employees are unlikely

to ever justify an overbroad noncompete provision. The general counsel states, among other things, that employers may protect training investments by less restrictive means, for example, by offering a longevity bonus. The general counsel also asserts that noncompetes are unlikely to pass muster when they are imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectable interests or in states in which noncompete provisions are unenforceable.

Nevertheless, the general counsel concedes that noncompetes "narrowly tailored to special circumstances justifying the infringement on employee rights" do not violate the NLRA. The general counsel further concedes that not all noncompete agreements necessarily violate the NLRA and that noncompetes that "restrict only individuals' managerial or ownership interests in a competing business, or true independent-contract relationships" do not violate the NLRA.

Implications for Employers

The memo does not have the force of law, but it is a strong indication of how the NLRB will view noncompetes when enforcing the NLRA.

The NLRA does not apply to supervisory or managerial employees, and the memo specifically states that the restriction of "managerial interests" falls outside the NLRA. That significantly limits the impact of the general counsel's memo because many employees who are subject to noncompete clauses are managerial.

In sum, the general counsel's memo indicates that the NLRB will focus on the following factors when evaluating whether a noncompete violates the NLRA:

- The type of employee subject to the noncompete (i.e., is the employee a low-, middle-, or high-level employee, which is determined in significant part based on the employee's salary), with noncompetes more likely to be upheld for high-level, high-earning employees.
- Whether, and to what extent, the employee subject to the noncompete has access to trade secrets or other proprietary information such as business development plans, etc., with noncompetes more likely to be upheld for employees who have such information.
- The scope of the restrictions (i.e., whether they are narrow), with restrictions on employees having managerial or ownership interests in competitors more likely to be upheld than more general restrictions such as restrictions on any employment within a certain radius.

Employers should be mindful of the status of the recent regulatory developments when drafting noncompetes:

- Refrain from using noncompetes for “low-wage” or “middle-wage” workers who lack access to trade secrets or other significant proprietary information. Many employees, even low-wage employees, will have access to *some* proprietary information such as a manufacturing process, etc. If it is determined that a noncompete for such employees is justified under the memo’s analysis, the agreement should describe the sensitive information that the employee has access to (such as a new manufacturing process).
- Be specific when drafting noncompete agreements. What is it about this employee that justifies a noncompete under the standards outlined above? While it is OK to have a template noncompete, the template should include specific information explaining the relevant “special circumstances” and how a restriction on competition is justified. The restriction should be “narrowly tailored” and only go so far as necessary to protect the employer’s legitimate interests.
- Consider using alternate or additional methods to protect sensitive information such as nondisclosure agreements. But keep in mind that the NLRB has also limited the use of confidentiality and other provisions and that care must be taken when drafting these.
- Consider using alternate or additional methods to help ensure that employees who have sensitive information do not leave at inopportune times. The general counsel’s memo specifically approves longevity bonuses, for example. Employers can also consider using programs that offer training or other development such as subsidizing the costs of a master’s degree in exchange for an employee’s commitment to remain with the company for a period of time to prevent an employee from leaving.

Looking Forward

We can expect more guidance on what constitutes a “special circumstance” justifying noncompetes in the future. Stay tuned for that, but recognize that the use of noncompetes is under attack and employers must be careful when considering implementation of noncompete provisions.

Authored By

James M. Sconzo

Jonathan Sterling

Brendan N. Gooley

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