



NLRB General Counsel Targets Non-Compete Agreements

Labor & Employment Law News E-blast

June 6, 2023

NLRB Views Non-Compete Agreements As Generally Unlawful

On May 30, 2023, the National Labor Relation Board's ("NLRB") General Counsel, Jennifer Abruzzo, issued a memorandum to all regional directors, officers-in-charge, and resident officers at the NLRB; advancing the position that except in limited circumstances, non-compete agreements violate the National Labor Relations Act ("NLRA"). The General Counsel's justification for this position is that overbroad non-compete agreements tend to chill employees from exercising their rights under Section 7 of the NLRA unless the provision is "narrowly tailored to address special circumstances justifying the infringement on employee rights."

The memo considers a non-compete provision to be "overly broad" when it could reasonably be interpreted by employees that it denies them the ability to seek other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences due to the type and location of work. Further, the memo rejects traditional arguments and states that a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense. The General Counsel also specifically targets non-compete provisions imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectable interests, arguing that such provisions are unenforceable.

Exceptions

There are very limited exceptions where a non-compete agreement is lawful according to the memo. In particular, the memo states that non-compete agreements could be lawful if the provisions clearly only restrict individuals' managerial or ownership interests in a competing business or true independent contract relationships. The General Counsel also states that "there may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances." But "special circumstances" are not defined and no examples were provided.

AUTHORS/ CONTRIBUTORS

Michael R. Blum

Karl W. Butterer

Anthony M. Dalimonte

Clifford L. Hammond

PRACTICE AREAS

Employer Services

Employment Litigation

Labor Relations



Implications

Importantly, the memo strongly suggests that the NLRB will pursue litigation against overbroad non-compete agreements. The memo directs all NLRB regional offices to submit cases concerning “arguably unlawful” non-compete agreements, as well as special circumstances defenses to the NLRB Division of Advice. The Regions were directed to seek “make-whole relief” for employees who, because of an overbroad non-compete provision, can demonstrate that they lost opportunities for other employment. The Regions were also directed to seek evidence of the impact of overbroad non-compete agreements on employees.

The General Counsel’s memo is not yet binding law, but to reduce or minimize the risk of litigation at the NLRB, it is essential that employers carefully assess their non-compete provisions to ensure they are narrowly tailored pursuant to the standards in the memo. Employers should also consider and evaluate the risk of asking low or middle wage employees to sign non-compete agreements, as doing so may be considered unlawful even if the employee refuses to sign it.

If you have further questions or concerns about the enforceability of your non-compete, please contact a member of our team:

- Mike Blum...248.785.4722...mblum@fosterswift.com
- Karl Butterer...616.726.2212...kbutterer@fosterswift.com
- Tony Dalimonte...248.785.4733...adalimonte@fosterswift.com
- Cliff Hammond...248.538.6324...chammond@fosterswift.com