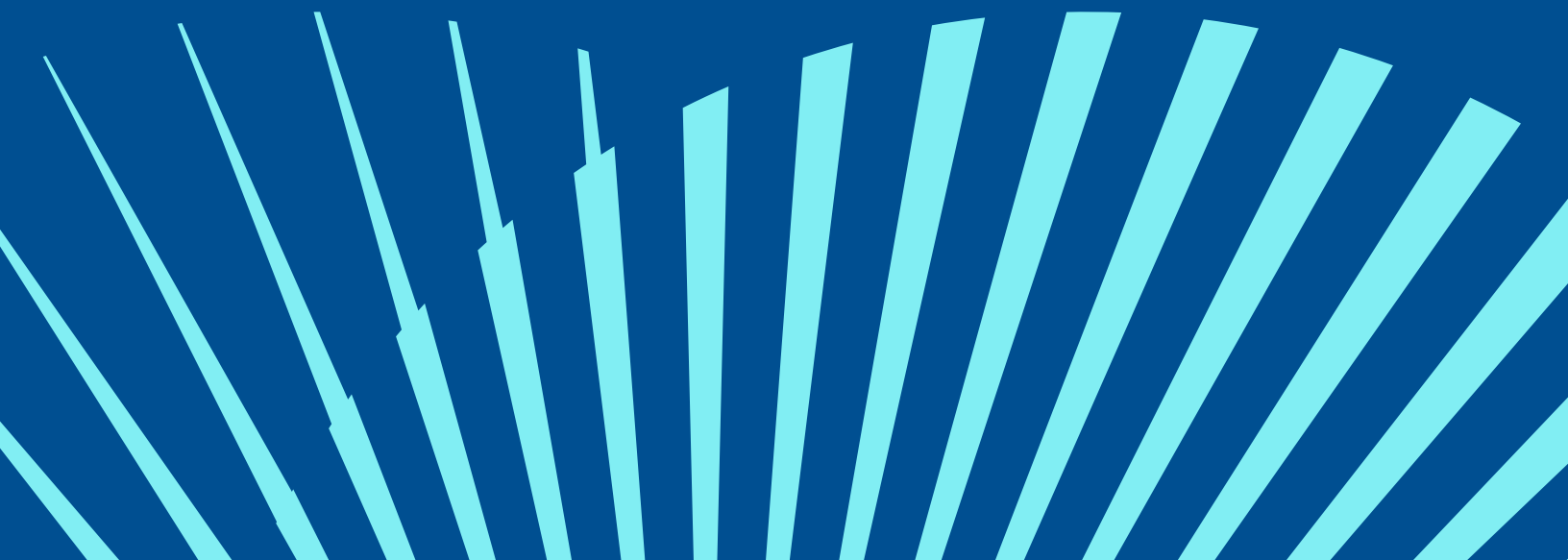
U.S. Chamber of Commerce

Caveat Emptor: The NLRB General Counsel's Misguided and Unsupported Attempt to Outlaw Non-Compete Agreements



Background

On May 30, 2023, the National Labor Relations Board's (NLRB) General Counsel (GC), Jennifer Abruzzo, issued Memorandum 23-08, titled "Non-Compete Agreements that Violate the National Labor Relations Act (NLRA)."[1] In the memorandum, she urges the Board to make new law declaring that the proffer, maintenance, and enforcement of employee non-compete agreements by employers is unlawful under the NLRA. The GC's unprecedented foray into regulating non-competes follows the Federal Trade Commission's recent controversial proposal to ban virtually all non-compete agreements in the workplace.

While the memorandum is dressed up to look like a compelling legal analysis, it rests on highly questionable legal grounds, and the myriad cases it cites in support of the proposal have little or nothing to do with non-compete agreements, or their lawfulness under the NLRA. As such, it is, charitably, a jurisprudential bait-and-switch.

By way of brief background, Section 7 of the NLRA provides both unionized and non-unionized employees with 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." An employer violates Section 8(a)(1) of the Act if it interferes with, restrains or coerces employees in the exercise of these Section 7 rights.

Abruzzo states in her memo that, with very limited exceptions, non-competes tend to "chill" employees in the exercise of Section 7 rights under the NLRA and that such agreements therefore violate Section 8(a)(1) of the Act. She lists five specific types of activity protected under Section 7 that she feels at risk:

- Concertedly threatening to resign to demand better working conditions.
- Carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions.
- Concertedly seeking or accepting employment with a local competitor to obtain better working conditions.
- Soliciting their co-workers to work for a local competitor as part of a broader course of protected concerted activity.
- Seeking employment, at least in part, to specifically engage in protected activity with other workers at a employer's workplace.

Abruzzo's six-page memorandum is heavily footnoted and cites more than a dozen cases in support of her proposition that, by and large, non-compete agreements are per se violative of the Act. There's only one problem—most of the case law upon which she relies has nothing whatsoever to do with non-compete agreements, and none of the few that arguably do address the lawfulness of such agreements under the NLRA.

[1] General Counsel Memorandum GC 23-08, "Non-Compete Agreements that Violate the National Labor Relations Act" (May 30, 2023) (hereinafter, "GC Memorandum").

Case in point: The GC relies heavily on the Board's 2016 decision in Minteq International, Inc.[2] While that case at least nominally deals with the topic of employee non-compete agreements, it in no way addressed whether such agreements in and of themselves violate the NLRA. Rather, it simply addressed the lawfulness of a unionized employer imposing non-compete agreements on its employees without bargaining with the union. Nowhere in the Board's decision is it even suggested that the agreements were per se violative of the Act. Indeed, the Minteq Board (and the case law upon which the decision relies) in numerous instances comes merely to the conclusion that where a union represents employees, non-compete agreements are a mandatory subject of bargaining, and thus, unsurprisingly, the unilateral imposition of such an agreement without bargaining violates Sections 8(a)(1) and (a)(5) of the Act. No part of the decision supports the proposition that non-compete agreements chill the exercise of Section 7 rights by denying employees "the ability to quit or change jobs."[3] In fact, by discussing non-competes and making no suggestion that they are unlawful, Minteq would seem to undermine the GC's position.

Similarly, the memorandum also notes that while current Board law does not "unequivocally recognize" the right of employees to concertedly resign from employment, such a right naturally flows from Board precedent, "Section 7 principles" and the U.S. Constitution. The purported "support" for the proposition that employees may resign en masse? Pollock v. Williams – a 1940s decision of the U.S. Supreme Court related to debt bondage, which reached the uncontroversial decision that forced labor violates the 13th Amendment's abolition of slavery. To say that this case provides no support for the argument that non-competes violate the NLRA is an understatement.

Finally, the GC cites a 1979 case, Liberty Mutual, in which an employee "declared war on management" for the proposition that, under certain circumstances, the Board may award attorneys' fees incurred in successfully defending a lawsuit alleging violation of a non-competition agreement as part of a make -whole remedy. Notably, the Board's decision turned not on any question of the enforceability of the non-compete agreement in question, but rather on the fact that the company allegedly terminated an insurance salesman's employment in violation of the NLRA, thus "forcing" him to compete against his former employer in violation of a non-competition agreement, and then to incur legal expenses in (unsuccessfully) defending a lawsuit by the company to enjoin him from continuing to compete. The Board determined that his initial discharge was unlawful under the NLRA, and thus he was entitled to recover the legal expenses he incurred defending the suit.

On appeal, the U.S. Court of Appeals for the First Circuit had none of it. Instead, it concluded that the employee was "attempting to resolve personal grievances" while also attempting to organize the company's salesmen, and had declared "war" on his employer, during which he was disruptive, missed appointments, and refused to meet with superiors as requested. On these facts, the Court of Appeals held that his termination for "insubordinate" behavior did not violate the NLRA and set aside the Board's decision.

[2] 364 NLRB 721 (2016), enforced 855 F.3d 329 (D.C. Cir. 2017).
[3] GC Memorandum at 2.

In her memo, the GC generously notes that enforcement of that case was "denied on other grounds" – quite an understatement, especially as, in the view of a concurring judge reversing the case, "the Board seems unable to recognize that as a matter of business judgment there can be only one course open to management when an employee persists in giving it the finger."[4] Put simply, this case provides no justification for banning non-competes, and even if it did, it was struck down by a federal court giving it no precedential value. Why the GC felt that citing this case strengthened the legal justification for her memo is unclear.

The vast remainder of the of NLRB case law cited in the GC's memorandum has nothing to do with non-competes agreements at all, but rather simply catalogs examples of protected, concerted activity. Indeed, the only cited case that arguably addresses the question of when Section 7 rights are improperly chilled is the Board's recent decision in McLaren Macomb.[5] In that case, the Board took the position that an employer's mere offering of a severance agreement that contained facially neutral, but purportedly over-broad, confidentiality and non-disparagement clauses violated the NLRA to the extent they may dissuade or hinder an employee's ability to engage in certain protected activities. Setting aside the question of whether that decision is correctly decided (it is currently on appeal in the Sixth Circuit, where its fate is uncertain), it takes a herculean leap of logic to bootstrap its limited holding into a nationwide ban on non-competes.

[4] Liberty Mutual Insurance Co. v. NLRB, 592 F.2d 595, 606 (1st Cir. 1979) (Aldrich, J. concurring).
[5] 327 NLRB No. 58 (2023).

Uncertain Fate

Setting aside its at-best attenuated legal support, the GC's proposal defies common sense and the realities of the workplace. She takes the position that non-compete agreements "chill" Section 7 rights insofar as they could be "reasonably construed" to infringe upon an employee's ability to quit or change jobs, because he or she is limited in what new job the employee could take. While this argument may have a superficial appeal, it in fact proves too much. Assume an individual works for a model employer that pays its employees over-market rates, and offers comprehensive health and other insurance, to attract and maintain the highest quality talent. Workers would likely feel limited in taking a new job, insofar as they are unlikely to find better working conditions. Applying the GC's logic, does this mean that generous wages and a robust benefit package violate the NLRA because they "chill" an employee's interest in finding new work?

It is also unclear how the GC's radical approach—if adopted by the Board—will fare in the courts. As the Supreme Court recently concluded: "[T]he want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."[6] Put more simply, courts are highly skeptical when an agency adopts a novel and far-reaching position that dramatically expands the scope of its regulatory reach where it has never asserted such a position previously.

In this regard, the GC's memorandum is Exhibit A—non-compete agreements have been in existence for literally hundreds of years, dating back to English common law and imported to American jurisprudence. Passed in 1938, the NLRA is nearing its 90th birthday. It at best strains credulity to suggest that for almost a century employers have routinely entered into contractual non-competition contracts that facially violate federal labor law—but the Board has only just now gotten around to discovering that and further discovering that all along it had the power to ban such agreements.

The same judicial skepticism holds true "when an agency seeks to 'intrud[e] into an area that is the particular domain of state law.'"[7] It is beyond dispute that the regulation of non-compete agreements has for hundreds of years been the exclusive province of state law and state courts (or federal courts applying state law). Forty-six out of 50 states allow employers to enter into some form of agreement to not compete post-employment with workers, subject to varying limitations (such as the income level of the worker) and of course bounded by the requirements of reasonableness as to duration and scope. It is difficult to imagine a federal appeals court allowing a board of unelected federal technocrats to completely undo literally thousands of years of state court jurisprudence and legislative prerogative and grant a new power to an agency that never, under Democrats or Republicans, assumed it had such power.

[6] West Virginia, 142 S. Ct. at 2,610, citing FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941).
[7] Id. at 2,621 (Gorsuch, J. concurring) citing Alabama Ass'n of Realtors, 141 S. Ct. at 2,489.

Conclusion

In her two-plus-year tenure, it is fair to say that General Counsel Abruzzo has found in equal measure supporters and detractors. But, to date, even those who may vehemently disagree with the substance of her arguments or positions would say she has been forthright and transparent in letting stakeholders know her views on federal labor law, what she thinks needs to change, her policy priorities, and her plans for advancing her agenda before the Board. In that light, her attempt to convince the Board to outlaw non-compete agreements based on scant legal support and a highly selective reading of case law is puzzling at best and troubling at worst.

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