The NLRB's Ongoing Shift Toward Employee-Friendly Standards

Aug 18, 2023

Categories:

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Labor
Restrictive Covenants

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The labor law landscape is constantly in flux as changes in presidential administrations continue to play a significant role in the development of rulemaking and decisional law at the National Labor Relations Board (NLRB or the "Board"). Over the past several months, various NLRB decisions and guidance memorandums have tipped the scales further in the employee's favor, requiring employers to re-think their current policies and agreements to avoid the pitfalls created by these recent decisions.

Employee Handbook Policies

The NLRB's August 2nd opinion in *Stericycle, Inc.*, 372 NLRB No. 113 (2023), found an employee policy unlawful because, from the employee's perspective, it had a "reasonable tendency" to discourage employees from exercising their rights under the National Labor Relations Act (NLRA).

This decision is a departure from the previous standard where the Board examined, "the nature and extent of the potential impact on NLRA rights, *and* [] legitimate justifications associated with the rule." Now a policy is unenforceable if an employee could reasonably interpret it to restrict conduct protected under the NLRA, *i.e.*, if the policy was enacted in response to such protected conduct, or if the policy, in practice, limits rights under the NLRA. In other words, the Board's primary concern is whether an employee believes they cannot avail themselves of the concerted activities protected by the NLRA as a result of the policy.

If an employee can meet that threshold inquiry, the burden shifts to the employer to demonstrate that it has a legitimate and substantial interest behind the policy and that the policy is narrowly tailored to further that interest. If it fails to do so, the policy can be deemed invalid.

This new standard is in its infancy and will likely be further fleshed out as more cases come before the Board, but employers should consider reviewing their employee handbooks and policies to

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identify potential policies that may potentially run afoul of the Board's recent holding.

Independent Contractor Test Revisions

On June 13, 2023, the NLRB, in its decision in *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023), reverted back to its employee-friendly test to determine whether a worker is an independent contractor. In doing so, the NLRB essentially reversed its opinion in 2019 in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), where the Board, under the previous presidential administration, deviated from the NLRB's well-established holistic application of 10 common law factors. Specifically, the *SuperShuttle* Board held that the worker's "entrepreneurial opportunity" is, on its own, dispositive regardless of the analysis of the 10 traditional factors. As a result, the greater a worker's opportunity to derive a benefit to their own business from their work with the employer, the more likely they will be considered an independent contractor regardless of any influence from an analysis of the 10 factors.

That is no longer the case after the Board's recent opinion in *The Atlanta Opera, Inc*. matter. Going forward, the Board must consider all of the following factors on equal footing in the assessment of entrepreneurial opportunity:

- The extent of control which, by the agreement, the master may exercise over the details of the work
- Whether or not the employee is engaged in a distinct occupation or business
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision
- The skill required in the particular occupation
- Whether the employer or the workman supplies the instrumentalities, tools, and place of work for the person doing the work
- The length of time for which the person is employed
- The method of payment, whether by the time or by the job

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- Whether or not the work is part of the regular business of the employer
- Whether or not the parties believe they are creating the relation of employer and employee
- Whether the principal is or is not in the business

Because this analysis substantially increases the scope of what constitutes an employee as opposed to an independent contractor, employers will need to closely consider the role its workers serve to avoid any significant exposure as to misclassification of employees as independent contractors.

Non-Compete Clauses

Little by little, proposed and enacted legislation, case law, and administrative regulations continue to chip away at the scope and enforceability of non-compete provisions. A May 30, 2023, memorandum from the NLRB's General Counsel indicates that the Board is moving in a similar direction. *See* Memorandum GC 23-08 (May 30, 2023).

The NLRA protects, among other things, employees' rights to self-organize and engage in concerted activity designed to aid employees. *See generally*, 29 U.S.C. § 157. A non-compete provision, according to the General Counsel, frustrates those rights largely because of the burden it imposes on employees who seek subsequent employment in the same field. For example, non-compete agreements chill employees from concertedly threatening to resign to secure better working conditions because non-competes significantly limit an employee's ability to find a new job. An employer can still attempt to demonstrate that the non-compete agreement supports a legitimate business interest, but the Board's General Counsel implied that the chilling affect non-competes have on employees is of paramount concern. Based on that, the NLRB's General Counsel attaches what is essentially a presumption of invalidity to non-compete agreements.

That is not to say, however, that all non-competes are invalid. Non-competes that restrict an individual's managerial or ownership interest in a competing business may be valid. Moreover, narrowly tailored non-competes may be enforceable if the infringement

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imposed on the employee is sufficiently limited to further an employer's legitimate business interest. Key to that assessment is whether the non-compete effectively denies the employee the ability to seek subsequent employment, as that curtails an employee's right to avail themselves of the protections under the NLRA.

While that may sound straight-forward, the reality is that navigating the vast gray area of what constitutes a valid non-compete agreement is quite complex and fact-specific. Guidance, such as the General Counsel's memorandum, merely lays the foundation for crafting valid non-compete language. Maximizing the likelihood that a non-compete agreement will be enforced requires a deep understanding of recent NLRB decisions, as well as state-specific restrictions and limitations, and the intricate facts which influence those decisions. This is an evolving area of the law that should be closely monitored.

Confidentiality and Non-Disparagement Clauses

On February 21, 2023, the NLRB further restricted employers in its opinion in *McLaren Macomb*, 372 NLRB No. 58 (2023) by hollowing out the protections previously afforded to employers through confidentiality and non-disparagement clauses in employee severance agreements. (For more information on the *McLaren Macomb* decision and its impact, *see Non-Disclosure and Non-Disparagement Provisions Under Scrutiny*). The NLRB found that such provisions tend to be overbroad, constituting unfair labor practices. Specifically, the Board found that severance agreements containing these provisions are "unlawful if [their] terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights."

Following the issuance of the decision, the NLRB's General Counsel issued a memorandum providing guidance on the opinion and answering questions submitted to the Board following the decision. *See* Memorandum GC 23-05 (March 22, 2023). First, the memorandum delineates that not all severance agreements are prohibited but, rather, they may not have overly broad provisions. Second, the General Counsel states that certain confidentiality clauses may still be lawful, including those clauses that are narrowly

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tailored to protect against the dissemination of trade secrets, with a reasonable time restraint. Similarly, provisions meant to prohibit the disclosure of financial terms related to an agreement are permitted. Third, with respect to non-disparagement clauses specifically, those clauses that protect against defamation, where the employee is prohibited from making statements that are maliciously untrue, are not prohibited.

These changes have effectively eroded some of the tools used by employers to protect their businesses, and foretell the Board's intention to examine employer practices with heightened scrutiny. We will continue to track the NLRB's decisions to ensure we stay ahead of the curve when advocating for our clients.

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