

NLRB Has “No Chill” When it Comes to Non-Competes

Article

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On May 30, 2023, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued Memorandum GC 23-08 stating “[non-competes] interfere with employees’ exercise of rights under Section 7 of the National Labor Relations Act (the Act or NLRA). Except in limited circumstances, I believe the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the Act.”

Abruzzo bases her opinion on the following justifications:

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

Does this apply to all employees?

It is important to remember that the NLRA does not apply to supervisors. Accordingly, Abruzzo’s position on non-competes does not affect “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.”

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Rather, Abruzzo indicated in her memo that the guidance is focused on low-wage and middle-wage workers, and employees who lack access to trade secrets or other protectible interests.

What about other laws regarding non-competes?

Clearly Abruzzo has no chill, as the U.S. Federal Trade Commission (FTC), which enforces antitrust law, proposed a rule in January 2023 that would ban companies from requiring workers to sign non-compete agreements. According to *Bloomberg Law*, the FTC received over 27,000 comments in response to the proposed rule, which remains pending and likely won't be voted on by the FTC until April 2024.

Additionally, California, Oklahoma and North Dakota have banned noncompete agreements, and about a dozen other states have passed laws limiting their use. Florida law permits non-competes pursuant to Section 542.335, *Florida Statutes*.

Are there exceptions?

Abruzzo did opine that there are times when noncompete agreements may not run afoul of the NLRA. Specifically, when a noncompete agreement is “narrowly tailored to address special circumstances justifying the infringement on employee rights.” In other words, if an employer has a legitimate business interest in enforcing a noncompete agreement, i.e. an employee has access to trade secrets or proprietary information, it appears unlikely that the NLRB would take issue with the restrictive covenant.

Given that Florida's non-compete statute already requires an employer to plead and prove one or more legitimate business interests justifying the restrictive covenant and that the restrictive covenant be narrowly tailored to protect such interest(s), the NLRB's memo may be more bark than bite, at least in Florida.

What should employers do?

If you have noncompete agreements in effect for non-supervisory, low/middle wage employees, we recommend that you work closely with counsel to determine whether these non-competes place your company at risk of an unfair labor practice complaint under the NLRA.

While the Abruzzo's memo is not binding law, it is the NLRB's clear position that, “the burden is going to be on you, the employer, to identify sufficiently narrowly tailored special circumstances for an individual employee to justify these restrictions.”

Lowndes attorneys are available and prepared to provide counsel to protect your company's interests.