Alert

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COZEN O'CONNOR

Non-Competes: The NLRB Has Entered The Chat

On May 30, 2023, National Labor Relations Board (NLRB or the Board) General Counsel Jennifer Abruzzo issued Memorandum GC 23-08 (the Memo), titled "Non-Compete Agreements that Violate the National Labor Relations Act." In the Memo, GC Abruzzo explains that "non-compete agreements between employers and employees [that] prohibit employees from accepting certain types of jobs and operating certain types of businesses after the end of their employment . . . interfere with employees' exercise of rights under Section 7 of the National Labor Relations Act (NLRA)."[1] GC Abruzzo further explained that "[e]xcept in limited circumstances, [she] believe[s] the proffer, maintenance, and enforcement of such [non-compete] agreements violate Section 8(a)(1) of the Act."

GC Abruzzo's position, as outlined in the Memo, is that "[n]on-compete provisions are overbroad" and that "[g]enerally speaking, this denial of access to employment opportunities chills employees from engaging in Section 7 activity because:

1. employees 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;
2. employees' bargaining power is undermined in the context of lockouts, strikes, and other labor disputes; and
3. an employer's former employees are unlikely to reunite at a local competitor's workplace and, thus, be unable to leverage their prior relationships—and the communication and solidarity engendered thereby—to encourage each other to exercise their rights to improve working conditions in their new workplace.

GC Abruzzo justifies Section 7's applicability to privately negotiated agreements by suggesting 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 NLRA:

1. concertedly threatening to resign to demand better working conditions;
2. carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions;
3. concertedly seeking or accepting employment with a local competitor to obtain better working conditions;
4. soliciting their co-workers to work for a local competitor as part of a broader course of protected concerted activity; and
5. seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace.

GC Abruzzo identifies very limited exceptions in her Memo. Specifically, GC Abruzzo suggests that "the proffer, maintenance, and enforcement of a non-compete provision that reasonably tends to chill employees from engaging in Section 7 activity as described above violate Section 8(a)(1) unless the provision is narrowly tailored to special circumstances justifying the infringement on employee rights." However, she thereafter clarifies that "a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense." Further, in GC Abruzzo's opinion, "business interests in retaining employees or protecting special investments in training employees are unlikely to ever justify an overbroad non-compete provision." GC Abruzzo proposes that as an alternative, employers may protect training investments by less restrictive means, for example, by offering a longevity bonus. And to "protect proprietary or trade secret information," employers can use "narrowly tailored workplace

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agreements."

As a seemingly general rule, GC Abruzzo states that it is unlikely that a non-compete provision would be considered reasonable where imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectable interests, or in states where non-compete provisions are unenforceable. That said, GC Abruzzo also states that "not all non-compete agreements necessarily violate the NLRA," such as when provisions clearly restrict only individuals' managerial or ownership interests in a competing business or true independent-contractor relationships. Moreover, GC Abruzzo qualifies that there may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances.

On Friday, June 2, 2023, just three days after she issued the Memo, Cozen O'Connor's Mike Schmidt interviewed GC Abruzzo about the new Memo on Cozen O'Connor's *Employment Law Now* podcast. During the interview, GC Abruzzo clarified that, although the agency has no independent investigatory authority, "the rights of employees and the rights of the public cannot be traded away in a matter that chills concerted activity." GC Abruzzo explained that the Board acts in a public capacity for public rights, and those rights cannot be privately contracted away. Further, GC Abruzzo explained that an employee's ability to seek and obtain higher wages from a competitor directly relates to working conditions. When Mike Schmidt asked GC Abruzzo whether the context of a certain non-compete agreement mattered, she explained that "they will have to take every case as it comes and the facts of each situation." She also stated that "in general, when dealing with low-wage and middle-wage workers that are required to sign non-competes, the Board will look at it objectively and make a determination if their Section 7 rights are interfered with." GC Abruzzo also explained that while "supervisors are not protected by [the NLRA], . . . the Act would protect a supervisor who is refusing to violate the NLRA on behalf of their employer, and . . . .[the Board] will take every case as it comes."

The Memo instructs Regions to "seek make-whole relief 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." Further, in continuing with a multi-disciplinary approach, GC Abbruzzo instructed the Regions in her Memo to "alert the Division of Operations-Management about cases involving non-compete agreements that could potentially violate laws enforced by the FTC and the Antitrust Division for possible referral to those agencies."

While the newly-issued Memo does not carry the force of the law, GC Abruzzo's aggressive action – in the wake of the Federal Trade Commission's proposed rule to ban non-compete clauses – makes it clear that a pattern has emerged within the Federal government concerning administrative agencies seeking to limit the use and enforceability of non-compete agreements, particularly for low-wage and middle-wage workers. An important contextual point is that GC Abruzzo's Memo merely represents her opinion, and it is an opinion that largely conflicts with the current state of the law. Indeed, in response to the Memo, U.S. Chamber of Commerce Executive Vice President and Chief Policy Officer Neil Bradley issued the following statement:

> Whatever one thinks about the merits of noncompete agreements, every American should be disturbed by the idea that one government lawyer can simply decide that noncompetes are unlawful and, therefore, with the support of three commissioners, declare illegal an employment practice that has legally existed for over 200 years. The U.S. Chamber of Commerce will utilize all available tools to fight this extreme and blatantly unlawful overreach.[2]

Nonetheless, employers should view GC Abruzzo's Memo as a warning shot, given that the Memo will invariably be followed by an uptick in NLRB complaints. In light of this Memo and the larger trend at play, employers should review their non-compete agreements with experienced employment counsel, regardless of whether their workforce is unionized, to assess the potential impacts of this legal development and to limit any inherent risks.

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[1] Section 7 of the NLRA protects employees' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or

protection."

[2] US Chamber of Commerce, US Chamber of Commerce Opposes NLRB General Counsel Memo on Noncompetes (May 31, 2023), https://www.uschamber.com/employment-law/u-s-chamber-opposes-nlrb-general-counsel-memo-on-noncompetes.