Alert

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COZEN O'CONNOR

NLRB General Counsel Issues Memorandum Arguing Noncompetes are Illegal

In May 2023, National Labor Relations Board's General Counsel Jennifer Abruzzo issued Memorandum GC 23-08, taking the position that noncompete provisions violate the National Labor Relations Act (NLRA) except in limited circumstances. Section 7 of the NLRA protects employees' right to unionize, to join together to advance their interests as employees, and to refrain from such activity. Section 7 of the NLRA applies to both unionized and non-union workplaces.

As we first explained in our June 12, 2023 alert, General Counsel Abruzzo argues that privately negotiated noncompete agreements could "reasonably tend to chill employees in the exercise of Section 7 rights[.]" Last week, General Counsel Abruzzo doubled down on this position by issuing Memorandum 25-01 on October 7, 2024 (the Memo), opining that certain *stay-or-pay* provisions also infringe on employees' Section 7 rights and therefore violate Section 8(a)(1) of the Act.

This announcement comes on the heels of the Northern District of Texas striking down the Federal Trade Commission's (FTC) attempt to ban noncompete agreements nationwide. General Counsel Abruzzo's latest memorandum focuses on these areas in relation to noncompete agreements:

i. stay or pay provisions,
ii. proposed remedies, and
iii. changes to the posting requirement.

Stay-or-Pay Provisions

GC Abruzzo defines stay-or-pay provisions as any agreement under which an employee must pay their employer if they separate from employment, including training repayment provisions, educational repayment, quit fees, relocation stipends, damages clauses, sign-on bonuses, or other types of cash payments tied to a mandatory stay period.

The Memo asks the Board to find any such stay or pay provision to be presumptively unlawful under the NLRA. An employer may rebut that presumption by proving that the provision advances a legitimate business interest and is narrowly tailored to minimize infringement on the employees' Section 7 by establishing the provision is:

1. is voluntarily entered into in exchange for a benefit;
2. has a reasonable and specific repayment amount;
3. has a reasonable stay period, and
4. does not require repayment if the employee is terminated without cause.

If the provision is not narrowly tailored but is otherwise compliant, an employer need only rescind and replace it with a lawful provision. However, if the "stay-or-pay" provision is not voluntary, General Counsel Abruzzo recommends recission and a requirement that the employer notify the impacted employees that the obligation and associated debt are forgiven.

Proposed Remedies

For any noncompete provisions violating the NLRA, the Memo argues that mere rescission of noncompete provisions is inadequate and instead urges the National Labor Relations Board (NLRB) to seek *make-whole relief* in order to "recreate the conditions and relations that would have been had there been no unfair labor practice."[1] For example, an employee could seek damages for a job they didn't receive because of an unlawful noncompete. Such make whole relief requires

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employees to come forward during the notice-posting period and demonstrate:

1. there was a vacancy available for a job with a better compensation package;
2. they were qualified for the job, and
3. they were discouraged from applying for or accepting the job because of the noncompete provision.

If these criteria are satisfied, the employer would be liable to the employee for the compensation difference between what they should have received and what they actually did receive. Any uncertainties as to whether an employee would have been hired by the other company, the expected salary, or the start date would be resolved in favor of the employee.

Under General Counsel Abruzzo's proposed remedies, employers may also be liable for certain damages when a former employee complies with an unlawful noncompete provision. For example, if the former employee can establish they were out of work longer than they otherwise would have been or that they had to take a lower-paying job, they would be entitled to lost wages. Damages could also include relocation or training costs.

Going one step further, General Counsel Abruzzo also calls for penalties to employers seeking the enforce noncompete provisions that are later determined by the NLRB to be unlawful, including dismissal of any legal action against an ex-employee and reimbursing employees for legal costs and fees incurred by the employee defending the action.

Changes to Notice Posting Requirements

General Counsel Abruzzo recommends that in these cases where employee mobility is threatened, the NLRB amend its standard notice posting to:

1. Alert employees that they may be entitled to a differential (wages or benefits) if they were discouraged from pursuing, or were unable to accept, other job opportunities due to the noncompete provision;
2. Employees that they may be entitled to other compensation if they separated from employment and had difficulty securing comparable employment due to the noncompete provision, including being unemployed longer, accepting a job with a lower compensation package, moving outside the provision's geographic scope, or incurring retraining costs to become qualified for jobs in a different industry; and
3. Include language directing individuals to contact the Regional office during the notice-posting period if they have evidence related to (1) or (2).

General Counsel Abruzzo also recommends the NLRB order mailing of the notice to ensure all current and former employees subject to the noncompete provision have an opportunity to read the notice and take steps to obtain relief, if appropriate.

What Now?

As we mentioned in our client alerts on January 9, 2023, April 25, 2024, and June 12, 2024, these efforts are part of a growing trend within both the federal government and state legislatures to ban the current widespread use of noncompete agreements. States such as Oklahoma, California, North Dakota, and Minnesota already prohibit noncompetes under state law. Other states, such as Illinois and Colorado, have passed restrictive laws limiting the use of such agreements. Even in states where such agreements are generally allowed, individual judges have wide discretion in enforcement. The recent efforts by the FTC and NLRB make crystal clear that it is getting harder to enforce noncompete agreements especially where the employee has not engaged in clear wrongdoing (e.g., misappropriating confidential information).

In light of these clear trends in legislation and rule-making, we suggest employers take the following steps:

1. Conduct a regular review of the use of restrictive covenants in your organization to ensure they are lawful and appropriate in the applicable jurisdiction in light of changing local and state laws, especially for employers with a large geographic footprint. Some states penalize employers who merely require such an agreement, even if it is never enforced.
2. Consider what levels of restrictions are necessary. Would a strong confidentiality agreement

suffice? Would a restriction on soliciting customers and employees serve the same practical effect and provide adequate protections?

3. Consider tiering the types of agreements used in your organization, reserving the most onerous restrictions for those at the highest levels of your organization with access to the most critical information to the long-term vitality of your business. The clear trend of state legislation cuts against enforcing noncompetes on low income workers and non-management employees.

[1] Memorandum 25-01 (October 7, 2024) (citing Franks v. Bowman Transp. Co., 424 US. 747, 769 (1976); NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969)).