

# Locke Lord QuickStudy: The NLRB Joins the Trend of Trying to Restrict Non-Compete Agreements

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Like several states and other federal agencies, through a memorandum published on May 30, 2023, the National Labor Relations Board's ("NLRB") General Counsel, Jennifer Abruzzo ("GC Abruzzo"), is pursuing an initiative to stifle the use of employee non-compete agreements. Importantly, while the memorandum is not law, and only applies to non-supervisory employees, it indicates how the NLRB will address non-competes in its investigatory and prosecutorial capacity for the near future, as detailed below.

## Summary of Memorandum

Through the memorandum, GC Abruzzo contends that, except in special circumstances, proffering, maintaining, or enforcing non-compete agreements violates the National Labor Relations Act ("NLRA"). Specifically, GC Abruzzo argues that non-competes generally violate employees' rights under Section 7 of the NLRA by tending to chill the exercise of their "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Activities the memorandum claims are protected and could be chilled by non-compete agreements in violation of the NLRA include:

- Employees concertedly threatening to resign to secure better working conditions;
- Employees concertedly resigning to secure better working conditions;
- Employees concertedly seeking or accepting employment with a competitor to obtain better working conditions;
- Employees soliciting coworkers to work for a competitor as part of a broader course of protected concerted activity; or
- Employees seeking employment to specifically engage in protected activity—including union organizing—with other employees.

As for "special circumstances" where a non-compete may be permissible, the memorandum provides two examples, namely:

- Non-competes narrowly tailored to protect proprietary or trade secret information; and
- Non-competes that employees could not reasonably construe as prohibiting their acceptance of employment relationships subject to the NLRA's protection (e.g., a non-compete provision restricting individuals' managerial

or ownership interests in a competing business, or true independent-contractor relationships).

However, per GC Abruzzo, the “special circumstances” exception would not permit non-competes born only out of a desire to avoid competition from a former employee. Similarly, the memorandum notes that this exception likely would not apply to non-competes intended for purposes of employee retention or protecting special investments in employee training. Additionally, it is unclear from the memorandum how lenient the NLRB will be with non-competes created to protect confidential and trade secret information because the memorandum notes that those interests can be addressed by “narrowly tailored workplace agreements that protect those interests.”

## **Practical Implications**

The rationale at the heart of GC Abruzzo’s memorandum is incredibly expansive and could, arguably, allow the NLRB to regulate a broad array of employment issues that have not been under the purview of the NLRB to date. Accordingly, it appears likely that this rationale will face significant scrutiny in court enforcement proceedings.

Nonetheless, the memorandum provides the NLRB’s Field Offices with a road map for how to address non-competes in the near future. Of particular note, it encourages Field Offices to pursue make-whole relief against employers maintaining allegedly overbroad non-compete provisions which, as detailed in a [previous QuickStudy](#), can greatly expand the scope of liability for unfair labor practices charges. For example, the memorandum encourages Field Offices to inquire regarding jobs an individual did not pursue because they were subject to a non-compete. Accordingly, for the near term, employers may need to be more cautious relative to the scope of their non-compete agreements and the employees to whom they apply.

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