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NLRB Stacks Deck in Favor of Employees: Employers Must Play Cards Defensively or Go Bust

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The National Labor Relations Board has made a series of employee-friendly moves over the past few months that have significant adverse implications for employers, including those in the insurance and securities industries. These moves include:

- Invalidating most confidentiality and non-disparagement provisions in employment agreements.
- Asserting that most noncompete agreements are illegal.
- Imposing stricter scrutiny on workplace rules in general.

In February, the NLRB held in McLaren Macomb that the National Labor Relations Act prohibits confidentiality and non-disparagement provisions in severance agreements when such provisions limit an employee's ability to discuss the agreement with co-workers or communicate about their employment. That decision reversed NLRB precedent and broadly limits two key tools that employers frequently use in severance agreements. Employers now will have to be extremely careful to tailor any such confidentiality and non-disparagement provisions narrowly. Then, in May, the NLRB's general counsel issued an enforcement memorandum asserting that noncompete agreements with employees violate the NLRA when they "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." While non-binding, the NLRB's memorandum followed on the heels of a rule proposed by the Federal Trade Commission that would ban the vast majority of noncompetes. That rule has yet to be finalized and is reportedly delayed until at least next year. Nevertheless, the NLRB's memorandum notifies employers of its intent to target noncompetes. Three months later, in August, the NLRB, in Stericyle Inc., reverted to an old rule that was formerly on the books that created a rebuttable presumption that workplace rules such as those found in employment handbooks are unlawful if they have a reasonable tendency to chill employees from

exercising their right to engage in concerted activity. To rebut this presumption, employers must show that the workplace rule is narrowly tailored to advance legitimate and substantial business interests — a high standard. Employers must now carefully review handbooks and other policies and rules. Collectively, the NLRB's actions establish its intent to adopt employee-friendly positions generally. It is virtually certain that the NLRB will continue to implement and perhaps even ratchet up this approach in its future regulatory and enforcement initiatives. Therefore, employers need to reexamine their policies and agreements in light of the NLRB's actions and other indications that the federal government's pendulum is swinging away from employer-friendly policies. The days of cutting and pasting boilerplate confidentiality and non-disparagement language in severance agreements and using the same noncompete for every new hire are over. Employers need to consider why confidentiality and a noncompete are essential for a particular employee. Does the employee have access to trade secrets? Will the employee be instrumental in developing and implementing the company's growth plan? Eventually, possibly with a new administration, the pendulum will likely swing back. But employers cannot assume they can wait it out. Prompt and decisive attention is necessary.

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