Client Alert: NLRB General Counsel Weighs in Against Non-Competes

BY ROBERT G. YOUNG • JUNE 14, 2023

On the heels of the FTC's proposed rule to ban non-compete agreements, (which remains pending), the NLRB General Counsel has decided to get in on the anti-noncompete action. The General Counsel released a memo on May 30 taking the position that, save for limited, narrowly-defined circumstances, non-compete agreements violate employees' rights under the National Labor Relations Act (NLRA).

In particular, the General Counsel stated that an overbroad non-compete covenant could chill employees – in particular low- or middle-wage employees – in their exercise of rights under Section 7 of the NLRA (which, among other things, allows employees to engage in concerted activities for their mutual aid and protection) by, for example:

- Denying employees the ability to threaten to resign collectively in order to secure better working conditions;
- Actually keeping employees from resigning collectively to secure better working conditions;
- Denying employees the ability to seek work together with a competitor under better conditions;
- Keeping employees from soliciting their co-workers to join a competitor for better working conditions; and
- Stopping employees from pursuing jobs, at least in part, for the purposes of engaging in protected activity, such as union organizing (which may require one person to work for several employers).

The General Counsel's position is not yet the law, but she has urged regional NLRB offices to be mindful of these situations, so a formal administrative challenge to non-compete agreements at the NLRB likely is not too far off. We will continue to monitor developments in this area.

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