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The NLRB's General Counsel Targets Employee Non-Competes

On May 30, 2023, General Counsel for the National Labor Relations Board ("NLRB") issued Memorandum GC 23-08 ("Memo 23-08"), asserting that many employee non-competes violate the National Labor Relations Act ("NLRA") because they interfere with employees' exercise of their rights under the NLRA. The General Counsel sets forth a proposed legal standard under which an employee non-compete will be found to violate the NLRA if it reasonably tends to "chill" employees' exercise of their Section 7 rights unless it is "narrowly tailored" to the special circumstances that justify infringing on employee rights. Because the NLRA protects most employees regardless of whether the employer's workforce is unionized or not, all employers should be mindful of the legal standard proposed by the NLRB's General Counsel.[1]

The General Counsel's proposed legal standard follows the reasoning in the NLRB's recent decision in *McLaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023). In *McLaren Macomb*, the NLRB ruled that overbroad confidentiality and non-disclosure provisions in severance agreements for certain employees—and even the mere offering of severance agreements with such overbroad provisions—violated the NLRA because such provisions may chill employees in the exercise of their NLRA rights.

The NLRB General Counsel's Proposed Legal Standard

The NLRB's General Counsel argues in Memo 23-08 that "the proffer, maintenance, and enforcement of" non-compete agreements[2] generally violate Sections 7 and 8 of the NLRA. As explained in our prior Legal Alert, Section 7 of the NLRA guarantees employees "the 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," as well as the right "to refrain from any or all such activities." Under Section 8(a)(1), employers may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

[1] The NLRA applies to most private sector employers, including manufacturers, retailers, private universities and healthcare facilities. The NLRA does not apply to federal, state or local governments; employers who employ only agricultural workers; and railroad and airline employers covered by the Railway Labor Act.

[2] In the Memo, the General Counsel generally describes non-competes as 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."

The General Counsel believes non-compete provisions chill employees' exercise of protected activities under the NLRA "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 type and location of work."[3] By way of illustration, the General Counsel sets forth five specific ways that non-compete agreements purportedly interfere with Section 7 rights:

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 work for a local competitor as part of a broader course of protected concerted activity.
5. Seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace.

Applicability to the Solicitation of Co-Workers

The fourth example listed above specifically mentions the solicitation of co-workers. Although Memo 23-08 does not directly address employee non-solicitation provisions, the General Counsel specifically references the "broader course of protected concerted activity" under the NLRA, including soliciting fellow employees. This indicates that non-solicitation provisions banning the solicitation of other employees may be next on the NLRB's chopping block.

The "Special Circumstances" Defense (or Lack Thereof)

While the NLRB's General Counsel opines that "the proffer, maintenance, and enforcement of" non-compete provisions chill employees' exercise of protected activities under the NLRA, she left the door open for employers to enforce such provisions under "special circumstances." Specifically, the General Counsel notes that "unless the [non-compete] provision is narrowly tailored to special circumstances justifying the infringement on employee rights," "the proffer, maintenance, and enforcement of" such provisions violate the five above-referenced protected activities.

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[3] While the General Counsel concedes the NLRA does not specifically protect employees' right to engage in these concerted resignations, Memo 23-08 reasons that "such a right follows logically from settled [NLRB] law, Section 7 principles, and the [NLRA]'s purposes."

Rather than defining such "special circumstances," the General Counsel sets forth two business interests that she declined to recognize as such. First, the General Counsel declines to recognize the business interest to generally "avoid competition from a former employee" as a legitimate interest supporting a special circumstances defense.[4] Second, the General Counsel opines that the business interest of retaining employees or protecting special investments in training employees would be "unlikely to ever justify an overbroad non-compete provision."

The General Counsel, however, explains that employers may protect their proprietary and trade secret information through "narrowly tailored workplace agreements that protect those interests." The reference to "narrowly tailored workplace agreements" without mention of the use of a non-competition agreement to protect such information is likely an indication the General Counsel believes a non-compete agreement would be more than what is necessary to protect an employer's proprietary information. This is because a confidentiality or non-disclosure agreement would likely be sufficiently narrow to protect such information without a non-compete agreement.

Additionally, the General Counsel states that some non-compete provisions may not violate the NLRA if they restrict "only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationships." The General Counsel most likely sets forth this proposition because the NLRA's definition of "employee," as used in Sections 7 and 8 of the NLRA, excludes "any individual employed as a supervisor"—among a few others—from its protections.[5]

Although the General Counsel indicates some non-compete provisions may comport with the NLRA, she also states that employers would be "unlikely" to justify imposing such provisions upon "low-wage and middle-wage workers" without access to protectable business interests. The General Counsel's proposed heightened standard of justification also would apply in situations where state law prohibits the use of non-compete provisions.

The General Counsel Calls on all NLRB Regional Directors

The General Counsel urges all NLRB Regional Directors to submit to the NLRB's Division of Advice any cases whereby employment agreements with non-compete provisions arguably have a chilling effect on employees' rights guaranteed under the NLRA. Additionally, all NLRB Regional Directors are instructed to submit to the NLRB's Division of Advice "arguably meritorious special circumstances defenses."

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[4] However, by citing to the Restatement (Second) of Contracts to support her conclusion that the desire to prohibit ordinary competition is not a special circumstance justifying a non-competition agreement, the General Counsel implicitly acknowledged that "post-employment restraint on competition 'must usually be justified on the ground that the employer has a legitimate interest in restraining the employee from appropriating valuable trade information and customer relationships to which he has had access in the course of his employment.'" *See* Restatement (Second) of Contracts § 188 cmt. b (1981).

[5] For purposes of the NLRA, a "supervisor" is "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." Like "supervisors," "managerial employees" are not protected by Section 7 of the NLRA. "Managerial employees" are those "who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy." Therefore, the General Counsel's proposed standard may not apply to executives, supervisors, managerial employees and independent contractors because they are outside the definition of "employees" covered by the NLRA.

The General Counsel further instructs all NLRB Regional Directors to seek make-whole relief for employees who can demonstrate lost employment opportunities due to an employer's "unlawful maintenance of an overbroad non-compete provision," even in situations where employers do not attempt to enforce such provisions. In other words, if an employee loses out on a job prospect due to their employer merely maintaining an overbroad non-compete provision, "even absent additional conduct by the employer to enforce the provision," then such employees would be entitled to make-whole relief.

If the NLRB elects to adopt the General Counsel's position on non-compete provisions, it would likely be challenged to the appropriate federal court of competent jurisdiction. In fact, the U.S. Chamber of Commerce has already publicly opposed Memo 23-08, calling the General Counsel's position an "extreme and blatantly unlawful overreach." The U.S. Chamber of Commerce's Vice President of Labor Policy referred to the General Counsel's proposed standard as "speculative at best" and "hardly a sound justification for banning a practice that has been legal since the founding of the Republic."

Information Sharing Among Federal Agencies

Finally, the General Counsel foreshadows the possibility of increased information sharing among the NLRB, the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ"). The General Counsel explains in a footnote that the NLRB entered into an agreement last year with the FTC and the DOJ's Antitrust Division to foster an "interagency approach to restrictions on the exercise of employee rights, including limits to workers' job mobility." Accordingly, Memo 23-08 implores all NLRB Regional Directors to alert the NLRB's Division of Operations-Management of cases concerning non-compete provisions "that could potentially violate laws enforced by the FTC and the [DOJ's] Antitrust Division for possible referral to those agencies."

In our prior Legal Alert concerning the FTC's attack on employee non-competes, we explained that the FTC recently published a Notice of Proposed Rulemaking (the "Proposed Rule"), which would preclude employers from entering into non-compete agreements with employees. The Proposed Rule would apply not only to employees, but also to independent contractors, externs, interns, volunteers, apprentices and sole proprietors offering services to the company's clients or customers. Given the FTC's shared stance on non-compete provisions, it is not surprising that the General Counsel is calling for more information sharing between the two agencies.

Employer Takeaways

While Memo 23-08 represents the General Counsel's position on non-compete provisions, it is not legally binding—yet. Any changes to NLRA precedent must first be approved by the NLRB; therefore, the NLRB would need to adopt the General Counsel's position set forth in Memo 23-08 for the Memo to become legally binding. Given the NLRB's recent ruling in *McLaren Macomb*, the NLRB's adoption of the General Counsel's position on non-compete provisions is likely.

As for now, Memo 23-08 indicates that employers should consider using non-compete agreements only for employees satisfying the NLRA's definition of "supervisor" or "managerial employees." For non-supervisor and non-managerial employees, employers should carefully scrutinize the use of non-compete agreements. First, employers should ensure that one or more legally protected interest exists to warrant their use, and that such agreements are narrowly tailored, such that the restrictions imposed on the employee are limited only to those that are necessary to protect those interests. Where customer goodwill can be protected with a narrowly drafted customer non-solicitation provision, and proprietary information or trade secrets can be adequately protected with a confidentiality or non-disclosure agreement, employers should consider utilizing those in lieu of a non-competition agreement. Finally, employers may want to wholly avoid non-compete agreements for low wage, non-managerial employees.

We will closely follow the NRLB's handling of Memo 23-08, as well as other state and federal developments involving non-competition agreements. In the meantime, if you have questions about the enforceability of your organization's non-compete agreements, including whether your policies, practices and employment agreements are compliant with state and federal law, or how to properly revise or draft a non-compete agreement in your jurisdiction, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.KutakRock.com.