Good news for employers: Moonlighting, noncompetes and the NLRA

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The National Labor Relations Board (NLRB)'s Division of Advice recently released a memorandum that should hearten employers. It concluded that requiring employees to sign an agreement that contains a noncompete clause or a "moonlighting" provision would not unlawfully interfere with an employee's exercise of rights under Section 7 of National Labor Relations Act (NLRA).

Section 7 provides that employees are free to engage in union activity or protected concerted activity for their mutual aid and protection.

Hiring and union 'salting'

The employer that was the subject of the memorandum, Thermal Tech, Inc., provides insulation installation services. Thermal is a nonunion employer.

The Heat and Frost Insulators and Asbestos Workers Local #7 has been attempting to organize Thermal's employees for several years. The union filed an unfair labor practice charge alleging that the noncompete and moonlighting provisions in Thermal's employment agreement interfere with employees' exercise of their Section 7 rights.

The union reasoned that the pro-visions prevent employees from engaging in union "salting" efforts protected by the NLRA. A "salt" is a union member—often a union organizer—who applies for work with a nonunion company. Salts usually disclose that they are union members and that they intend to organize the company's workers if they are hired.

In these cases, unless the applicant lacks qualifications or no open position exists, the employer is faced with a difficult choice. Hiring the union member will expose the employer's workforce to potential organizing. Not hiring the union member will almost certainly lead to an unfair labor practice charge alleging that the applicant was not hired specifically because of antiunion animus.

Geographic limits

The noncompete provision in Thermal's agreement restricted employees from working in a defined geographic territory during and after their employment without Thermal's written consent.

The moonlighting provision stated:

"Other Employment. Without the prior written consent of Employer, Employee is prohibited directly or indirectly, during the term of this Agreement, from working or rendering services of a business, professional, or commercial nature to any other person, firm, or corporation."

The NLRB memorandum cited *Lutheran Heritage Village-Livonia* (343 NLRB 646, 646-47, 2004) for a test to determine whether workplace rules violated Section 7. Under that test, merely having a rule or policy that explicitly restricts Section 7 activities would violate the NLRA.

The memorandum stated that the noncompete provision in Thermal's agreement did not violate Section 7 because the NLRA does not necessarily confer a right to work in a particular geographic region. Preventing employees from becoming union salts in a particular geographic area after leaving Thermal "does not violate the Act because any effect it may have on Section 7 activities is too attenuated."

The moonlighting question

The memorandum used the same reasoning concerning Thermal's prohibition on "moonlighting," indicating that Section 7 does not provide a right to work for more than one employer simultaneously. Although the memorandum conceded that the provision prohibiting all outside employment would clearly prohibit salting should one of Thermal's employees want to take on that role, that itself was not sufficient to establish an NLRA violation, absent evidence that the stated prohibition was a specific response to union activity or subsequently applied to restrain union activity.

Favorable to employers was the acknowledgment that an employer may have a legitimate, nondiscriminatory purpose from having and enforcing a moonlighting provision. The memorandum suggested that the NLRB, in past decisions, had reviewed moonlighting provisions and found them unlawful only where there was specific evidence that the policies were adopted to eliminate or prevent salting or where they were discriminatorily enforced against union members.

Effect of NLRB memorandum

The memorandum suggested that the allegation regarding Thermal's noncompete should be dismissed. It instructed the NLRB's regional office to further investigate Thermal's moonlighting policy to determine whether it was put into place because of antiunion animus or if it has been applied discriminatorily against employees who are also union members. Without such evidence, the memorandum suggested dismissing the moonlighting charge.

The takeaway: It appears that a noncompete provision in an employment agreement will pass NLRB muster and won't be considered a violation of an employee's Section 7 rights under the NLRA.

Advice: Be careful when instituting and applying a moonlighting provision. When you do, be sure to identify legitimate business reasons for the policy. Furthermore, ensure that you apply it consistently to all employees so any allegation that it is discriminatorily enforced against union "salts" cannot be sustained.

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