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Non-compete, non-disparagement agreements in NLRB's crosshairs

Businesses should take care when making such deals

By MATTHEW REITZ

The National Labor Relations Board is promoting an array of employee friendly policies and positions under the Biden Administration, taking aim at non-compete agreements, confidentiality and non-disparagement agreements tied to severance packages, the definition of independent contractors and other long-used business arrangements.

Businesses should be cognizant of several recent rulings and memoranda from the National Labor Relations Board (NLRB), several of which could impact operations and leave companies open to potential liabilities if not addressed. Experts say companies should be paying particular attention to non-compete agreements, which are under scrutiny from the NLRB and a variety of other state and federal agencies and moving to update company policies to reflect the changing labor law landscape.

NLRB General Counsel Jennifer Abruzzo released a May 30 memo stating that non-compete agreements violate the National Labor Relations Act (NLRA) in all but limited circumstances. Abruzzo argued that overly broad non-compete agreements are unlawful in part because they prevent workers from seeking and accepting employment elsewhere to obtain a better working situation.

"Non-compete provisions reasonably tend to chill employees in the exercise of Section 7 (of the NLRA) rights when the provisions 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," Abruzzo said.

Abruzzo specified that non-compete provisions are unlawful if they prevent employees from:

- Seeking employment with competitors to obtain better working conditions.
- Discussing workplace issues with third parties.

Business interests in retaining employees or protecting investments in training are unlikely to justify broad non-compete agreements, according to the memo.


Mulvehill

Kevin Mulvehill, a partner at Phillips Lytle and leader of the firm's labor and employment team, said the Abruzzo memo is not currently the law and a decision ultimately rests with the NLRB and the courts to determine if the general counsel's interpretation is accurate. However, there is pressure on non-competes from multiple fronts.

"Whether or not this specific memorandum is binding, it is clear that non-competes, on a national basis and in New York state, are currently under attack," Mulvehill said, noting in addition to the NLRB memo there is state legislation and potential action from the Federal Trade Commission that could impact non-compete agreements.


Weissflach

Rob Weissflach, a partner in the labor and employment department at Harter, Secrest & Emery, said the NLRB's stance on non-compete agreements could cause problems for many employers, putting existing arrangements at risk.

"Employers have a legitimate interest in protecting their customers, goodwill and relationships, but if they can't protect those in an agreement then when someone leaves, they're put in jeopardy of losing a lot of business," Weissflach said, noting it's particularly problematic because employees are much more mobile than in previous generations.

Non-compete agreements may be lawful in some cases, according to the memo, such as when the terms limit only an individual's managerial or ownership interests in a competing business, or in independent contractor relationships. Abruzzo noted there are potential circumstances in

which, in narrowly tailored non-compete agreements, "infringement on employee rights may be justified by special circumstances."

Employers may need to revise non-compete agreements, especially for workers without access to trade secrets or proprietary information, and Mulvehill said it's prudent to consult with experienced labor and employment counsel to understand the memorandum's potential impact on business and to draft any revised non-compete agreements.

"And (businesses) should really be proceeding with caution if entering into non-compete agreements with non-supervisors," Mulvehill said. "The use of them should not be widespread and should target specific employees in which you have a good faith, legitimate business reason for utilizing and enforcing a non-compete."

There are other potential avenues to protect business interests, Weissflach said, noting the protection of "truly confidential information, proprietary information and trade secrets" is still lawful through non-solicitation agreements and other arrangements.

Non-compete agreements are typically broader and prohibit employment in the same industry, but non-solicitation agreements are narrower and prohibit individuals from going after their employer's, or former employer's, customers or employees. Mulvehill, however, noted the language in the NLRB memo appears to potentially be targeting non-solicitation of employees as well.

Contractual arrangements like confidentiality agreements may also be useful, preventing employees from sharing confidential information and trade secrets with third parties or using the information to their own advantage.

Mulvehill said New York common law duties of loyalty also exist that preclude employees from using company resources, time, facilities or confidential information to start a competing business venture. Mulvehill said even in the absence of non-compete or non-solicitation agreements, employees should not be soliciting other employees, planning a business or using confidential information at their place of employment.

In a separate February ruling, the NLRB concluded that employers cannot include certain restrictive clauses in severance or separation agreements that prevent laid-off employees from discussing the terms and conditions of their employment or assisting coworkers with workplace issues concerning their employer. The NLRB declared broadly written confidentiality clauses and non-disparagement agreements are unlawful.

Weissflach said the NLRB ruling posits that broad confidentiality or non-disparagement provisions in severance agreements are an unfair labor practice. Severance deals often included such provisions in the past, but the NLRB currently views them as infringing on an employee's right to talk about their employment conditions, Weissflach said. Similar stipulations can still be included in such deals, Weissflach said, but must be limited to maliciously untrue statements.

In light of the February decision, Mulvehill said he's advising employers to modify any forms used in severance agreements for non-supervisory employees, taking the NLRB ruling into account in an effort to mitigate risks.

Another issue Mulvehill and Weissflach noted employers should be aware of is a June 13 decision from the NLRB that alters the standard for determining whether an individual is appropriately classified as an independent contractor or employee. A reversal of a 2019 ruling, the June decision makes it more difficult to classify workers as independent contractors.

"The consequences of misclassifying individuals as independent contractors can be significant and severe," Mulvehill said, adding employers are strongly advised to consult with labor and employment attorneys to make determinations on whether current individuals and future relationships are properly classified.

Weissflach said one other area employers should be focused on is employee handbooks. He said frequent changes to labor laws and their interpretations, particularly as federal administrations change hands, can make employer policies and procedures obsolete or even unlawful, and it's important to update documents regularly.

"It's really just a matter of regularly looking at and updating handbooks and policies," Weissflach said. "A lot of employers put them in place and then have them sitting out there, and even if they start doing something different along the way don't update policies to match what's going on in real life. If you don't update your policies on a regular basis, you're going to run afoul of some legal development somewhere."