

CLIENT ALERTS

NLRB General Counsel Issues Memo Claiming that Non-Compete Agreements Violate the NLRA

Client Alert

6.13.2023

On May 30, 2023, NLRB General Counsel Jennifer Abruzzo entered the ongoing battle against non-compete agreements in the form a six-page Memo claiming that the proffer, maintenance, and enforcement of non-compete provisions could violate Section 8(a)(1) of the National Labor Relations Act by interfering with, retraining, or coercing employees in the exercise of their rights guaranteed in Section 7.

In Abruzzo's opinion, most non-compete agreements chill employees from exercising or engaging in Section 7 rights because they "know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions." As such, employees lose power in lockouts and strikes and are discouraged from concertedly threatening to resign for better working conditions.

The Memo recognizes that not all non-competes violate the NLRA, noting that provisions that are narrowly tailored to special circumstances are permissible, including, for example, provisions that clearly restrict only individuals' managerial or ownership interests in a competing business or agreements related to true independent contractor relationships. Non-competes on low-wage or middle-wages workers, who lack access to trade secrets or other protectible interests, on the other hand, are, according to the Memo, not enforceable.

Abruzzo ends the Memo by directing field investigators to refer non-compete provisions that purportedly violate the NLRA to attorneys at the NLRB's Division of Advice for review and possible prosecution.

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While the Memo is not binding on the NLRB and is certainly not law, it serves as an announcement both internally, to the regional NLRB offices and investigators, and externally, to private employers, that the regional offices can, and should, investigate non-compete agreements with non-managerial employees. It also serves as a warning to employers that the GC intends to prosecute non-compete agreements, particularly those with low-wage and/or low-skilled workers. This has already proved true, as the NLRB enforced its first non-compete action against a Michigan cannabis processor that had non-compete agreements preventing low-wage workers from working in the cannabis processing industry in the entire state for two years. The enforcement ended with a private, confidential settlement resolving the alleged unfair labor practice.

Employers should be mindful that even if the NLRB were to adopt Abruzzo's argument that non-competes violate the NLRA, it will be litigated in the circuit courts.

Your Butzel Non-Compete and Trade Secret attorneys are at the ready to provide guidance on the impact of any future NLRB decisions on non-compete agreements. We will continue to monitor and report on the situation. If you have any questions about the GC's memo or any other related issues, please contact your Butzel Non-Compete and Trade Secret Attorney.

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