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CLIENT ALERT

NLRB General Counsel Targets Employee Non-Compete Agreements Under the National Labor Relations Act

June 6, 2023

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On May 30, 2023, National Labor Relations Board ("NLRB") General Counsel ("GC") Jennifer Abruzzo issued GC Memo 23-08 (the "Memo") urging the NLRB to adopt the position that most non-compete agreements unlawfully interfere with employees' rights under the National Labor Relations Act (the "Act" or "NLRA"). While memoranda issued by the NLRB GC are not binding precedent, they can be persuasive authority and offer a preview of future enforcement priorities before the NLRB. The Memo is the Biden administration's latest effort to achieve a broad prohibition of employee non-compete agreements, through the multi-agency "Whole of Government" approach outlined in the President's Executive Order on Promoting Competition in the American Economy. Exec. Order No. 14036 (July 9, 2021). Earlier this year, the Federal Trade Commission proposed a rule that would impose a nationwide ban on most employee non-compete agreements, as discussed in a prior Willkie client alert. The NLRB's adoption of the Memo's position could lead to a similarly broad prohibition, given that the NLRA grants rights to most non-supervisory employees in the private sector, regardless of whether the employer's workforce is unionized.

In the Memo, the GC argues that the "proffer, maintenance, and enforcement" of non-compete provisions tends to chill employees' exercise of their rights to engage in protected concerted activity under Section 7 of the NLRA because non-compete provisions limit alternative employment opportunities and may intimidate employees from acting due to threats of legal action. The GC contends that non-compete provisions likely discourage employees from individually or collectively engaging in protected concerted activity designed to improve working conditions such as threatening to resign or actually

resigning, seeking and accepting new employment, and soliciting employees to work for competitors. Unless non-compete provisions are "narrowly tailored to special circumstances justifying the infringement on employee rights," the Memo concludes that they violate the Act.

The Memo concedes the existence of limited circumstances where non-compete provisions would be permitted under the NLRA. The GC acknowledges that non-compete provisions which (i) restrict only managerial or ownership interests in a competing business; (ii) restrict only true independent contractor relationships; or (iii) are narrowly tailored and "justified by special circumstances," such as protecting proprietary or trade secret information, will not violate the Act. However, the Memo proclaims that alternative justifications by employers for non-compete agreements, such as avoiding competition, retaining employees, or protecting special investments in training employees, are insufficient to excuse the violation of employees' rights, especially where non-competes are issued to "low-wage or middle-wage workers who lack access to trade secrets or other protectable interests, or in states where non-compete provisions are unenforceable."

The Memo recommends that violations of employees' NLRA rights due to unlawful non-compete provisions require "make-whole relief" where it can be established that employees "lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision." Make-whole relief for employees affected by unfair labor practices includes compensation for "all direct or foreseeable pecuniary harms suffered as a result[.]" *Thryv, Inc*., 372 NLRB No. 22 (Dec. 13, 2022). In this context of non-compete provisions, the GC's recommendation that employees be awarded make-whole relief could result in an award of compensation reflecting the difference between the wages and benefits offered by the employer and those offered by a competitor for a role that an employee was qualified for, but did not pursue because of the employer's non-compete provision.

The NLRB has yet to issue a ruling which would give legal effect to the position advocated by the GC. Nevertheless, the Memo is further notice to employers of the Biden administration's stance against the widespread use of non-compete agreements in the United States.

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