



Compliance Alert

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NLRB States Most Non-Competes Are Illegal

On May 30, 2023, General Counsel for the National Labor Relations Board, Jennifer Abruzzo, released GC Memorandum 23-08 stating most non-compete provisions in employment agreements violate Section 7 of the National Labor Relations Act and are therefore illegal.

The memo declares that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under Section 7 of the National Labor Relations Act, which protects employees' rights to take collective action to improve their working conditions. Specifically, the memo contends that non-competition agreements hinder employees' ability to: 1. concertedly threaten to resign to secure better working conditions; 2. concertedly seek or accept employment with a local competitor to obtain better working conditions; 3. solicit their co-workers to go work for a local competitor as part of a broader course of protected concerted activity; and 4. seek employment, at least in part, to specifically engage in protected activity, including union organizing, with other workers at an employer's workplace.

The memo clarifies that narrowly tailored non-compete agreements may still be lawful. For example, in cases wherein the provisions clearly restrict only individuals' managerial or ownership interests in a competing business, in true independent-contractor relationships, and in special circumstances involving trade secret, a narrowly tailored non-compete agreement may be justified.

While this memo is not binding on employers, it sheds light on how the NLRB may pursue unfair labor practice cases involving non-competition agreements. The memo noted that the NLRB is committed to an interagency approach to restrictions on the exercise of employee rights, including sharing information and referring cases to other agencies. General Counsel Abruzzo also asks that NLRB regional offices submit cases involving "arguably unlawful" non-compete provisions in an attempt to seek "make-whole relief" for affected employees.



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The NLRB memo represents the latest in state and federal actions to curb non-competition agreements. The FTC recently proposed regulation banning non-competition agreements. In 2022, Colorado passed its own non-competition law, the Restrictive Employment Agreements Act (HB 22-1317), stating that non-compete agreements are void unless they fit specific qualifying situations. Employers attempting to enforce invalid non-compete agreements can be subject to fines, penalties, damages, injunctions, and attorney fees. Many other states have recently passed or proposed legislation banning or restricting the use and scope of non-competition agreements.

Clients should carefully review their own employment contracts and any non-competition provisions and may wish to consider legal options beyond non-competition agreements to protect their legitimate business interests. For further information, contact Dara Keller of Messner Reeves at dkeller@messner.com.