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EMPLOYER LAW BLOG

General Counsel Claims Non-Competes Are Unlawful

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On May 30, 2023, the General Counsel for the National Labor Relations Board (NLRB) issued a formal memorandum titled "Non-Compete Agreements that Violate the National Labor Relations Act." In the memo, the General Counsel expressed her belief that "the proffer, maintenance, and enforcement of [non-compete] agreements violate" federal labor law.

This is perhaps unsurprising coming from the current General Counsel, given recent examples of similarly expansive readings and interpretation of federal labor law.

Nonetheless, this most recent memorandum should still cause employers concern for many reasons. Perhaps the most pressing concern is the General Counsel's belief that the following "standard" should apply to non-competes: a non-compete is unlawful "if it reasonably tends to chill employees in the exercise of Section 7 rights unless it is narrowly tailored to address special circumstances justifying the infringement on employee rights."

Side note: Section 7 of the National Labor Relations Act (NLRA) generally protects the rights of employees to act in concert in addressing workplace terms and conditions.

But what does "reasonably tends to chill employees in the exercise of Section 7 rights" mean here under this new "standard"? According to the General Counsel, this refers to "when the provisions [of the non-compete] could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work."

But what about the employer and protecting its interests? The memorandum appears to pay almost no attention to the reality that employers invest substantial time, resources, and money in building their businesses and have to actively protect their business interests via non-competes and other restrictive covenant agreements.

Indeed, the General Counsel goes so far as to say—without any meaningful nuance—that "business 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." Making matters worse, the General Counsel casually suggests: "employers' legitimate business interest in protecting proprietary or trade secret information can be addressed by narrowly tailored workplace agreements that protect those interests," but offers nothing to explain how.

It is clear from this memorandum that the General Counsel is taking a heavy-handed and very aggressive approach to the use of non-competes, one which does not concern itself with the complicated details and realities of the situations it purports to address. And it seems equally clear that the approach the General Counsel is advocating is directly at odds with established case law in many—if not most—states across the country. Most states have legal precedent that has developed over decades to carefully balance the competing and nuanced interests of employers and employees. The General Counsel's memorandum appears to ignore this reality.

As a result, it seems the "standard" that the General Counsel is advocating is not much of a standard at all. It appears to constitute little more than a power-grab attempt to fundamentally skew the issue of non-competes in favor of employees, without any meaningful or due regard for employers or their interests. The net result appears to be an unworkable and impracticable "standard" that adds no value or novel insights to established non-compete law.

While this memorandum does not have the force and effect of law, it signifies a noteworthy statement of current policy by the NLRB for purposes of legal interpretation and enforcement. So, employers should be alert and aware of this potential issue if and when the NLRB comes knocking, as labor investigators will undoubtedly want to start to scrutinize the use of any non-competes for potential labor law violations.

Do not hesitate to contact a member of our Labor & Employment Team at Sandberg Phoenix to discuss further what this new guidance may mean for you and your business.