Many Non-Compete Agreements Violate Federal Law According to NLRB's Chief Prosecutor: Your Top 7 Questions Answered

Insights
6.01.23

Employers should review their non-compete agreements now that the NLRB General Counsel announced that many of them violate federal labor law – regardless of whether you have a unionized workforce. General Counsel Jennifer Abruzzo's May 30 memo was yet another broadside against employers, urging NLRB regional directors to find that many employer-mandated non-compete agreements infringe on employees' rights under Section 7 of the National Labor Relations Act (NLRA). You should immediately examine your non-compete agreements for potential compliance concerns, understand the risks that are now presented by using such agreements, and decide whether to update your practices accordingly. Here are the answers to your top seven questions about this development.

1. Does this Memo Apply to Our Workforce?

The May 30 memo could apply to at least a segment of your workforce regardless of whether your company is unionized. That's because General Counsel Abruzzo made the case that many non-compete agreements violate a section of the NLRA that applies to both unionized and non-unionized environments. Under the NLRA's Section 7, employees at both unionized and nonunionized workforces have the right to collectively band together in an effort to improve the workplace.

Specifically, Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities." In general, "concerted" means working together as a group to achieve a particular goal.

But not all workers have Section 7 rights. For instance, independent contractors, managers, most supervisors, public sector employees, and some agricultural workers are not covered by these NLRA protections.

2. What Does the Memo Say?

According to General Counsel Abruzzo, employers may commit unfair labor practices in violation of the NLRA by proffering, maintaining, or enforcing non-compete agreements. "Generally speaking,

this denial of access to employment opportunities chills employees from engaging in Section 7 activity," she opined.

The General Counsel provided the following examples of protected employee activities that non-competes could potentially interfere with:

- Demanding better working conditions by concertedly threatening to resign;
- Carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions;
- Concertedly seeking or accepting employment with a local competitor to obtain better working conditions;
- Soliciting co-workers to go work for a local competitor as part of a broader course of protected concerted activity; and
- Seeking employment, at least in part, to specifically engage in protected activity with co-workers.

3. How Can Non-Compete Agreements Satisfy the General Counsel?

General Counsel Abruzzo said that non-competes could be lawful in some cases if they are "narrowly tailored to address special circumstances justifying the infringement on employee rights." Perhaps in recognition of the NLRB's lack of authority over independent contractors, managerial employees, and supervisors, she says that non-compete provisions could be lawful if they restrict "only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationships."

General Counsel Abruzzo also cites authority for the proposition that legitimate interests may include, for example, restraining employees from appropriating trade secret information and customer relationships to which the employee had access during employment. She also suggests that higher standards for justification of an agreement may apply where overbroad non-compete provisions are imposed on low-wage or middle-wage workers.

4. Are Other Restrictive Covenants Subject to this Memo?

Throughout the memo, General Counsel Abruzzo refers to "non-competes," referring to agreements that prohibit employees from accepting certain types of jobs. This term does not necessarily appear to include customer non-solicitation agreements.

That being said, you should note that other employment-related agreements have recently been targeted by the General Counsel. In fact, the NLRB recently ruled that severance agreements in both unionized and non-union workplaces could be deemed unlawful if they could be construed to broadly restrict a worker's rights to speak about the agreement or otherwise talk negatively about their former employer, among other things.

Moreover, some of the memo's language strongly suggests that the NLRB may well launch attacks against agreements barring employees from soliciting or recruiting company personnel. Of the five ways the GC claims that non-competes allegedly impinge on workers' Section 7 rights, one of them specifically talks about soliciting co-workers to go elsewhere and three others talk about "concertedly" leaving or threatening to leave for other employment. All of that may implicate covenants not to solicit personnel. While the memo doesn't specifically purport to bar them, the Board may well extend its stated position to encompass such restrictive covenants.

You should therefore work with your legal counsel to analyze your other restrictive covenants such as non-solicitation agreements to determine whether their validity could also be affected by this memo.

5. What Happens Next?

While General Counsel memos don't represent the official legal position of the entire agency, they do represent the policy and guidance for all Regional Offices investigating and prosecuting charges against employers. The General Counsel is responsible for overseeing the investigation and prosecution of unfair labor practice charges and supervising the NLRB field offices in the processing of cases. So her word on this topic could have widespread reverberations across the country.

This memo will almost certainly generate a whole new wave of NLRB investigations, many of which will target employers who have not had much experience dealing with the Board or its processes. This may be an unpleasant new experience for employers who are not accustomed to the Board and the NLRA's process for handling all complaints through internal NLRB processes, Administrative Law Judges (ALJs), and decisions by the politically appointed Board.

Here's how the process works and the potential impact of the new memo:

- Unions and individuals may soon start filing unfair labor practice charges against employers claiming that their non-competes violate employees' rights.
- Once an employer has been served with an unfair labor practice charge, it has the opportunity to respond to the allegations and ask for an early dismissal. However, given the General Counsel's memo, the Region isn't likely to dismiss the case and will likely issue a complaint.
- Once the Region issues a complaint, the employer files an answer and a hearing is eventually scheduled to decide the matter.
- An ALJ will oversee the hearing and decide whether the provisions at issue violate the NLRA.
- The employer has an opportunity to appeal the ALJ's decision to the full NLRB. After multiple layers of review in the NLRB's own system, any party not satisfied with the outcome could seek an appeal with the federal court system.

Meanwhile, the General Counsel also directed the NLRB Regional Offices to seek "make-whole" remedies for employees who can demonstrate that they lost opportunities for other employment because of allegedly overbroad non-compete provisions.

She also encouraged the Regions to alert the Division of Operations-Management about non-compete agreements that could violate other federal laws, raising the specter of possible referral to the Federal Trade Commission or the Justice Department's Antitrust Division.

Needless to say, battling over non-compete agreements could be a long road for employers, fraught with risks at each turn. Even a well-written non-compete agreement could be the subject of a protracted – and expensive – battle before the NLRB. This is why you'll want to weigh the risks and benefits of continuing to use non-compete agreements in your workplace.

6. Should We Be Surprised by this Development?

No. The General Counsel's memo comes as no surprise since she has hinted about this position in the past. As noted above, she most recently concluded that many severance agreements run afoul of federal labor law, and this week's memo is the next step down that path.

More to the point, General Counsel Abruzzo agreed to an interagency compact last year with the Federal Trade Commission, which is also seeking to formally ban most employment-related non-compete agreements. While the FTC's proposed non-compete ban was reportedly delayed until 2024, such agreements are now subject to increased scrutiny by the Biden administration.

7. What Should Employers Do Now?

Even if your organization hasn't had prior dealings with the NLRB, your choice to continue using non-compete agreements could very well come under scrutiny — and you should be prepared for the possibility that employees will file unfair labor practice charges against you. Here are some steps you should consider taking to best position yourself for this new day.

- Take inventory of all existing non-compete agreements in your organization. Take note of who is subject to one and who isn't and analyze whether a less burdensome restriction could properly protect your interests.
- Assess which employees – and most importantly, which roles or titles – are being asked to sign non-competes. Analyze what threat that person poses if they depart for a direct competitor, with a particular eye on whether that threat might be addressed with a lesser restriction such as a covenant prohibiting solicitation of certain customers or personnel.
- Work with legal counsel to understand the associated risks and potentially steep cost of defending your agreements before the NLRB. You may want to pause your policy of sending demand letters or taking any other action to enforce or threaten enforcement of a noncompete agreement while you strategize with counsel.

- If you decide to continue using non-compete agreements, you'll want to ensure they are well-written and properly executed.
- Consider adding broad-based NLRA disclaimers in close proximity to provisions that may be challenged.
- Articulate and document any special circumstances or legitimate protectable interests in advance.
- Consider offering your managers a refresher on the NLRA and make them aware of how an unfair labor practice charge could trigger potential legal exposure in a variety of contexts - including in both unionized and non-union settings.
- Review your process and procedures related to trade secrets to ensure you can continue to protect your company's protectable assets and interests without running afoul of this new enforcement approach by the NLRB – and possibly the FTC's.

Conclusion

We'll continue to monitor NLRB, FTC, and other agency actions that impact your day-to-day operations and provide updates as necessary, so you should sign up for the Fisher Phillips Insight Service to ensure you receive updates directly to your inbox. If you have questions, please contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our Employee Defection and Trade Secrets Practice Group or Labor Relations Practice Group.

Related People

Alba V. Aviles
Partner
908.516.1058
Email

Steven M. Bernstein
Regional Managing Partner and Labor Relations Group Co-Chair
813.769.7513
Email

Risa B. Boerner, CIPP/US, CIPM
Partner
610.230.2132
Email

Michael R. Greco
Regional Managing Partner

Regional Managing Partner
303.218.3655
Email

Rick Grimaldi
Partner
610.230.2136
Email

Christopher P. Stief
Regional Managing Partner

Regional Managing Partner
207.477.7007
Email

Service Focus

Employee Defection and Trade Secrets

Labor Relations