

# Electronic Alert

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## **NLRB General Counsel Issues Memo Opining That Non-Compete Agreements Violate the NLRA**

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The National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo issued Memorandum GC 23-08 explaining her position that offering and binding employees to non-competition agreements violates the protections of the National Labor Relations Act (NLRA) and constitutes an unfair labor practice. The Memorandum does not change the law, but it shows the General Counsel's intent to push for the NLRB to adopt this position as law.

The Memorandum details Ms. Abruzzo's rationale for why "overbroad" non-competition agreements chill employees from exercising their rights under the NLRA. The Memorandum argues that a non-competition agreement is overbroad when it could reasonably be construed by employees as denying them the ability to quit or change jobs by cutting off their access to employment opportunities for which they are qualified. The General Counsel argues that employees bound by overbroad non-competition agreements are restricted or discouraged from taking concerted actions such as collectively resigning to obtain concessions from their employers. Therefore, offering, entering into, or enforcing an overbroad non-competition agreement arguably constitutes a violation of Section 8(a)(1) and (5) of the NLRA. As a reminder, these arguments apply only to "employees" as that term is defined under the NLRA.

The Memorandum also argues that non-competition agreements may be permissible in limited circumstances when the agreement "is narrowly tailored to special circumstances justifying the infringement on employee rights." The General Counsel then provides examples of employer interests which, in her opinion, would or would not justify such an infringement. To the General Counsel, protecting proprietary and/or trade secret information constitutes a legitimate interest. The General Counsel's viewpoint does not consider retaining employees, protecting investments in training, or avoiding competition with former employees to be legitimate interests.

This Memorandum signifies an additional attempt by various executive agencies to restrict employers' abilities to bind employees through non-competition agreements. Employers can reference our prior E-Alert on the FTC's rulemaking to try to restrict non-competition agreements. Again, it is important to note that this Memorandum does not change the law. However, it indicates that the NLRB General Counsel is likely to push the NLRB to adopt the Memorandum's reasoning by advancing unfair labor practice charges against employers who the GC's office believes use non-competition agreements to chill the exercise of Section 7 rights.

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