

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 23-08

May 30, 2023

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Non-Compete Agreements that Violate the National Labor Relations Act

In workplaces across America, many employers are requiring their employees to sign non-compete agreements to obtain or keep their jobs, or as part of severance agreements.¹ Generally speaking, non-compete agreements between employers and employees prohibit employees from accepting certain types of jobs and operating certain types of businesses after the end of their employment. As explained below, such agreements interfere with employees' exercise of rights under Section 7 of the National Labor Relations Act (the Act or NLRA). Except in limited circumstances, I believe the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the Act.

Section 7 protects employees' "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."² It is an unfair labor practice in violation of Section 8(a)(1) for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."³ Under the standard I have urged the Board to adopt in *Stericycle, Inc.*,⁴ a provision in an employment agreement violates Section 8(a)(1) if it reasonably tends to chill employees in the exercise of Section 7 rights unless it is narrowly

¹ See Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J. Law & Econ. 53, 60, 64 (2021) (estimating that approximately 18.1 percent of American workers—roughly 28 million individuals—are subject to a non-compete agreement, including approximately 13.3 percent of workers earning less than \$40,000 per year). See generally U.S. Gov't Accountability Off., GAO-23-103785, *Noncompete Agreements: Use Is Widespread to Protect Business' Stated Interests, Restricts Job Mobility, and May Affect Wages* (2023).

² 29 U.S.C. § 157. Section 7 also generally protects employees' right to refrain from such activity. See *id.*

³ *Id.* § 158(a)(1).

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

tailored to address special circumstances justifying the infringement on employee rights.⁵ The Board already applies a similar standard to provisions in severance agreements.⁶ And, it is no defense that employees contractually agreed to any infringement on their Section 7 rights because employees cannot waive those rights in individual contracts.⁷

Non-compete provisions are overbroad, that is, they 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. Generally speaking, this denial of access to employment opportunities chills employees from engaging in Section 7 activity because: employees 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;⁸ employees' bargaining power is undermined in the context of lockouts, strikes, and other labor disputes;⁹ and, an employer's former employees are unlikely to reunite at a local competitor's workplace, and, thus be unable to leverage their prior relationships—and the communication and solidarity engendered thereby—to encourage each other to exercise their rights to improve working conditions in their new workplace.

⁵ See *Minteq International, Inc.*, 364 NLRB 721, 727 (2016), *enforced*, 855 F.3d 329 (D.C. Cir. 2017).

⁶ See *McLaren Macomb*, 372 NLRB No. 58, slip op. at 4, 7 (2023) (a severance agreement “is unlawful if its terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights” unless any relinquishment of those rights is “narrowly tailored”); Guidance in Response to Inquiries About the *McLaren Macomb* Decision, Memorandum GC 23-05 (Mar. 22, 2023). Although the general analysis in this memorandum is based on the standard I proposed in *Stericycle*, I believe that under the *McLaren Macomb* standard the same principles apply to non-compete provisions in severance agreements.

⁷ See *McLaren Macomb*, 372 NLRB No. 58, slip op. at 5-6 (“The ‘future rights of employees as well as the rights of the public may not be traded away’ in a manner which requires ‘forbearance from future . . . concerted activities.’” (quoting *Mandel Security Bureau*, 202 NLRB 117, 119 (1973))) (collecting cases).

⁸ See *Minteq*, 364 NLRB at 727 (unilaterally adopted work rule stating that employees, who were covered by a collective-bargaining agreement that included protection from discipline and discharge without “just cause,” were “employee[s]-at-will” had “a reasonable tendency to discourage employees from engaging in” protected activity “for fear that they could be discharged without the contractual ‘just cause’ protection”).

⁹ See *id.* at 723 n.11 (in determining that non-compete provisions are mandatory subjects of bargaining, “recogniz[ing] the serious impact on employees of [a non-compete provision] if, for example, employees . . . were locked out by the [employer] during a labor dispute,” because the provision prohibits employees from replacing lost income by performing the type of work they had been performing for the employer).

In addition, non-compete provisions that could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting access to other employment opportunities chill employees from engaging in five specific types of activity protected under Section 7 of the Act.

First, they chill employees from concertedly threatening to resign to demand better working conditions.¹⁰ Specifically, they discourage such threats because employees would view the threats as futile given their lack of access to other employment opportunities and because employees could reasonably fear retaliatory legal action for threatening to breach their agreements, even though such legal action would likely violate the Act.¹¹

Second, they chill employees from carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions. Although extant Board law does not unequivocally recognize a Section 7 right of employees to concertedly resign from employment,¹² such a right follows logically from settled Board law, Section 7 principles, and the Act's purposes.¹³ It is also consistent with the U.S. Constitution and other federal laws.¹⁴ Accordingly, I will urge the Board to limit decisions inconsistent with that right to their facts or overrule them.

¹⁰ See, e.g., *Morgan Corp.*, 371 NLRB No. 142, slip op. at 3-4 (2022) (employee who complained to supervisor about coworker's raise and said that he and two other coworkers were threatening to quit because of it was engaged in protected concerted advocacy for higher wages).

¹¹ See generally *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 3-7 (2018) (lawsuit targeting Section 7-protected consumer boycott violated Section 8(a)(1)).

¹² See, e.g., *Crescent Wharf & Warehouse Co.*, 104 NLRB 860, 861-62 (1953) (voluntary resignation, by letter, of six employees dissatisfied with their employer's refusal to increase their wages was unprotected where there was "no basis for inferring that the letter was a device selected by the . . . employees to enforce demands upon [the employer]").

¹³ See, e.g., *QIC Corp.*, 212 NLRB 63, 68 (1974) (employees' seeking employment at competitor of their employer was protected where "[t]he employees were bound by no contract to remain with the [employer] and, as a result, were free at any time they wished to exercise economic self-help and seek better paying jobs").

¹⁴ See, e.g., *Pollock v. Williams*, 322 U.S. 4, 17-18 (1944) (explaining that the Thirteenth Amendment was meant to maintain a system of "completely free and voluntary labor" and that the "right to change employers" is the "defense against oppressive hours, pay, working conditions, or treatment"). See generally Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3504 (proposed Jan. 19, 2023) ("FTC Proposed Non-Compete Rule") (non-compete clauses, which burden the ability to quit by forcing workers to either remain in their current job or take an action that would likely affect their livelihood, are exploitative and coercive at the time of the worker's potential departure from their job) and <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>; Antitrust Div. of the U.S. Dep't of Just., Comment on FTC Proposed Non-Compete Rule at 2-3 (Apr. 19, 2023), <https://www.justice.gov/atr/page/file/1580551/download>

Third, they chill employees from concertedly seeking or accepting employment with a local competitor to obtain better working conditions.¹⁵ Such protected activity would also include a lone employee's acceptance of a job as a logical outgrowth of earlier protected concerted activity.¹⁶

Fourth, they chill employees from soliciting their co-workers to go work for a local competitor as part of a broader course of protected concerted activity.¹⁷ They do so because employees cannot act on the solicitation without breaching the agreements and because potential solicitors could reasonably fear retaliatory legal action for soliciting co-workers to breach their agreements, even though such legal action would likely violate the Act.¹⁸

Finally, they chill employees from seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace.¹⁹ In this regard, they effectively limit employees from the kind of mobility required to be able to engage in some particular forms of this activity, such as union organizing, which may involve obtaining work with multiple employers in a specific trade and geographic region.

Thus, in my view, the proffer, maintenance, and enforcement of a non-compete provision that reasonably tends to chill employees from engaging in Section 7 activity as described above violate Section 8(a)(1) unless the provision is narrowly tailored to special circumstances justifying the infringement on employee rights. In this regard, a desire to avoid competition from a former employee is not a legitimate business interest that could support a special circumstances defense.²⁰ Additionally, in my opinion, business interests

("Antitrust Div. Comment") (explaining that since at least 1414, the law has looked with skepticism on restraints on workers' future employment).

¹⁵ See, e.g., *Laurus Technical Institute*, 360 NLRB 1155, 1164-66 (2014) (employee's inquiry with competitor about job opportunities on behalf of coworkers was protected concerted activity and not unprotected "disloyalty").

¹⁶ Cf. *Liberty Mutual Insurance Co.*, 235 NLRB 1387, 1387-88 (1978) (where employer unlawfully discharged employee in violation of Section 8(a)(3) and (1), employee thereafter formed competing enterprise in apparent violation of non-compete agreement, and employer sued to enforce the agreement, Board ordered the employer to reimburse employee's legal defense costs), *enforcement denied on other grounds*, 592 F.2d 595 (1st Cir. 1979).

¹⁷ See, e.g., *M.J. Mechanical Services*, 325 NLRB 1098, 1098, 1106 (1998) (union organizers were protected in telling their coworkers about the benefits of belonging to a union and referring them to the union hall, even where it caused one employee to join the union, which then assigned the employee to work for a union contractor), *enforced mem.*, 194 F.3d 174 (D.C. Cir. 1999).

¹⁸ See generally *Ashford TRS Nickel*, 366 NLRB No. 6, slip op. at 3-7.

¹⁹ See, e.g., *M. J. Mechanical Services*, 324 NLRB 812, 812-14 (1997), *enforced mem.*, 172 F.3d 920 (D.C. Cir. 1998).

²⁰ See Restatement (Second) of Contracts § 188 cmt. b (1981) (post-employment restraint on competition "must usually be justified on the ground that the employer has a legitimate interest in

in retaining employees or protecting special investments in training employees are unlikely to ever justify an overbroad non-compete provision because U.S. law generally protects employee mobility,²¹ and employers may protect training investments by less restrictive means, for example, by offering a longevity bonus. I note that employers' legitimate business interest in protecting proprietary or trade secret information can be addressed by narrowly tailored workplace agreements that protect those interests.

It is unlikely an employer's justification would be considered reasonable in common situations where overbroad non-compete provisions are imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectible interests, or in states where non-compete provisions are unenforceable. For example, in a recent case I authorized issuance of a complaint alleging unlawful maintenance of an overbroad non-compete provision, to which the employer had subjected low-wage employees, where there was no evidence of a legitimate business interest justifying the provision. The provision prohibited the employees from, until two years after the end of their employment with the employer, "enter[ing] the employment of any . . . business directly engaged" in the business of the employer in the entire state.

Notwithstanding the above, not all non-compete agreements necessarily violate the NLRA.²² Some non-compete agreements may not violate the Act because employees could not reasonably construe the agreements to prohibit their acceptance of employment relationships subject to the Act's protection,²³ for example, provisions that clearly restrict only individuals' managerial or ownership interests in a competing business, or true

restraining the employee from appropriating valuable trade information and customer relationships to which he has had access in the course of his employment"); *see also, e.g., Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471, 473 (Tenn. 1984) (to enforce non-compete agreement, employer must show "special facts present over and above ordinary competition" that would otherwise give former employee "an unfair advantage in future competition with the employer").

²¹ *See supra* note 14.

²² Non-compete agreements that do not violate the Act may violate other federal laws. *See, e.g., U.S. v. Am. Tobacco Co.*, 221 U.S. 106, 181-83 (1911) (tobacco companies' collective practices, including "constantly recurring" use of non-compete provisions, violated the Sherman Act); FTC Proposed Non-Compete Rule, 88 Fed. Reg. at 3482 (proposing rule that would make non-compete agreements an unlawful "unfair method of competition") and <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>; Antitrust Div. Comment, *supra* note 14, at 3 (citing challenges the Division has brought to anticompetitive employment practices such as the use of non-compete clauses).

²³ *See Harrah's Lake Tahoe Resort*, 307 NLRB 182, 182 (1992) (employee's advocacy for proposal that employee stock option plan buy 50 percent of stock of employer's parent corporation was unprotected where proposal would not have advanced employees' interests as employees but rather their interests as "entrepreneurs, owners, and managers").

independent-contractor relationships.²⁴ Moreover, there may be circumstances in which a narrowly tailored non-compete agreement's infringement on employee rights is justified by special circumstances.

In conclusion, Regions should submit to Advice cases involving non-compete provisions that are arguably unlawful under the analysis summarized herein, as well as arguably meritorious special circumstances defenses. In appropriate circumstances, Regions should seek make-whole relief for employees who, because of their employer's unlawful maintenance of an overbroad non-compete provision, can demonstrate that they lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision. In this regard, Regions should seek evidence of the impact of overbroad non-compete agreements on employees and, where applicable, present at trial evidence of any adverse consequences, including specific employment opportunities employees lost because of the agreements.²⁵

Please direct any questions about this memorandum to Advice.

/s/
J.A.A.

²⁴ A non-compete provision prohibiting independent-contractor relationships may, however, violate Section 8(a)(1) in the context of industries where employees are commonly misclassified as independent contractors. Regions should submit to the Division of Advice ("Advice") any cases where a non-compete agreement would chill Section 7 activity by effectively prohibiting employment relationships even though nominally prohibiting only independent-contractor relationships.

²⁵ As you know, I am committed to an interagency approach to restrictions on the exercise of employee rights, including limits to workers' job mobility. 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. Regions should alert the Division of Operations-Management about cases involving non-compete agreements that could potentially violate laws enforced by the FTC and the Antitrust Division for possible referral to those agencies.