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CLIENT ALERT: Most Non-Compete Agreements Violate Federal Labor Law, According to New Advice Memorandum from NLRB General Counsel

National Labor Relations Board General Counsel Jennifer Abruzzo has proclaimed that, except in limited circumstances, non-compete agreements generally violate Section 8(a)(1) of the National Labor Relations Act ("NLRA"). In a memorandum released on May 30, 2023, the NLRB's top lawyer found that the proffer, maintenance or enforcement of such agreements constitutes an unfair labor practice, as such agreements tend to interfere with rights guaranteed to employees under Section 7 of the NLRA, including the rights to organize and to engage in concerted activity regarding terms and conditions of employment. Reasoning that these agreements deny employees the ability to quit or change jobs, Abruzzo argues that non-competes discourage employees from threatening to resign to negotiate better terms and conditions of employment, chill employees from concertedly seeking or accepting employment with a local competitor, and prevent employees from organizing to seek employment at another workplace which may allow them greater ability to engage in protected activity.

Abruzzo states that in the narrow circumstances where such agreements are legal, they must be narrowly tailored to a special circumstance justifying the infringement on employee rights. For example, a desire to avoid competition from a former employee is not a legitimate business interest to support such a defense; however, agreements which restrict only an employee's managerial or ownership interests in a competitor, or true independent contractor relationships, may be legal.

This memorandum follows a March memo, in which the General Counsel advised that overly broad non-disparagement and confidentiality clauses in severance agreements constituted unlawful restrictions on Section 7 rights. That memorandum followed the *McLaren McComb* NLRB decision which Morgan, Brown & Joy discussed in a recent client alert. These memoranda demonstrate the current Board's position not only that former employees enjoy protections under the NLRA, but that an employer's mere proffer of an agreement that would chill Section 7 rights may constitute an unfair labor practice.

While General Counsel Memoranda do not have the effect of law, they do give insight into the Board's current posture with respect to adjudicating claims of NLRA violations. Employers should be cautious when drafting and offering non-compete agreements with employees and candidates who fall under the protection of Section 7. Employers are encouraged to contact their MBJ attorney with questions regarding the legality of non-compete agreements in light of this recent memorandum.

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This alert was prepared on June 7, 2023.

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