

NLRB's General Counsel Aims to Restrict Employee Non-Compete Clauses

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Daniel J. Clark

Samia A. Shaheen

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On May 30, 2023, the General Counsel for the National Labor Relations Board (NLRB) issued a memorandum informing the Labor Board's Regional Directors of the GC's stance that non-compete clauses for employees protected by the National Labor Relations Act (the Act) in employment contracts and severance agreements violates federal labor law.

Following closely on the heels of the NLRB's decision in *McLaren Macomb* (limiting confidentiality and non-disparagement provisions in severance agreements), Abruzzo's memo contends that an overly broad non-compete clause violates the Act if it "reasonably tends to *chill* employees" from engaging in Section 7 activity, unless the non-complete is "narrowly tailored to special circumstances."

The GC's Memo is not binding law. It is the latest initiative to limit the use of non-competes since the Federal Trade Commission's (FTC) announcement in January of 2023. Both the GC and the FTC's positions are at odds with the majority of states who enforce non-competes. Disputes regarding the enforceability of non-competes are generally resolved by courts, not the NLRB. Employers should continue to review their current restrictive covenants to consider strategies for mitigating the risks in light of these developments.

Concertedly threatening to resign to demand better working conditions: Abruzzo emphasizes that non-compete clauses chill employees from concertedly threatening to resign as a strategy to urge their employers to improve working conditions. She asserts that employees would view these threats as futile, given their lack of access to other job opportunities or fear of retaliation.

Carrying out concerted threats to resign to demand better working conditions: While Abruzzo admits that Section 7 does not expressly recognize the "right of employees to concertedly resign from employment," she asserts that such a right is implicit under the Act and would chill employees from carrying out concerted threats to resign if subject to a non-compete.

Concertedly seeking or accepting employment with competitors to obtain better working conditions:

Abruzzo takes the stance that non-competes would chill employees, because “[s]uch protected activity would also include a lone employee’s acceptance of a job as a logical outgrowth of earlier protected concerted activity.”

Soliciting co-workers to work for a local competitor: On this point, Abruzzo stresses that non-competes have the potential to chill employees from soliciting their co-workers to go work for a local competitor as part of a broader course of protected concerted activity. She further explains that employees subject to non-competes “cannot act on the solicitation without breaching such agreements” even though “retaliatory action for soliciting co-workers to breach their agreements.... would likely violate” the Act.

Seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer’s workplace: Finally, Abruzzo takes the view that non-competes limit employees from the mobility needed to engage in protected activity, for example, union organizing, which “may involve obtaining work with multiple employers in a specific trade and geographic region.”

Notwithstanding its overall approach, the memorandum acknowledges that narrowly tailored non-compete clauses *may* be lawful in certain circumstances.

What Happens Next?

The GC’s Memo is not binding law, it is the latest initiative to limit the use non-competes, since the Federal Trade Commission’s (FTC) announcement in January of 2023. Both the GC and the FTC’s positions are at odds with the majority of states who enforce non-competes. Disputes regarding the enforceability of non-competes are generally resolved by courts not the NLRB. Employers should continue to review their current restrictive covenants to consider strategies for mitigating the risks in light of these developments.

Contact your Vorys attorney with questions about the impact of the GC’s memo and practical suggestions.