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# LEGAL ALERT

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# FTC VOTE DELAYED, BUT MORE TURBULENCE FOR NON-COMPETE PROVISIONS FORECASTED


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On May 30, 2023, National Labor Relations Board (NLRB) General Counsel (GC) Jennifer A. Abruzzo released Memorandum 23-08 (Memo) in yet another effort to alter the labor and employment landscape. This Memo follows the Federal Trade Commission's (FTC) recent proposal to ban most non-compete restrictions, providing very limited exceptions. On a positive note, the FTC's vote on its proposed rule has been delayed to at least April 2024 due to the massive number of public comments received in response to its proposal (nearly 27,000 reported).

Turning back to the GC's Memo, while not binding law, it does represent the latest initiative to limit non-compete restrictions in both unionized and non-unionized environments. The Memo states that "the proffer, maintenance, and enforcement of such agreements" violate the National Labor Relations Act (NLRA).

The Memo indicates that non-compete restrictions could be lawful in some cases if they are "narrowly tailored to address special circumstances justifying the infringement on employee rights." The GC explained that she does not believe "a desire to avoid competition from a former employee" and "business interests in retaining employees or protecting special investments in training employees" would ever constitute "special circumstances" which would permit the use of non-compete provisions.

According to the GC, the few very limited circumstances where non-compete restrictions may not violate the NLRA include: "restrict[ing] only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationships." The Memo also cites to authority which suggests that, in the GC's view, a non-compete provision restraining employees from misappropriating trade secret information and customer relationships may constitute a "limited circumstance" permissible under the NLRA.

The Memo calls on all NLRB regional offices to submit cases concerning "arguably unlawful" non-compete agreements, as well as "special circumstances" defenses, to the NLRB Division of Advice. The GC also directed the regional offices to seek "make-whole" remedies for employees who can demonstrate that they lost opportunities for other employment due to overbroad non-compete provisions.

Again, the Memo is not binding law, but the GC is responsible for overseeing the investigation and prosecution of unfair labor practice charges and supervising the NLRB field offices in the processing of cases. Thus, the Memo is a clear indication that employers can expect the NLRB to issue complaints, rather than dismiss a charge, following investigations of unfair labor practice charges involving non-compete restrictions.

## WHAT DOES THIS MEAN FOR EMPLOYERS?

With the FTC vote delayed and the NLRB GC's non-binding Memo, the law concerning non-competes remains unsettled. However, employers may wish to take the following steps to put themselves in the best position regarding non-compete provisions:

- Become familiar with the NLRB unfair labor practice process;
- Review your company's standard non-compete restrictions with legal counsel to minimize potential legal liability; and
- Assess which roles are subjected to non-compete restrictions and whether any potential threats from those employees departing may be addressed by less restrictive means.

Hahn Loeser & Parks LLP's Labor and Employment Group routinely advises employers on the preparation and enforcement of non-compete provisions to ensure compliance with the NLRA, as well as other applicable state and federal laws.

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