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NLRB ALJ Finds Post-Employment Non-Compete and Non-Solicit Provisions Unlawful

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Employers' use of non-compete agreements have been subject to increasing scrutiny from federal agencies in the past year or so. More recently, the balance of discussion surrounding regulatory efforts to curtail the use of non-compete agreements has been focused on the Federal Trade Commission's final rule banning non-compete agreements. At the same time, the National Labor Relations Board has quietly continued to challenge employee non-compete agreements through enforcement actions.

In June, an NLRB administrative law judge ("ALJ") sided with the Board, ruling that "ridiculously broad" non-solicit and non-compete provisions in an employment agreement were unlawful under federal labor law. The ruling is yet another reminder of the Board's increased scrutiny of employee restrictive covenants.

Background

Last year, the Board's General Counsel issued a memorandum broadly declaring that, with limited exception, any employment non-compete agreement that limits future employment interferes with Section 7 rights under the National Labor Relations Act. The memorandum signaled the Board's intent to find and challenge the use of non-competes with "low-wage or middle-wage workers."

The Board's first target in its war against restrictive covenants was a Michigan-based cannabis processing company. There, the Board challenged a non-interference provision, which prohibited employees from encouraging anyone to reduce or discontinue their business relationship with the company. The Board previously declared a similar non-interference with business relationships provision unlawful, finding that such a provision restricts employees' ability to communicate with customers and others in a concerted effort to improve the terms and conditions of their employment.

Next, the Board filed an enforcement action against an Ohio-based medical clinic and spa, challenging the employer's use of two-year non-compete and non-solicitation provisions, a provision requiring repayment of training and continuing education costs if an employee left within two years, and a non-disparagement provision that prohibited employees from making "negative comments" about the spa. Both cases were ultimately settled.

More recently, the Board issued an unfair labor practice complaint challenging restrictive covenants in an employment agreement. The administrative complaint there was filed after the employer commenced a lawsuit to enforce the restrictive covenants against a former employee in federal court. Remarkably, the Board even sent a letter to the employer demanding it withdraw claims relying on the employment agreement, as well a then-pending motion for preliminary injunction. The administrative action remains ongoing.

***J.O. Mory* Case**

In *J.O. Mory, Inc.*, involved a commercial heating, ventilation, and air conditioning ("HVAC") technician who was a union organizer or "salt." The technician sought employment at J.O. Mory with the goal of organizing the workplace (otherwise known as "salting"). During the interview process, he falsely claimed to have previously worked at a non-union shop. When the company discovered this was a lie, it terminated his employment.

The employer argued that it terminated the technician because he lied about his employment history. The technician (and the Board) argued the company terminated his employment for engaging in protected activity, including the salting activity. Ultimately, the ALJ agreed with the Board finding that the technician was discharged for engaging in activities protected by the NLRA. The ALJ's ruling was primarily based on a finding that the post-employment non-compete and non-solicit provisions in the technician's employment agreement were unlawful work rules and/or policies.

The provisions at issue included a non-compete that prohibited former employees from working for any business "similar or competitive" with the employer's business for 12 months, as well as a non-solicit that prohibited employees from soliciting, encouraging, or attempting to persuade any other employee to end their employment with the company for 24 months. The agreement also required employees to report any offer or solicitations of employment that the employee receives from third parties.

Relying on the employee-friendly framework adopted in the Board's Stericycle decision, the ALJ found that the "ridiculously broad" provisions "would deter a reasonable employee from working for other employers in the area as a union salt or recruiting others to do so for fear of being accused of inducing other employees to leave, being forced to tell their supervisors about job offers they receive, or having [the employer] find out they are working for one of its competitors." The ALJ further found the employer provided no evidence the challenged restrictive covenant provisions advanced a legitimate business interest, which would ultimately be required for enforcement. At the same time, the ALJ reasoned that any theoretical legitimate business interests advanced by the challenged covenants were already advanced by other provisions in the agreement, such as those protecting confidential and proprietary information.

The ALJ ordered the employee be reinstated with back pay and other financial harms he suffered as a result of his unlawful termination. With regard to the challenged restrictive covenants, the ALJ ordered J.O. Mory to send notice to all current and former employees subject to the same or a similar agreement, informing them that the restrictive covenants were rescinded.

Key Takeaways

The *J.O. Mory* decision is another reminder of GC Abruzzo's prioritization of worker mobility issues. If the decision is upheld, the non-compete provisions for non-supervisory and non-managerial employees will effectively be rendered unenforceable.

While the appeals process plays out, employers should continue identifying the legitimate business interests they are aiming to protect through the use of non-competes. The non-competes provisions of an Employer's agreement should then be narrowly tailored to protect just those limited interests and nothing more. Additionally, employers should consider whether a particular employee's departure would pose a risk to any of the identified interests. If not, employers should generally avoid having those employees sign non-compete agreements. Otherwise, such employees may now be able to rely on the use of such agreements to challenge seemingly unrelated employment

decisions, as was the case in *J.O. Mory*.

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