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Top NLRB Official Claims Most Employee Non-Compete Agreements Violate the NLRA

In a sweeping memorandum this week, the National Labor Relations Board (NLRB) General Counsel, Jennifer Abruzzo, staked out her position that most non-competition covenants with employees, as well as employee non-solicitation agreements, violate the National Labor Relations Act (NLRA). According to the memo, such agreements tend to discourage employees from exercising their Section 7 rights. If her position is adopted by the NLRB more broadly, union and non-union employers should expect a rush of unfair labor practice charges challenging non-competition and non-solicitation agreements.

The NLRA applies to both union and non-union employers. Section 7 of the NLRA gives non-supervisory employees the right to engage in "concerted activities" to act together with other workers to improve working conditions. And, according to the General Counsel, non-competition covenants chill workers from exercising their rights by:

- Concertedly threatening to resign to demand better working conditions;
- Carrying out concerted threats to resign to secure improved working conditions;
- Concertedly seeking or accepting employment with a local competitor to obtain better working conditions;
- Soliciting co-workers to go work for a local competitor as a part of a wider course of protected concerted activity; and
- Seeking employment, in part, to specifically engage in protected activity with other workers at an employer's workplace.

The memo recognizes such noncompete restrictions *may* be valid if they (1) clearly prevent only individuals' managerial or ownership interests in a competing business; or (2) other special circumstances. Non-compete restrictions may also still be valid for use with employees who are not covered by the NLRA (i.e., managers and supervisors).

The General Counsel's theory would represent a sweeping change in the law

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because even *current* non-competition and non-solicitation covenants would be unlawful under Section 7. Employers would thus not only be limited in entering new agreements, but also could face unfair labor practice charges related to agreements that have been in place for years.

The memo marks the latest step in the Biden Administration's aggressive efforts to prohibit non-competition and non-solicitation restrictions with certain employees. Earlier this year, the Federal Trade Commission proposed a rule that would effectively ban these agreements. That proposed change, however, must still go through the rulemaking process, which could take years.

Here, even though the memo is not binding law, the effect could be immediate—regional NLRB offices may begin pursuing unfair labor challenges against companies using such non-compete restrictions with employees under the legal theories outlined by the memo. Still, the memo promises to be controversial and, if its theories are adopted by the NLRB, legal challenges are likely.

Employers, whether unionized or not, must be aware of the risk that their use of non-compete covenants may subject them to an unfair labor practice charge. Employers with questions regarding non-compete covenants or the NLRB should contact a member of Reinhart's Labor and Employment Practice Group or their Reinhart attorney.