An NLRB Memorandum

Another strike against non-compete agreements

by: Robert C. Goldberg, BTA General Counsel

In the February issue of Office Technology, I shared the details of a trade regulation rule proposed by the Federal Trade Commission (FTC) banning non-compete agreements. That rule remains in the comment stage, with the Business Technology Association (BTA) voicing strong objections to a complete ban where businesses have heavily invested in establishing loyal customer bases. BTA is not alone in its position, as many other organizations have stated similar concerns. It is commonly believed that if the rule is ultimately enacted, it will be considerably reduced in scope and impact.

Almost two years ago, President Joe Biden issued Executive Order 14036, which broadly addresses promoting competition in the U.S. economy. Among the measures considered in that executive order was greater scrutiny of employee non-compete agreements. Now, in addition to the president and the FTC, the general counsel of the National Labor Relations Board (NLRB) has inserted her agency's authority in hopes of further restricting employee non-compete agreements. On May 30, 2023, NLRB General Counsel Jennifer Abruzzo sent a memorandum to the various regional directors and other NLRB officials explaining her theory that most employee non-compete agreements violate the National Labor Relations Act (NLRA). In the memorandum, Abruzzo directs the various NLRB regions to be on the lookout for cases to bring against employers that enter into, or even propose, employee non-compete agreements.

The NLRA, enacted by Congress in 1935, has never been interpreted to prohibit, or even to limit, employee non-compete agreements. Abruzzo, however, explains in her memorandum that, in her opinion, most such agreements are unlawful throughout the United States because they "interfere with, restrain or coerce employees in the exercise" of their right "to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Essentially, Abruzzo argues that non-compete provisions interfere with workers' rights because they limit an employee's option to threaten to or actually quit or change jobs in support of demands to an employer for different or better pay and working conditions, either individually or in a group. She argues that while there might be some "special circumstances" that would make an employee non-compete agreement lawful, as a general rule "the proffer, maintenance and enforcement

of a non-compete provision that reasonably tends to chill employees from engaging in ... activity as described above violates" the NLRA.

The good news for dealers that proffer, maintain and enforce employee non-compete agreements is that the NLRB general counsel does not have the power to make rules like this. Instead, she acts as a prosecutor, choosing certain cases as vehicles to try to convince the full NLRB to adopt her (unconventional) view of the scope of the NLRA. And even if she found an appropriate case and convinced the NLRB to adopt her view, that decision itself would be subject to review by a federal court. We are many years away from any sort of definitive ruling that the NLRA restricts employee non-compete agreements.

While the NLRB is unlikely to hold that the NLRA prohibits employee non-compete agreements — and it is particularly unlikely to do so soon — dealers who use employee non-compete agreements should take this as yet another warning that such agreements are subject to increasing scrutiny. Dealers are well advised to limit non-compete agreements to employees with significant customer contact and/or access to confidential business information. Consider confidentiality provisions for both your employee handbook and agreements. ■

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