Updates
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NLRB General Counsel Opines Noncompete Agreements May Violate the National Labor Relations Act

The National Labor Relations Board (NLRB or the Board) General Counsel Jennifer A. Abruzzo issued a memorandum on May 30, 2023, opining that noncompete agreements contained in employment agreements and severance agreements violate the National Labor Relations Act (NLRA) except in limited circumstances.

The General Counsel's Rationale for Concluding Noncompetes Violate the NLRA

Section 7 of the NLRA protects employees' rights to self-organization, collective bargaining, and other concerted activities. Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. According to the general counsel, except in limited circumstances, offering, maintaining, or enforcing a noncompete agreement violates Section 8(a)(1) of the NLRA by chilling employees in the exercise of Section 7 rights. This is because:

- "Employees know they will have greater difficulty replacing their lost income [due to their noncompete] if they are discharged for exercising their statutory rights to organize and act together to improve working conditions."
- Employees' bargaining power is undermined in the context of lockouts, strikes, and other labor disputes.
- Former employees are unlikely to reunite at a competitor's workplace and thus cannot leverage their prior relationships to improve working conditions at the new workplace.

The general counsel identifies five specific types of activity protected under Section 7 that she contends are chilled by noncompetes:

1. **Threatening to resign** as a tactic to secure better working conditions because such threats would be futile given the known lack of employment opportunities for employees bound by a noncompete.
2. **Carrying out concerted threats to resign or concertedly resigning** to secure better working conditions because although the "Board law does not unequivocally recognize a Section 7 right to concertedly resign," the general counsel contends such a right should exist based on settled Board law, Section 7 principles, the NLRA's purposes, the Thirteenth Amendment to the U.S. Constitution, and "other federal laws" (citing the Federal Trade Commission's (FTC's) proposed rule banning noncompetes).
3. **Concertedly seeking or accepting employment with a local competitor** to obtain better working conditions, including a "lone employee's acceptance of a job as a logical outgrowth of earlier protected concerted activity" that led to the employee's discharge.
4. **Soliciting co-workers to work for a local competitor** because employees bound by noncompetes cannot act on the solicitations and because the solicitor might be subject to legal action for soliciting co-workers to breach their agreements.
5. **Seeking employment for the specific reason to engage in protected activity (a practice known as "salting")**, such as for union organizing purposes, which may involve obtaining work with multiple employers in a specific trade and geographic region.

The General Counsel Asserts Some Agreements Would Not Violate the NLRA

Although most noncompete agreements with workers who enjoy Section 7 rights would likely run afoul of the NLRA under the general counsel's opinion, she identifies narrow circumstances where such agreements might be permissible.

- **Agreements that are narrowly tailored to special circumstances** justifying the infringement on employee rights. The general counsel suggests that noncompetes narrowly tailored to "restraining the employee from appropriating valuable trade secret information and customer relationships to which the employee had access in the course of his employment," or noncompetes in circumstances where a former employee would otherwise have "an unfair advantage in future competition with the employer" might not violate the NLRA.

  However, according to the general counsel, an employer's desire to avoid competition from a former employee, to retain employees, or to protect investments in training employees are not circumstances justifying a noncompete. Similarly, noncompetes with "low-wage or middle-wage workers who lack access to trade secrets or other protectible interests" are not justifiable. For example, an agreement that would prohibit a low-wage worker, for two years, from working for any employer in the entire state engaged in the same business as their former employer is unreasonable. Additionally, noncompetes in states that ban noncompetes are also likely not justifiable.
- **Agreements that clearly restrict only an individual's managerial or ownership interests in a competing business**, without interfering with employees' Section 7 rights.
- **Agreements prohibiting independent-contractor relationships**, except in industries where employees are commonly misclassified as independent contractors and the noncompete agreement would effectively prohibit employment relationships even though it nominally only prohibits independent contractor relationships.
- **Longevity bonuses** to protect employer training investments.

Who Is Affected?

The general counsel's opinion, if adopted by the Board, would affect virtually all private sector employers (not just those with unionized workforces) but would not control agreements with every type of employee employed by a covered employer.

The guidance only concerns employers covered by the NLRA. With a few specific exceptions (such as agricultural employers, airlines, and railroads), in general, the NLRA applies to all nonretail businesses that have at least $50,000 in direct or indirect inflows or outflows and all retail businesses with gross annual revenues of at least $500,000. It covers all such employers, not just ones with unionized workforces.

The guidance would only affect noncompete agreements with nonsupervisory employees. The guidance likely does not apply to agreements with supervisors, independent contractors, or others who have no Section 7 rights.

Key Takeaways for Employers

Employers should consult with experienced counsel to understand the memorandum's potential impact on their business. Although the Board has not officially adopted the general counsel's guidance, and civil courts are not technically bound by it, the general counsel directed regional offices to apply her guidance to cases involving noncompete provisions and to seek "make-whole" relief for employees who can demonstrate lost employment opportunities for other employment, even absent any attempt by the employer to enforce the noncompete.

Moreover, employers should take note that noncompetes are subject to increased federal and state regulation, and employers should be mindful when offering or attempting to enforce noncompetes or similar restrictive covenants. The FTC's proposed rule that would ban nearly all noncompete agreements is cited as supporting authority in the general counsel's memorandum. The general counsel also references memoranda of understanding the NLRB entered in July 2022 with the FTC and the U.S. Department of Justice's Antitrust Division, which address the perceived anticompetitive effects of noncompete agreements. Employers should continue to monitor developments in this area and adjust accordingly.

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