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Pennsylvania Conference of Teamsters

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LEGISLATIVE ACTION ALERT

NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act

May 30, 2023

Today, NLRB General Counsel Jennifer Abruzzo sent a memo to all Regional Directors, Officers-in-Charge, and Resident Officers, setting forth her view that the proffer, maintenance, and enforcement non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act except in limited circumstances.

The memo explains that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under Section 7 of the National Labor Relations Act, which protects employees' rights to take collective action to improve their working conditions. Specifically, these agreements interfere with employees ability to: 1. concertedly threaten to resign to secure better working conditions; 2. carry out concerted threats to resign or otherwise concertedly resign to secure improved working conditions; 3. concertedly seek or accept employment with a local competitor to obtain better working conditions; 4. solicit their co-workers to go work for a local competitor as part of a broader course of protected concerted activity; 5. seek employment, at least in part, to specifically engage in protected activity, including union organizing, with other workers at an employer's workplace.

"Non-compete provisions reasonably tend to chill employees in the exercise of Section 7 rights when the provisions 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 based on their experience, aptitudes, and preferences as to type and location of work," said General Counsel Abruzzo. "This denial of access to employment opportunities interferes with workers engaging in Section 7 activity in a number of ways—for example, workers know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions; their bargaining power is undermined in the context of lockouts, strikes and other labor disputes; and their social ties and solidarity leading to improvements in working conditions at workplaces are lost as they scatter to the four winds."

General Counsel Abruzzo explains that in some cases, noncompete agreements could be lawful if the provisions clearly restrict only individuals' managerial or ownership interests in a competing business, or true independent-contractor relationships. Moreover, there may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights may be justified by special circumstances.

The memo also notes that the General Counsel is committed to an interagency approach to restrictions on the exercise of employee rights, including limits to workers' job mobility, including information sharing and referrals to other agencies. Last year, the NLRB entered into memoranda of understanding with the Federal Trade Commission and the Department of Justice's Antitrust Division, both of which have addressed the anticompetitive effects of non-compete agreements.