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NLRB General Counsel Says Most Non-Competes are Illegal Under Labor Law

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According to a memorandum issued on May 30, 2023 by National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo (the "Memorandum"), most non-compete agreements with employees violate the National Labor Relations Act (the "NLRA"). The Memorandum reflects the most recent effort by federal administrative agencies to curb the use of restrictive covenants in the employment context. These efforts include the Federal Trade Commission's proposed wholesale ban on non-compete agreements and an earlier memorandum by Ms. Abruzzo regarding the use of certain provisions in severance agreements in the wake of the NLRB's decision in *McLaren Macomb*, 372 NLRB No. 58 (2023).

In an effort to tie the use of non-competes to the NLRB's mission, the Memorandum argues that the proffer, maintenance, and enforcement of non-competes violates Section 8(a)(1) of the NLRA, which makes it an unfair labor practice for employers to interfere with, restrain, or coerce employees in exercising their Section 7 rights. Such rights encompass a broad range of conduct, including "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." Importantly, the NLRB takes the position that all non-supervisory employees retain Section 7 rights regardless of whether they are part of a unionized workforce.

The Memorandum contends that non-compete agreements have a "chilling effect" on Section 7 rights unless they are narrowly tailored to "special circumstances" justifying the infringement on employee rights. Specifically, the Memorandum contends that employees subject to non-competes may be chilled from: (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 go 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."

Notably, the Memorandum does not define what constitutes "special circumstances" that would permit the use of a non-compete. However, the Memorandum affirmatively rebuts certain anticipated arguments by employers, including that: (1) employees waived their Section 7 rights by signing an agreement; (2) avoiding competition by a former employee alone constitutes "special circumstances"; and (3) retaining employees and protecting investments in employee training constitute "special circumstances." The Memorandum also cautions that an employer's justification is unlikely to be reasonable when an overbroad non-compete is imposed on a low- to mid-wage worker who has no access to trade secrets or other protectable interests, or in states where non-compete provisions are unenforceable under existing law.

The Memorandum identifies certain limited circumstances where non-compete agreements would not violate the NLRA, including where an employer has "legitimate business interest[s] in protecting proprietary or trade secret information [that] can be addressed by narrowly tailored workplace agreements that protect those interests." Moreover, non-competes may be permissible when limited to "restrict only individuals' managerial or ownership interest in a competing business, or true independent-contractor relationships."

While the language of the Memorandum is broad, the Memorandum appears primarily focused on the use of overbroad non-competes—such as those that prohibit work for a competitor in any capacity—and the imposition of non-competes on low-wage workers who lack access to confidential information, trade secrets and protectable relationships of the business.

It is also important to note that General Counsel memoranda do not have the force of law. It remains unclear whether the NLRB will adopt the General Counsel's proposal on non-competes in a future decision and, if so, what legal challenges will follow. To that end, employers should consider narrowing the scope of their non-competes and limiting their use to situations where the employer has a protectable interest, as described above.

Should you have any questions, please contact **Alex C. Weinstein** at aweinstein@vedderprice.com, **Peyton C. Demith** at pdemith@vedderprice.com or the Vedder Price lawyer(s) with whom you normally work.