

**Companies cannot unilaterally implement non-compete and non-disclosure agreements.**

Recently, the D.C. Circuit upheld an NLRB ruling that non-competition and non-disclosure agreements are mandatory subjects of bargaining.

Minteq International, Inc. and its employees were represented by the International Union of Operating Engineers, Local 150. Both parties were covered by a collective bargaining agreement. The CBA contained a management rights provision, and also a provision for employees that have never accrued seniority who were rehired, were subject to a probationary status of 6 months of employment. The discipline, layoff, or discharge of a probationary employee was not subject to protection by the CBA.

In 2012, without bargaining or giving notice to the Union, Minteq required new employees to sign a Non-Compete and Confidentiality Agreement ("NCCA"). The NCCA prohibited employees from working at Minteq's competitors for eighteen months following their employment and prohibited the disclosure of confidential or proprietary information. Further, the NCCA required employees to assign Minteq the rights to inventions or "related know-how" developed during their employment at Minteq. The NCCA also included a section entitled "Interference with Relationships" and "At-Will-Employees." The Interference section prohibited a restricted employee from soliciting or encouraging any current or future customer of the Company to terminate its relationship with the Company in an adverse manner. The "At-Will" provision contained a clause that at-will employees had no additional rights. Again, the Company implemented the NCCA unilaterally.

The D.C. Circuit applied the established deferential standard of review to this NLRB decision. NLRB determinations regarding which collective-bargaining subjects constitute mandatory subjects of bargaining are upheld as long as they are "reasonably defensible." The NLRB ruled that the imposition of the NCCA requirement for hiring constituted an unfair labor practice. The D.C. Circuit agreed finding that the NCCA was a mandatory subject of bargaining because it "directly settles an aspect of the relationship between the employer and the employees." The NCCA had a direct economic impact on employees, and thus represented the sort of matter suitable for collective bargaining. The Court found that this conclusion was consistent with the longstanding NLRB precedent that non-competition and non-disclosure requirements are mandatory subjects of bargaining.

The Court rejected the Company's claim it had no duty to bargain over the NCCA because its implementation was covered by the CBA. The Court found nothing in the management-rights clause of the CBA that permitted the Company to impose obligations on employees after they left employment, or bind employees "heirs, successors, and assignees." Also, the company did not argue that the provisions of the NCCA were severable in any way, which allowed the Court to just evaluate the entire NCCA, not just individual provisions. The Court stated that the enumerated management rights were limited to traditional managerial prerogatives, but the management rights clause provides nothing with respect to employees' further capacities after their employment. Ultimately, it was unlawful for the Company to unilaterally implement the entire NCCA.

The Court also examined whether the Company violated the NLRA Section 8(a)(1) with its implementation of the "Interference with Relationships" and "At-Will-Employees" sections. Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their section 7 rights to unionize and engage in related concerted activities. The Court found the Board's decision was reasonably defensible in finding that these two sections prohibited section 7 activity. For example, employees have a right to support a consumer boycott of their employer's products in connection with a labor dispute. The language of the "Interference with Relationships" section could be construed as prohibiting the Company's employees from soliciting customers for support in a labor dispute. Also, the "At-Will Employees" section indicates that employees hired on at-will status have no further rights. However, after the 6 month probationary period, these employees are subject to the discipline procedures of the CBA. The Court found that an employee could reasonably construe this Section as applying to all employees indefinitely. As a result, Minteq could not implement these provisions either regardless of whether they are covered by the CBA, because those provisions violate section 8(a)(1) of the Act.

This is a good decision for unions. Companies cannot unilaterally implement non-compete and non-disclosure agreements, because it is a mandatory bargaining subject and they will have to bargain for it.

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