



Insights: Alerts

NLRB General Counsel: Most Non-Compete Agreements Violate Federal Labor Law

June 5, 2023

Written by John W. Alden, Christopher M. Caiaccio, Drew Williamson

Historically, non-compete agreements between employer and employee have been matters of state law. However, in recent years, federal agencies have commenced efforts to curtail their use. For example, the Federal Trade Commission (“FTC”) proposed a new rule this past January that would bar nearly any non-compete agreement. The FTC has even pursued several [enforcement actions](#) against employers, claiming their use of non-compete agreements restrict job mobility and thus unlawfully harm competition.

This past week, the National Labor Relations Board’s (the “Board” or “NLRB”) General Counsel Jennifer Abruzzo joined the growing national debate by issuing a [memorandum](#) broadly contending that, with limited exceptions, employment non-compete agreements violate Section 7 of the National Labor Relations Act (“NLRA”). In the memorandum, GC Abruzzo opines that, absent “special circumstances,” employee covenants against competition generally tend to chill employee rights under Section 7 of the NLRA. She reasons that non-compete provisions do so by limiting employees’ ability to quit or change jobs, thereby limiting their relative bargaining power and ability to engage in concerted activities necessary to improve their working conditions. GC Abruzzo identifies five areas where non-compete agreements chill employee Section 7 rights: (i) threats to resign, (ii) carrying out threats to resign, (iii) seeking or accepting employment with a competitor, (iv) soliciting co-workers to resign and join a competitor, and (v) seeking employment to, at least in part, engage in protected activity with other employees.

GC Abruzzo rejects common reasons articulated by employers as justifying non-compete agreements, including employee retention, protecting investments in training employees, and the protection of trade secrets, contending that less-restrictive means could achieve the same purposes. For instance, she opines that an employer could offer bonus payments to address retention concerns or to protect training investments rather than implementing agreements containing non-competes or other restrictive covenants. Moreover, GC Abruzzo reasons that a narrowly tailored confidentiality agreement alone should sufficiently serve an employer’s legitimate interest in protecting proprietary or trade secret information. Conversely, she explains that no such legitimate interest exists in the case of low- or middle-wage workers who lack access to such information in the first place.

Notwithstanding the foregoing, the memorandum identifies a few narrow circumstances where, in the GC’s opinion, non-compete restrictions would be acceptable, such as a restriction limiting an employee from being an owner or manager in a competing business and true independent contractor agreements.

Key Takeaways

GC Abruzzo's memorandum does not effect any change in the law, it signals yet another enforcement priority for her office moving forward. In the memorandum, GC Abruzzo specifically directs agency lawyers to refer cases to her office involving arguably unlawful non-compete agreements. It is likely, if not certain, that one such case will be used by her office to ask the NLRB to restrict or prohibit the use of non-compete agreements. As such, employers can expect that employees covered by non-compete agreements may seek to challenge their enforceability through the NLRB's administrative processes. If the NLRB ultimately reviews and adopts the position set forth in GC Abruzzo's memorandum, the enforceability of non-compete provisions for non-managerial and non-supervisory employees would be significantly limited nationwide.

Regardless of whether the NLRB adopts GC Abruzzo's rationale, employers should bear in mind that many state jurisdictions have restrictions on and requirements for non-compete and other restrictive covenants. For example, California, North Dakota, and Oklahoma ban employee non-compete agreements. At least 11 other states and the District of Columbia, have imposed compensation thresholds for employees asked to sign restrictive covenant agreements. Several more state legislatures, including the [New York State Senate](#), are considering legislation that would either ban or limit the use of employee restrictive covenants. Employers should carefully review their restrictive covenants to ensure continued enforceability as the legal landscape surrounding restrictive covenant agreements continues to shift.

If you have any questions about this Alert or the effect of the NLRB's recent decision, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

Related People



John W. Alden

t 404.815.6058

jalden@ktslaw.com



Christopher M. Caiaccio

t 404.815.6203

ccaiaccio@ktslaw.com



Drew Williamson

t 404.815.6522

drew.williamson@ktslaw.com