NLRB GENERAL COUNSEL SEEKS TO OUTLAW MOST NONCOMPETITION AGREEMENTS

Date: 31 May 2023

US Labor, Employment, and Workplace Safety Alert

By: Michael A. Pavlick, Erinn L. Rigney

INTRODUCTION

On 30 May 2023, the Office of the General Counsel (the General Counsel) of the National Labor Relations Board (the Board) issued a policy memo (30 May GC Memo) expressing its position that noncompetition agreements violate Section 8(a)(1) of the National Labor Relations Act (NLRA) because they "prohibit employees from accepting certain types of jobs and operating certain types of businesses after the end of their employment."[1]

The 30 May GC Memo applies to both union and nonunion employers, and it comes on the heels of the Board's decision in *McLaren Macomb* imposing restrictions on severance agreements and the General Counsel's 22 March 2023 memo clarifying those restrictions.[2] Indeed, the 30 May GC Memo notes that the General Counsel's proposed standard for noncompetition agreements mirrors the Board's *McLaren Macomb* decision.[3]

While the 30 May GC Memo does not yet have the force of law, it is a key insight into what arguments the General Counsel may make in future cases prosecuting employers for potentially illegal noncompetition agreements before the employee-friendly Board and a predictor for what conclusions the Board may ultimately reach in these cases.

ACCORDING TO THE 30 MAY GC MEMO, NONCOMPETITION AGREEMENTS MUST BE NARROWLY TAILORED TO RESPECT SECTION 7 RIGHTS—AND "EMPLOYER SPECIAL CIRCUMSTANCES" SHOULD BE EXCEPTIONS TO THIS GENERAL RULE

The General Counsel asserts sweepingly that noncompetition agreements violate the NLRA when they "could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for," borrowing from the standard it proposed in pending litigation before the Board, in a case challenging the validity of workplace rules addressing personal conduct, conflicts of interest, and confidentiality of harassment complaints.[4]

The General Counsel does allow that some noncompetition agreements may not necessarily violate the NLRA if, for instance, they merely restrict parties' "managerial or ownership interests in a competing business" or apply to "true independent-contractor relationships." The General Counsel also leaves open the possibility that a narrowly tailored noncompetition agreement's infringement on employee rights may survive NLRA muster if "justified by

©2005-2026 K&L Gates LLP. All Rights Reserved.

special circumstances." Although not directly stated in the General Counsel's memo, since supervisors are excluded from the NLRA's definition of "employee,"[5] the 30 May GC Memo should not extend to a noncompetition agreement that an employer presents to a supervisor.

However, the 30 May GC Memo both limits those defenses and rejects others. For example, it states that an employer's "desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense."

Similarly, the General Counsel also reads federal anti-trust and constitutional law to hold that an employer's interests in retaining employees as well as protecting employee training investments, proprietary information, and trade secrets do not justify overly broad noncompetition agreements when alternative solutions to those issues exist, such as employee longevity bonuses.

Moreover, the 30 May GC Memo suggests that noncompetition agreements would likely violate the NLRA, under any circumstances, when employers insert them into employment contracts signed by low- or middle-wage workers who either have no trade secrets or work in jurisdictions where such agreements are generally unenforceable, such as California.

The 30 May GC Memo leaves unsaid what the model language looks like for sufficiently narrowly tailored noncompetition agreements, the extent to which noncompetition agreements would be permissible if enforceable under state law, or what may qualify as "special circumstances."

ACCORDING TO THE 30 MAY GC MEMO, NONCOMPETITION AGREEMENTS THAT MAY INHIBIT EMPLOYEES FROM CONCERTEDLY RESIGNING LIKELY VIOLATE THE NLRA

The 30 May GC Memo justifies its conclusions by focusing on denied employment opportunities that employees may allegedly suffer from overly broad noncompetition agreements. The General Counsel reasons that employees subject to noncompetition agreements will arguably struggle to replace lost income if they are fired for exercising their Section 7 rights, lose bargaining power during labor disputes featuring strikes or lockouts, and be less likely to reconvene with other employees interested in exercising their Section 7 rights at a former employer's competitor.

The 30 May GC Memo provides five types of employee Section 7 activity that the General Counsel argues would be jeopardized by overly broad noncompetition agreements. First among them are concerted threats by employees to resign from their employers to demand better working conditions, because such threats may be futile given the Board's concern about retaliatory legal action by employers as well as the chilling effect such agreements might have. With respect to concerted resignations, the 30 May GC Memo notes that, while current Board law "does not unequivocally recognize a Section 7 right to concertedly resign from employment," the General Counsel—for the first time under the Biden administration—argues that such a right "follows logically from settled Board law, Section 7 principles, and the [NLRA's] purposes."[6] As a result, the General Counsel urges the Board to limit any NLRA caselaw to the contrary in the future.

Other Section 7 activities the 30 May GC Memo seeks to protect from overly broad noncompetition agreements include an employee's rights to concertedly seek better working conditions at a prior employer's competitors,

©2005-2026 K&L Gates LLP. All Rights Reserved.

solicit coworkers to join them at a competitor as part of their protected concerted activity, and engage in such activity with coworkers at their current workplace—including union organizing—out of fear that they will lose their job and be unable to find comparable employment elsewhere regionally or in a specific occupation or trade.

The recommended prohibition on overly broad noncompetition agreements follows the Federal Trade Commission's (FTC) January 2023 proposed rule seeking to bar noncompetition agreements under federal law,[7] which was preceded by increased state-level activity limiting the use and scope of noncompetition agreements, especially for lower wage workers.[8] Moreover, prior to the 30 May GC Memo and the FTC proposed rule, the FTC and the Board announced an information-sharing agreement,[9] which lends further credence to the General Counsel's stated commitment to an "interagency approach to restrictions on the exercise of employee rights."[10] Taken together, the increase in regulatory and administrative attention on the perceived inequitable bargaining power between employees and employers signals a continued focus on noncompetition agreements in the employment space.

CONCLUSION

While the 30 May GC Memo is not yet the "law of the land," its sheer breadth would seem to threaten most noncompetition agreements proffered by employers on nonsupervisory employees. The position it stakes out leads to the possibility that employees currently subject to noncompetition agreements may attempt to escape their contractual obligations to former (or current) employers by filing unfair labor practice charges against them with the Board. Additionally, given the historically tight US labor market and related nationwide employee Section 7 activities, including high-profile union organizing campaigns, the 30 May GC Memo is especially relevant to employers with significant low- and medium-wage employees in high turnover industries. The 30 May GC Memo places employers in a difficult position, as they must balance protecting their businesses with the possibility that giving or enforcing noncompetition agreements could subject them to imminent litigation before the Board and exposure to still undefined remedies owed to the covered employees.

FOOTNOTES

[1] National Labor Relations Board Memorandum GC 23-08 (May 30, 2023).

[2] National Labor Relations Board Memorandum GC 23-05 (Mar. 22, 2023). See Michael A. Pavlick & Taylor J. Arluck, *NLRB General Counsel Issues Compliance Guidance on Recent Ruling Limiting Severance Agreements*, K&L GATES HUB (Mar. 24, 2023),https://www.klgates.com/NLRB-General-Counsel-Issues-Compliance-Guidance-on-Recent-Ruling-Limiting-Severance-Agreements-3-24-2023.

[3] *See* Michael A. Pavlick & Taylor J. Arluck, *NLRB Imposes Broad Restrictions on Severance Agreements*, K&L GATES HUB (Feb. 24, 2023), https://www.klgates.com/NLRB-Imposes-Broad-Restrictions-on-Severance-Agreements-2-24-2023.

[4] *See* General Counsel's March 7, 2022 Brief to the Board, *Stericycle, Inc.*, Cases 04-CA-137660 et al.

[5] *See* 29 U.S.C. § 152(3). A "supervisor" is defined under the NLRA as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such

©2005-2026 K&L Gates LLP. All Rights Reserved.

action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Id. § 152(11).

[6] National Labor Relations Board Memorandum GC 23-08 (May 30, 2023).

[7] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3504; *see* Lauren Norris Donahue et al., *FTC Proposes Sweeping Ban on Employee Noncompete Clauses: What Employers Need to Know, Proposed Alternatives, and Opportunity for Public Comment*, K&L GATES HUB (Jan. 6, 2023), https://www.klgates.com/FTC-Proposes-Sweeping-Ban-on-Employee-Noncompete-Clauses-What-Employers-Need-to-Know-Proposed-Alternatives-and-Opportunity-for-Public-Comment-1-6-2023; *see* also K&L Gates Legal Alert, *What Does President Biden's Executive Order on Promoting Competition in the American Economy Mean for Employer Noncompete Clauses?*, K&L GATES HUB (July 12, 2021), https://www.klgates.com/What-Does-President-Bidens-Executive-Order-on-Promoting-Competition-in-the-American-Economy-Mean-for-Employer-Noncompete-Clauses-7-12-2021.

[8] These states include Illinois, 820 ILL. COMP. STAT. 90/1; Maine, ME. REV. STAT. ANN. tit. 26, §§ 599-A, 599-B; Maryland, MD. CODE ANN., LAB. & EMPL. § 3-716; Massachusetts, MASS. GEN. LAWS ch. 149, § 24L(c); New Hampshire, N.H. REV. STAT. ANN. § 275:70-a; Oregon, OR. REV. STAT. § 653.295; Rhode Island, R.I. GEN. LAWS §§ 28-58-1 to -3; Virginia, VA. CODE ANN. § 40.1-28.7:8; and Washington, WASH. REV. CODE § 49.62.020.

[9] *See* Gene Ryu, Katie Staba & Jonathan Rue, *FTC and NLRB Enter Into an Information Sharing Agreement as a Likely Precursor to New Enforcement Activity*, K&L GATES CONSUMER PRODS. WATCH (Dec. 20, 2022), https://www.consumerproductslawwatch.com/2022/12/ftc-and-nlrb-enter-into-an-information-sharing-agreement-as-a-likely-precursor-to-new-enforcement-activity/.

[10] Press Release, Fed. Trade Comm'n, Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices (July 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers.

KEY CONTACTS



MICHAEL A. PAVLICK
PARTNER

PITTSBURGH
+1.412.355.6275
MICHAEL.PAVLICK@KLGATES.COM



ERINN L. RIGNEY
PARTNER

CHICAGO
+1.312.807.4407
ERINN.RIGNEY@KLGATES.COM

©2005-2026 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.