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NLRB General Counsel Continues Her Attempted Erosion of Employer 'Rights': Considers Most Non-Compete Agreements Unlawful

On May 30, the National Labor Relations Board's (NLRB) General Counsel, Jennifer Abruzzo, issued [Memorandum GC 23-08](#) ("Memo"). The Memo highlights her opinion that most non-compete provisions violate the National Labor Relations Act (the "Act") and follows her alarming [guidance on severance agreement language](#). The General Counsel's Memo simply is her interpretation of the Act.

While the Memo is not official NLRB policy, it formulates the official blueprint for the NLRB's Regional Offices to investigate and prosecute unfair labor practice charges against employers. While the Act applies to private sector union and non-union workplaces, it does *not* apply to managers, most supervisors, and independent contractors.

Under the General Counsel's rationale, non-compete provisions are unlawful when they "could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work." (Memo at 2).

The General Counsel presumes (without legal or factual support) that non-compete provisions chill employees from engaging, in part, in the following Section 7 activity:

- Concertedly threatening to resign to demand better working conditions;
- Carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions;
- Concertedly seeking or accepting employment with a local competitor to obtain better working conditions;

- Soliciting their coworkers to work for a local competitor as part of a broader course of protected concerted activity; and
- Seeking employment, at least in part, to specifically engage in protected activity with other workers at the employer's workplace.

Circumstances Where an Employer's 'Special Circumstances' Defense Would Not Be Accepted

In the General Counsel's view, non-compete provisions that reasonably tend to chill employees' exercise of Section 7 rights violate the Act "unless the provision is narrowly tailored to special circumstances justifying the infringement on employee rights." (Memo at 4). While she did not define "special circumstances," she informed employers what "special circumstances" would *not* include:

- A desire to avoid competition from a former employee;
- A business desire to retain employees;
- Protecting training investments (the General Counsel, with what many employers would consider a naïve view of the modern workplace, opines an employer can achieve that protection by "offering a longevity bonus");
- Imposing non-compete provisions on low- or middle-wage workers "who lack access to trade secrets or other protectible interests"; or
- Imposing such provisions in states where non-compete provisions are unenforceable. (Memo at 5).

Narrow Circumstances Where Non-Compete Provisions May Be Lawful

In contrast to her enumerated list of what would not be a "special circumstance" justifying a non-compete provision, the General Counsel recognized that not *all* non-compete provisions necessarily violate the Act. That admission was notably vague. Some provisions *may not* violate the Act "because employees could not reasonably construe the [non-compete provision] to prohibit their acceptance

of employment relationships subject to the Act's protection..." (Memo at 5). The General Counsel then proffered a few examples where non-compete provisions *may be* lawful:

- Provisions that clearly restrict only individuals' managerial or ownership interests in a competing business;
- True independent contractor relationships;
- Provisions protecting employers' proprietary or trade secret information if addressed in narrowly tailored agreements; or
- Provisions narrowly tailored to "special circumstances" (not yet defined) that justify the infringement on employee rights.

Potential Remedies if a Non-Compete Provision is Deemed Unlawful

The General Counsel instructs Regional Offices, in appropriate circumstances, to "seek make-whole relief [lost wages] for employees who, because of their employer's unlawful maintenance of an overbroad non-compete provision, can demonstrate that they **lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision.**" (Emphasis added.) (Memo at 6). Put more plainly, an employer could be subject to financial liability even if it does *not* attempt to enforce a non-compete provision based on an employee's claim that he/she voluntarily did not explore other jobs out of fear of the non-compete. What "lost opportunities" evidence would an employee need to produce? Unfortunately, imagination knows no boundaries.

Practical Impact of the General Counsel's Memo

The NLRB has *not* yet adopted the General Counsel's fanciful position. Even if adopted by the NLRB, this blatantly overreaching position will be challenged and (hopefully) reversed by the federal courts.^[1]

That being said, the General Counsel's Memo will make enforcement of non-compete agreements extremely difficult and challenging for employers going forward. Employees may attempt to avoid non-compete agreements with current or former employers by filing

unfair labor practice charges with the NLRB. Employers who attempt to enforce non-compete agreements in court may risk concurrently battling the NLRB. Courts, moreover, may be reluctant to grant a temporary restraining order or preliminary injunctive relief when doing so arguably runs counter to federal agency positions (including the Federal Trade Commission's (FTC) proposed rule which will impose a near-complete ban on non-compete agreements). While this Memo does not specifically bar non-solicitation agreements (customers and/or employees), the General Counsel's track record suggests they, too, could be under future attack.

Based on the above, compounded by the growing negative and limiting treatment of non-compete provisions by various states and the FTC, employers should carefully evaluate *which* employees should be covered by a non-compete provision. A nuanced and careful analysis versus a seemingly more convenient "one size fits all" approach will go far in minimizing an employer's chances of being immersed in expensive, time-consuming, and unpredictable administrative and/or court proceedings.

If you have any questions about this article or other labor law issues, please contact the authors or any attorney in Frost Brown Todd's [Labor and Employment](#) practice group.

[1] The United States Supreme Court, in two companion decisions, *Axon Enterprise v. Federal Trade Commission* and *Securities and Exchange Commission v. Cochran*, recently afforded employers a huge victory. Employers immediately can bring certain constitutional claims against federal agencies (e.g., NLRB) without having to slog through a time-consuming and often in "fait accompli" fashion, administrative review process. Based on the Biden NLRB's recent strident positions, the Supreme Court rulings are welcome news for employers. Additionally, later this year, the Supreme Court, in *Loper Bright Enterprises v. Raimondo*, will decide whether to overturn the "Chevron doctrine" that has given federal agencies broad and arguably unchecked power under the guise of having the so-called "expertise" to handle matters before them.

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