Cahill

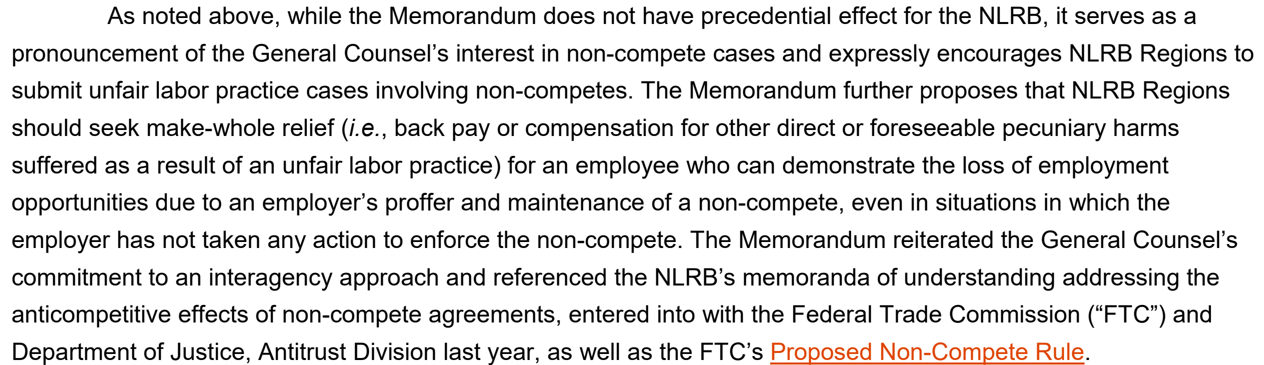
June 22, 2023

NLRB General Counsel Issues Memorandum Asserting Non-Competes Violate the National Labor Relations Act Except in Limited Circumstances

On May 30, 2023, the General Counsel of the National Labor Relations Board ("NLRB") issued Memorandum GC 23-08 (the "Memorandum"), which articulated the General Counsel's position that, except in limited circumstances, the proffer, maintenance and enforcement of non-compete agreements with non-management employees violate the National Labor Relations Act ("NLRA"). The Memorandum itself is not binding precedent unless its reasoning is subsequently adopted by the NLRB in a decision. However, the Memorandum demonstrates the General Counsel's view that non-competes violate covered employees' rights under Section 7 of the NLRA, which generally encompasses an employee's ability to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and puts employers on notice that continuing to enter into non-competes (and enforcing existing non-competes) with non-management employees could constitute an unfair labor practice.

The General Counsel enumerated five examples of concerted activity under Section 7 of the NLRA which, in the General Counsel's view, are chilled by the use of non-competes: (i) concertedly threatening to resign to demand better working conditions, (ii) carrying out threats to resign or concertedly resigning to secure improved working conditions, (iii) concertedly seeking or accepting employment with a local competitor to obtain better working conditions, (iv) soliciting co-workers to work for a local competitor as part of a broader course of protected concerted activity and (v) seeking employment, at least in part, specifically to engage in protected activity with other workers in a workplace (*e.g.*, a union organizing campaign). Section 8(a)(1) of the NLRA provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of Section 7 rights.

While the Memorandum noted that a non-compete may still be enforceable, the General Counsel emphasized that such non-competes would need to be narrowly tailored to special circumstances in order to justify infringing on an employee's exercise of Section 7 rights. In the General Counsel's opinion, an employer's desire to avoid competition from a former employee or an interest in retaining employees or protecting special investments in training are insufficient justifications for entering into non-competes with NLRA-covered employees, and these issues could be addressed through other means, such as a longevity bonus. The General Counsel acknowledged protecting proprietary or trade secret information was a legitimate business interest, but stated that this can be addressed through narrowly tailored workplace agreements, and also noted that this is unlikely to be a reasonable justification for non-competes with low-wage and middle-wage workers who lack access to such information. The General Counsel did indicate, however, that non-competes which could not reasonably be construed to prohibit an employee's acceptance of employment may be valid under the NLRA, and provided as examples provisions limited to restricting an individual's management or ownership interest in a competitor or prohibiting true independent contractor relationships.



As noted above, while the Memorandum does not have precedential effect for the NLRB, it serves as a pronouncement of the General Counsel's interest in non-compete cases and expressly encourages NLRB Regions to submit unfair labor practice cases involving non-competes. The Memorandum further proposes that NLRB Regions should seek make-whole relief (*i.e.*, back pay or compensation for other direct or foreseeable pecuniary harms suffered as a result of an unfair labor practice) for an employee who can demonstrate the loss of employment opportunities due to an employer's proffer and maintenance of a non-compete, even in situations in which the employer has not taken any action to enforce the non-compete. The Memorandum reiterated the General Counsel's commitment to an interagency approach and referenced the NLRB's memoranda of understanding addressing the anticompetitive effects of non-compete agreements, entered into with the Federal Trade Commission ("FTC") and Department of Justice, Antitrust Division last year, as well as the FTC's Proposed Non-Compete Rule.

While the Memorandum broadly prohibits non-competes as a violation of employees' Section 7 rights, this guidance does not extend to management-level employees, who are generally not covered by the NLRA. Therefore, the General Counsel's position on the proffer, maintenance and enforcement of non-compete provisions in employment arrangements will not affect the continued use of such provisions in the context of executives and other supervisory personnel.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; Mark Gelman (counsel) at 212.701.3061 or mgelman@cahill.com; Lauren Perlgut (counsel) at 212.701.3558 or lperlgut@cahill.com; or Eric Scher (senior attorney) at 212.701.3984 or escher@cahill.com; or email publications@cahill.com.

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