National Labor Relations Board Declares Noncompetes Unlawful

By Janet A. Hendrick

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On May 30, 2023, National Labor Relations Board General Counsel Jennifer Abruzzo issued a memo declaring that "except in limited circumstances," virtually every noncompete agreement between an employer and an employee violates federal labor law. In the memo to the Board's Regional Directors, Abruzzo says that unless a noncompete or similar provision in an employment agreement is "narrowly tailored to address special circumstances," such provisions necessarily infringe on employees' rights to engage in concerted activities under Section 7 of the National Labor Relations Act. The memo details five specific types of activities protected by the Act that, in the NLRB's view, the proffer, maintenance, and

enforcement of noncompete agreements chill. As a reminder, Section 7 of the NLRA covers most employees of covered, private sector employers, which includes both unionized and *non-unionized* workplaces. The NLRA does not cover supervisors, which is defined as those having authority to hire, fire, promote or discipline other employees, or effectively to recommend such action, through exercise of independent judgment.

Although Abruzzo says "not all non-compete agreements necessarily violate the NLRA," her memo makes clear that employers will face an uphill battle to justify them. She rejects typical reasons for noncompetes, stating that employers' interests "in retaining employees or protecting special investments in training employees are unlikely to ever justify an overbroad non-compete provision because U.S. law generally protects employee mobility, and employers may protect training investments by less restrictive means, for example, by offering a longevity bonus." She then notes that "employers' legitimate business interest in protecting proprietary or trade secret information can be addressed by narrowly tailored workplace agreements that protect those interests." The only specific example of a potentially lawful provision the memo provides is one that clearly restricts only an individual's managerial or ownership interests in a competing business. Beyond that, the memo offers only that "there may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances" without offering any examples.

Abruzzo concludes by directing the NLRB's 30+ regions across the U.S. to submit cases to the Board involving arguably unlawful noncompete provisions and, where appropriate, seek make-whole relief for employees who were denied employment opportunities because of noncompetes. Here again, the memo makes clear that merely maintaining a noncompete, even without

efforts to enforce it, is unlawful and may entitle employees to damages based on evidence of lost opportunities or other adverse consequences.

Interestingly, the Board's memo comes on the heels of the January announcement by the Federal Trade Commission of its intention to issue a rule formally banning all noncompetes. With 27,000 public comments to wade through, the FTC's vote is not expected to take place until April 2024, according to Bloomberg Law. But any relief employers that use noncompetes may have felt with this delay was brief, given the NLRB's memo declaring virtually all noncompetes of employees, other than true supervisors, unlawful.

Phillips Murrah's Labor and Employment Law team will continue to monitor this and other developments that impact our clients.

CONTACT: If you have questions about this decision, contact Janet A. Hendrick, who regularly handles Texas noncompete matters in court and arbitration, in the Dallas office of Phillips Murrah at 469.485.7334 or at jahendrick@phillipsmurrah.com.

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