

JUNE 8, 2023 | TRADITIONAL LABOR RELATIONS

NLRB Throws Its Hat Into the Non-Compete Provision Conversation

By [Samuel S. Rose](#)

On May 30, 2023, Jennifer Abruzzo, General Counsel at the National Labor Relations Board (NLRB), issued [Memorandum GC 23-08](#) regarding Non-Compete Agreements. While the guidance memo is not law, it provides employers with context for the NLRB's enforcement position and future policy decisions. This is the latest development on the issue of non-competes, with the [FTC already considering a rule](#) that would essentially prevent employers from entering into non-compete agreements with employees. 

What Does the Memo Say?

The memo focuses on Section 7 rights, which protect employees' "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." It notes that it is an unfair labor practice in violation of Section 8(a)(1) for an employer to interfere with or restrain employees from exercising their Section 7 rights.

Abruzzo writes that non-compete provisions are overboard in that "they reasonably tend to chill employees in the exercise of Section 7 rights, 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." The memo goes on to identify five types of protected activity that are chilled by non-compete provisions:

1. Concerted threats to resign to demand better working conditions.
2. Carrying out concerted threats to resign to demand better working conditions.
3. Concerted efforts to seek or accept employment with a local competitor for better working conditions.
4. Soliciting co-workers to work for a local competitor.
5. Seeking employment to specifically engage in protected activity with other workers at an employer's workplace.

In Abruzzo's view, a non-compete provision that chills these activities violates the NLRA unless it is "narrowly tailored to special circumstances." She goes on to point out that "a desire to avoid competition from a former

employee is not a legitimate business interest that could support a special circumstance defense." Specifically, Abruzzo notes that it is unlikely that a non-compete provision would be reasonable when imposed on "low-wage or middle-wage workers who lack access to trade secrets...or in states where non-compete provisions are unenforceable."

What Should Employers Be Doing?

In jurisdictions where non-compete provisions have been deemed unenforceable, this memo does little to change the analysis. However, in jurisdictions where non-compete provisions have not been deemed unenforceable, employers should review the language in their provisions to ensure that they are not drafted in a way that could be interpreted to violate employee rights under the NLRA. All employers should continue to monitor developments in the FTC rulemaking process, which is expected to continue into 2024.