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UNDER-REASONED OVERREACH: THE NLRB GENERAL COUNSEL'S OPINION ON EMPLOYEE NONCOMPETES

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On May 30, 2023, National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo issued a memorandum in which she opined that nearly all noncompetition agreements with employees violate the National Labor Relations Act ("NLRA"). She is now seeking test cases in which she will urge the NLRB to adopt her unprecedented interpretation of the Act - an interpretation that is as under-reasoned as it is overreaching.

Under Section 8(a)(1) of the NLRA, it is an unfair labor practice for an employer to interfere with an employee's rights under Section 7 of the Act, which include the right to join a union, bargain collectively, and engage in other protected concerted activity. Agreements that tend to "chill" employees in the exercise of Section 7 rights violate Section 8(a)(1).

In Memorandum GC 23-08, the General Counsel concluded that most noncompetes tend to chill the exercise of Section 7 rights because they "could reasonably be construed by employees to deny them the ability to quit or change jobs…" This "denial of access to employment opportunities" has a chilling effect (in the General Counsel's view) because:

- "employees know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions;"
- "employees' bargaining power is undermined in the context of lockouts, strikes, and other labor disputes;" and,
- "an employer's former employees are unlikely to reunite at a local competitor's workplace, and, thus be unable to leverage their prior relationships—and the communication and solidarity engendered thereby—to encourage each other to exercise their rights to improve working conditions in their new workplace."

To describe the General Counsel's reasoning as a "stretch" would be an act of kindness. For example, employers do many things that have the effect of making it harder for discharged employees to replace their lost income, including refusing to give a job reference, adopting a strict

no-rehire policy, or terminating employees during the holidays (when job opportunities tend to be scarce). Do these actions now violate the NLRA because employees will know that "they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions"?

And did Congress really intend Section 7 rights to include a right to "reunite" at some other workplace and "leverage prior relationships"? If so, that "right" has somehow managed to escape the notice of Congress, the courts, and the NLRB itself for almost 90 years.

It remains to be seen whether and to what extent the NLRB will adopt the General Counsel's position - and, if so, whether the federal courts (including the Supreme Court) will enforce it.

It will also be interesting to see whether the NLRB makes clear (as the General Counsel did not) that a prohibition based on protection of Section 7 rights does not apply to managerial employees or "supervisors" as defined in the NRLA, because such employees have no rights under Section 7. (Supervisors have a limited protection from discrimination for refusing to violate the NLRA, but that protection arises under Section 8, not Section 7.) Any attempt by the NLRB to ban noncompetes with managers and supervisors based on protection of their non-existent Section 7 rights will presumably meet considerable resistance in the courts.

With her novel interpretation of the NLRA, the General Counsel has had the first word on this issue. She is unlikely to have the last.

MEET THE TEAM

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