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Non-Disparagement Provisions, Confidentiality Provisions, and now Non-Competition Agreements

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On May 30, 2023, less than three months after the National Labor Relations Board ("NLRB") asserted that confidentiality provisions and non-disparagement provisions violate the National Labor Relations Act ("NLRA") and should not be in severance agreements, the NLRB General Counsel, Jennifer Abruzzo, in a memo to the Regional Directors and other NLRB officials, asserts that most employee non-compete agreements violate the NLRA.

The NLRA does not apply to supervisors. A supervisor is any individual having "authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or reasonably responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Non-Compete Provisions are Restricting

The General Counsel asserts that "non-compete provisions are overbroad, that is, they reasonably tend to chill employees in the exercise of section 7 rights, when the provisions could reasonably be construed by the employee 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, attitudes, and preferences as to the type and location of work." Specifically, she asserts that non-competes:

- "chill employees from concertedly threatening to resign to demand better working conditions."
- "chill employees from carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions."
- "chill employees from concertedly seeking or excepting employment with a local competitor to obtain better working conditions."
- "chill employees from soliciting their coworkers to go work for a local competitor as part of a broader course of protected concerted activity."
- "chill employees from seeking employment, at least in part to specifically engage in protected activity with other workers at an employer's workplace."

Consequently, unless the non-compete is narrowly tailored to "special circumstances justifying the infringement on employee rights," a non-compete would chill employees from engaging in section 7 activity and violate section 8 (a) (1) of the NLRA.

The General Counsel to the NLRB cannot create a rule banning non-competes. However, she has the authority to prosecute cases to support her view. In the process, she would be requesting that the NLRB adopt her position regarding non-compete agreements. If the NLRB proceeding to support such a ban, it would be subject to court review.

This memo, from the General Counsel of the NLRB, is yet another indicator that non-compete agreements are becoming subject to increasing scrutiny.

Takeaway: Employers wanting to use a non-compete agreement should consult with counsel. Employers with questions can contact Tracy Armstrong or another member of the Wilentz Employment Law Team.

Attorney

- Tracy Armstrong

Practice

- Employment Law