NLRB General Counsel Issues Sweeping Challenge to Non-Compete Agreements

On May 30, 2023 the National Labor Relations Board (NLRB or the Board) General Counsel issued a memorandum advancing the position that non-compete agreements between employers and employees, which limit employees from accepting certain jobs at the end of their employment, interfere with employees' rights under Section 7 of the National Labor Relations Act (the Act). The memo, which is the latest pronouncement in an aggressive agenda to curtail established management practices, and expand the reach of the Act, directs the NLRB's regional staff to begin enforcement of this novel, expansive interpretation of the law.

Section 7 protects employees' rights to self-organize, form, join and assist unions, bargain collectively and engage in concerted activities for the purpose of collective bargaining. General Counsel Abruzzo's view is that "except in limited circumstances…. the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the Act." Section 8(a)(1) of the Act makes it an unfair labor practice for employers to interfere with, restrain or coerce employees in connection with their Section 7 rights.

Building off the NLRB's recent decision in *McLaren Macomb*, in which the Board found certain severance agreement provisions unlawful (*see* NLRB General Counsel Releases Guidance on Board's *McLaren Macomb* Decision and The NLRB's Latest Decision Restricts the Use of Broad Confidentiality and Nondisparagement Clauses in Severance Agreements), the General Counsel argues that non-compete agreements violate Section 8(a)(1) because they reasonably tend to chill employees in the exercise of their Section 7 rights, unless the agreement is narrowly tailored to address special circumstances justifying the infringement on employee rights. The General Counsel's memo reasons that if employees know that they may be denied access to future employment and that they will have a more difficult time replacing lost income after employment, this will have a chilling effect on their ability to engage in organizing activity. The memorandum posits that non-compete provisions chill employees from engaging in five specific types of activity protected under Section 7 of the Act, including:

- Concertedly threatening to resign/demand better working conditions – employees would view threats as futile given lack of access to other employment and fear of retaliatory termination.
- Carrying out concerted threats to resign.
- Concertedly seeking or accepting employment with a local competitor to obtain better working conditions.
- Soliciting coworkers to work for a local competitor as part of a broader course of action of protected concerted activity.
- Seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace.

The remote and speculative nature of these chilling-effect examples provides little support for the sweeping enforcement position taken by the General Counsel.

Notably, the General Counsel does not rule out all non-compete agreements. Rather, as in *McLaren Macomb*, a provision that is narrowly tailored to special circumstances may justify the infringement on employee rights. The General Counsel asserts that a desire to avoid competition from former employees, an interest in retaining employees or in protecting special investments in training employees "are unlikely to ever" justify non-compete agreements. On the other hand, narrowly tailored agreements to protect proprietary information and trade secrets, to restrict individuals' managerial or ownership interests in competing businesses, or "true" independent contractor interests are cited as examples of potentially lawful non-compete arrangements.

While the General Counsel's memo is not binding on the Board, it does provide direction to the NLRB regional offices that investigate and prosecute unfair labor practice charges. In this regard, the General Counsel reveals the reach of this pronouncement by instructing the regions in cases in which an allegedly unlawful non-compete agreement is found to "seek make-whole relief for employees who, because of their employer's unlawful maintenance of an overbroad non-compete provision, can demonstrate that they lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision."

As with earlier pronouncements from the General Counsel, employers should carefully consider the arguments and opinions laid out in the memo when evaluating the need for non-compete agreements with different categories of employees, the terms of those agreements, and the specific business interests that the agreements are designed to protect.

If you have any questions, please contact Thomas Eron, Pamela Silverblatt or any attorney in Bond's labor and employment practice.

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