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NLRB's General Counsel: Most Noncompete Agreements Violate the National Labor Relations Act

By: Rich May, Ashley M. Berger, Frank N. Gaeta, J. Allen Holland

On May 30, 2023, Jennifer A. Abruzzo, General Counsel of the National Labor Relations Board (the "NRLB" or the "Board") issued a memorandum in which she expressed her view that non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act (the "Act") except in limited circumstances. While the Memorandum does not have the force of law, it may motivate employees to file complaints with the Board asserting that non-compete agreements they entered violate the Act. If the NLRB were to adopt Abruzzo's position, appeals would certainly ensue.

Generally, Abruzzo argues that most non-compete agreements with non-supervisory personnel are unlawful because they chill employees from exercising their rights under Section 7 of the Act, which protects employees' rights to take collective action to improve their working conditions. Her memo follows the Board's recent decision in *McLaren Macomb*, in which it held that an employer violated Act by including standard confidentiality and non-disparagement provisions in severance agreements offered to furloughed employees. For further information discussing *McLaren Macomb*, please see our prior blog discussing the decision **here**.

Abruzzo states that "non-compete provisions that could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting access to other employment opportunities chill employees from engaging in five specific types of activity protected under Section 7 of the Act." The five protected types of activity she identifies are:

1. Concerted threats to resign to demand better working conditions. According to Abruzzo, non-compete provisions discourage threats because employees would view the threats as futile given their "lack of access to other employment opportunities and because employees could reasonably fear retaliatory legal action for threatening to breach their agreements, even though legal action would likely violate the Act."

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2. Carrying out threats to resign or concertedly resigning to secure improved working conditions.
3. Concertedly seeking or accepting employment with a local competitor to obtain better working conditions.
4. Soliciting co-workers to work for a local competitor. According to Abruzzo, this activity would be chilled because a former employee could not solicit another employee without breaching the agreement and potential solicitors could reasonably fear retaliatory legal action for threatening to breach their agreements, even though legal action would likely violate the Act.
5. Seeking employment to specifically engage in protected activity with other workers at an employer's workplace. According to Abruzzo, non-competes may limit employees from engaging in the kind of mobility required to, for example, union organize.

Abruzzo does acknowledge that protecting proprietary or trade secret information is a legitimate business interest that can be addressed by narrowly tailored workplace agreements. She argues, however, that this interest is not likely implicated by low or middle wage workers, who likely lack access to this information.

Notably, Section 7 confers rights on "employees" only, and the Act excludes "any individual employed as a supervisor" from the definition of employee. The term "supervisor," under the Act, means "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

If you have specific questions about how your company's confidentiality, non-disparagement and non-compete provisions might be modified in light of *McLaren Macomb* or Ms. Abruzzo's memorandum, please contact Frank Gaeta, J. Allen Holland, or Ashley Berger.

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