

Services

Labor & Employment
Traditional Labor
Relations

Professionals

TOM O'DAY
MADISON:
608.234.6017
MILWAUKEE:
414.273.2100
TOM.ODAY@
HUSCHBLACKWELL.COM

R. BENJAMIN (BEN)
PARKER
MINNEAPOLIS:
612.349.3012
BEN.PARKER@
HUSCHBLACKWELL.COM

THOMAS P. GODAR
MADISON:
608.234.6064
THOMAS.GODAR@
HUSCHBLACKWELL.COM

TERRY L. POTTER
ST. LOUIS:
314.345.6438
TERRY.POTTER@
HUSCHBLACKWELL.COM

NLRB Guidance for Your Workplace Agreements and Policies

The National Labor Relations Board (NLRB) Division of Advice recently released three guidance documents that collectively signal a more employer-friendly enforcement posture. Roughly 94% of private-sector employers do not have a labor union, but these rules apply to all employers! It is welcome guidance.

In previous client commentary by Husch Blackwell, we commented on Biden-era interpretations involving employment agreements, non-compete agreements, and separation (severance) agreements. The Biden-era NLRB interpreted federal law to be very favorable toward employees. The enforcement of federal law changed significantly for standard employment, non-compete and separation agreements.

Now, the pendulum has swung. Here is what cleared, what remains risky, and what you should do now.

***Biotricity, Inc.*—Non-Competes, Confidentiality Clauses, & Post-Employment Litigation**

The NLRB Division of Advice found that non-compete and confidentiality agreements are no longer presumptively unlawful under the National Labor Relations Act (NLRA). The idea that such agreements were presumptively invalid and unlawful was largely a creation of the Biden NLRB. The current NLRB rescinded its prior anti-non-compete stance that held non-compete provisions violate an employee's Section 7 rights. The current NLRB will likely narrowly interpret the Board's 2023 *McLaren Macomb* decision. Employers are also entitled to seek post-employment civil litigation against employees who breach non-compete agreements, provided the suit is not retaliatory.

What This Means for Employers:

Employers should audit all post-employment agreements and remove or narrow clauses that may be overbroad.

If you need to enforce a non-compete or confidentiality clause against a departing employee, ensure that you document a clear, independent business justification.

Employers need to verify compliance with state non-compete law as there are some states—such as California and Minnesota, which have state-level bans. Most states have very specific requirements.

Sutherland Global Services, Inc.—Overtime Policy Changes & Termination for Workplace Recording

This case involved an employer without a labor union. The NLRB Division of Advice found that the employer did not retaliate against employees when it changed its overtime approval policy after employees raised wage complaints. The NLRB stated that relying on the timing of implementing the policy alone was not sufficient to determine retaliation. Additionally, the NLRB upheld the employer terminating an employee for covertly recording a supervisor. The Division of Advice reasoned that the recording lacked a clear group or collective purpose. The Guidance is helpful in specifying when an employee engaged in recording is involved in protected concerted activity under the NLRA.

What This Means for Employers:

Employers should consider implementing an anti-recording policy along with other important policies in the workplace such as non-solicitation, dress code, visitor access and others.

Employers need to document the business rationale for any policy change before announcing the change, particularly when employee complaints are concurrent.

Employers should discipline employees for violating reasonable workplace recording or other policies. However, employers should check with legal counsel to ensure whether or not the employee was engaged in protected concerted activity.

Husch Blackwell will have a Labor Law Insider podcast with Tom Godar and Terry Potter further discussing what these advisory opinions mean for employers. Be on the lookout for that podcast episode coming out later this month.