Insights

NLRB's General Counsel Issues New Guidance Memo Challenging Non-Compete Agreements as Violating Section 7 of the NLRA

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By: Scott S. Morrisson and Elizabeth M. Roberson

On May 30, 2023, NLRB General Counsel Jennifer Abruzzo **issued a memo** outlining her position that the proffer, maintenance, and enforcement of non-compete agreements violates the National Labor Relations Act (NLRA) with few exceptions. Abruzzo's memo follows recent actions by the Federal Trade Commission (FTC) attacking non-compete agreements. Krieg DeVault Attorney **Elizabeth M. Roberson** recently spoke and wrote about the FTC's recent actions on the **Krieg DeVault Podcast Series** and in a recent **client alert**.

Abruzzo's Issues with Non-Competes

Under Section 7 of the NLRA, employees have 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." Employers are not allowed to interfere with, restrain, or coerce employees engaging in their rights under Section 7.

Abruzzo explains that non-compete agreements chill employees' exercise of their Section 7 rights by denying employees the ability to quit or change jobs by cutting off employees' access to other employment opportunities. Abruzzo highlights five specific ways non-compete agreements infringe on employees' Section 7 rights. Non-compete agreements prevent employees from:

1. Threatening to quit to demand better working conditions.
2. Quitting to obtain better working conditions.
3. Seeking or accepting better working conditions from local competitors.
4. Soliciting their co-workers to go work for local competitors to obtain better working conditions
5. Seeking other employment to, in part, engage in protected activity with other workers at the employer's office.

Valid Non-Competes

Abruzzo does not entirely close the door on all non-compete agreements. If the non-compete provisions are narrowly tailored to special circumstances justifying the infringement of the employee's rights, the non-compete may be valid. Circumstances more likely to be considered justifiable will often involve an employer's proprietary or trade secrets, but the non-compete clause must be tailored specifically to those justifications.

In addition, some non-compete agreements cannot be reasonably construed to infringe on employees' Section 7 rights. For example, non-compete agreements that only restrict an employee's managerial or ownership interest in a competing business or true independent contractor relationships do not infringe on employees' Section 7 rights.

Conclusion

NLRB action in this regard will likely be subject to litigation and actions to invalidate this guidance will likely be taken. However, in an abundance of caution, employers should revisit all non-compete agreements and determine if they align with the NLRB's new guidance. Abruzzo has made it clear that issuing non-compete agreements simply to avoid competition from former employees, retain employees, or protect investment in employee training is unlikely to stop the NLRB from voiding a non-compete agreement. Abruzzo's new guidance not only draws question to future non-compete agreements but all maintenance and enforcement of current non-compete agreements. Therefore, employers should review employment agreements they intend to offer in the future, employment agreements with current employees that have non-compete clauses, and all non-competes still in effect for former employees.

Our attorneys will continue to monitor guidance from the NLRB related to the validity of non-compete clauses and employee rights under the NLRA. If you have questions about this decision or how it may impact your organization moving forward, please contact **Scott S. Morrisson**, **Elizabeth M. Roberson**, or another member of our **Labor and Employment Law Practice**.

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