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NLRB General Counsel Takes a Stand on Noncompetition Agreements: Employers Beware!

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05.31.2023

In a memo issued on May 30, 2023, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo has taken the position that the offer, maintenance, and enforcement of overly broad noncompetition agreements offered to employees as a condition of employment or continued employment infringe upon employees' protected rights afforded to them under Section 7 of the National Labor Relations Act (NLRA), except in very limited circumstances. Employers currently offering, or planning to offer, noncompetition agreements to non-supervisory employees need to be on high alert as to whether the agreement's language would now violate federal labor law.

Abruzzo's rationale lies with the notion that, at a high level, an employer who commits an action to "interfere with, restrain, or coerce employees" in exercising Section 7 rights, violates Section 8(a)(1). 29 U.S.C. § 158(a)(1). Overly broad noncompetition agreements, in Abruzzo's opinion, "reasonably tend to chill employees in the exercise of Section 7 rights, when the provisions 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 the type and location of work." In other words, by offering a noncompetition agreement to an employee, an employer chills that employee's right to seek to improve their working conditions under Section 7 by restricting their ability to seek employment opportunities that would give them access to better working

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Practice Areas

Non-Compete / Trade Secrets

Non-Compete, Executive Employment and Other Agreements

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conditions.

Abruzzo details five specific types of protected activity under Section 7 that are restricted by virtue of offering, maintaining, and enforcing a noncompetition agreement:

1. Noncompetition agreements prevent employees "**from concertedly threatening to resign to demand better working conditions**." Should an employee construe their noncompetition agreement as keeping them from finding better conditions at a competitor, for example, they may be less likely to speak up at their current workplace, as those agreement prevents them from seeking similar work opportunities at another employer.
2. These agreements "**chill employees from carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions**." Abruzzo notes that although current Board law "does not unequivocally recognize" this right, "such a right follows logically from settled Board law, Section 7 principles, and the [NLRA's] purposes."
3. Noncompetition agreements "**chill employees from concertedly seeking or accepting employment with a local competitor to obtain better working conditions**."
4. Similarly, these agreements "**chill employees from soliciting their coworkers to go work for a local competitor as part of a broader course of protected concerted activity**." This seems to imply that under the reasoning set forth in this memo, a non-solicitation agreement would also violate the NLRA.
5. Finally, noncompetition agreements "**chill employees from seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace**." To this point, Abruzzo believes that noncompetition agreements would infringe on bargaining opportunities or union organizing efforts, for these types of efforts "may involve obtaining work with multiple employers in a specific trade and geographic region."

But what about an employer's legitimate business interests that a noncompetition agreement is meant to protect? To be compliant with Abruzzo's position, noncompetition agreements need to be "narrowly tailored to special circumstances justifying the infringement on employee rights." Although avoiding unfair competition from a former employee would seemingly qualify as a "special circumstance," Abruzzo definitively finds this not to be a legitimate business interest and does not support such a defense. Even further, justifying a noncompetition agreement based on the need to protect an employer's investment in special training for the employee, is not a viable defense, either.

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However, Abruzzo does agree that protecting proprietary or trade secret information is a legitimate business interest where protection of such information can be achieved through "narrowly tailored workplace agreements." (But, remember that the Abruzzo memo finds overly broad confidentiality agreements also to be violative of the NLRA.) She states that not every noncompetition agreement would "necessarily violate the NLRA," because "provisions that clearly restrict only individuals' managerial or ownership interests in competing business, or true independent-contractor relationships," would not be construed as prohibiting an employee from accepting "employment relationships subject to the [NLRA's] protection." Thus, noncompetition agreements, if narrowly tailored, may pass muster in some cases, but they would not for low- or middle-wage workers.

Please contact your servicing Laner Muchin attorney for advice on drafting a noncompetition agreement that will comply with this new guidance.