# PUBLICATION

## Should Employees Stay or Should They Go: The NLRB and FTC Crack Down on Restrictive Covenants

**Authors: Louis J. Cannon, Jr., Cassandra L. Horton, John G. Calender**
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**Many employers were encouraged when a federal court in Texas last month blocked the enforcement of a Federal Trade Commission (FTC) prohibition against essentially all non-compete employment agreements in *Ryan, LLC v. FTC*. The FTC proposed rule would have required employers to provide notice to workers that any non-competes would not be enforced and that the worker was free to seek or accept a job with a competitor. While the FTC is currently precluded from enforcing an across-the-board prohibition on non-competes, the FTC has signaled its intent to individually target any non-competes that it maintains are in violation of antitrust laws.**

Now, another agency, the National Labor Relations Board (NLRB), has entered the fray. Expanding on her prior guidance from May 2023, the NLRB's General Counsel, Jennifer Abruzzo, issued a Guidance Memorandum outlining the agency's objectives regarding non-compete agreements and stay-or-pay agreements. While the NLRB governs union-management relations and concerted conduct in the workplace, General Counsel Abruzzo has indicated it is her belief that many non-competes violate federal labor laws regardless of whether the workforce is unionized. How did the NLRB get here and what are the takeaways for employers?

## Background and History

In May of 2023, NLRB General Counsel Abruzzo issued a Guidance Memorandum in which she stated the position that an employer violates Section 7 of the National Labor Relations Act (NLRA) by requiring (or even asking) non-supervisory, non-managerial employees to enter into a non-compete agreement unless it is "narrowly tailored" to meet a legitimate and substantial business objective. Section 7 of the NLRA states that employees have the right to form a union (or refrain from forming a union) and also to engage in "other concerted" activities for "mutual aid or protection" in the workplace. An example of the latter would be employees circulating a petition urging management to rehire an employee whom his/her coworkers believe should not have been fired. Another example is employees banding together and "walking off the job" to protest safety issues or other issues of mistreatment, such as racism by management. These acts are called "protected, concerted activity" (PCA).

So what does this kind of activity have to do with non-compete agreements? According to General Counsel Abruzzo's May 2023 Memorandum, non-competes potentially would "chill" PCA because they would prevent employees from "concertedly threatening to quit their jobs for other employment unless working conditions are changed," from carrying out such threats, from soliciting coworkers to leave and go to work for competitors and would chill employees from "seeking employment…to specifically engage in [PCA] with other workers at an employer's workplace."

The last point quoted is of particular importance: It refers to what is known as "union salting," where an employee is employed (or being compensated) by a labor union and applies for a job with an employer with the

intent of clandestinely forming a union within the employer's facility. Once the salt has achieved this, the individual resigns and moves on to another workplace – very often, "a local competitor."

Let's pause here to note that the General Counsel's views regarding the NLRA do not have the force of law. Rather, the General Counsel, as the agency's prosecutor, directs Regional Directors of NLRB offices nationwide to issue complaints based on certain legal theories. Those are heard before administrative law judges (ALJs), whose decisions may be appealed to the NLRB. The decisions of the NLRB become binding agency precedent (but are subject to challenge by the federal appellate courts). On June 13, 2024, an NLRB ALJ accepted General Counsel Abruzzo's invitation to find certain non-competes violative of the NLRA. In that decision, *J.O. Mory, Inc.*, the judge found that the employer violated the NLRA when it fired a union salt and also by requiring him to enter into an unlawful non-compete. Specifically, the ALJ found the following provisions to be illegal: 1. The "anti-poaching" clause prohibiting employees from encouraging coworkers to leave the company during and after employment. 2. A post-employment non-compete clause stating that employees could not compete with the employer in any manner after their employment ended. 3. A requirement that employees report all "outside" job offers that could violate the non-compete.

It is important to note that this ALJ decision is not precedential; the case was not appealed to the NLRB, and no cases currently are pending before the full NLRB.

## The October 7, 2024, Guidance Memorandum: Non-Competes

General Counsel Abruzzo issued a new Guidance Memorandum on October 7, 2024, reiterating her position that nearly all non-competes violate the NLRA, and instructing Regional Directors to seek special remedies in cases involving unlawful non-competes. More specifically, the Memorandum directs a Regional Director investigating a charge involving a nonsupervisory, nonmanagerial employee who was bound by, or offered, an unlawful non-compete to take the following steps if the employer settles prior to trial before an ALJ:

1. Employees should be allowed to come forward for 60 days after the settlement (the period of time during which an NLRB notice must be posted in the facility) and demonstrate "that they were deprived of a better job opportunity as a result of the non-compete," by showing that (a) there was a job elsewhere with a better compensation package, (b) the employee was qualified for the job, and (c) they were discouraged from applying for or accepting the job because of the non-compete provision.
2. If Step 1 is satisfied during the 60-day "notice-posting" period, the employer must pay the employee the difference between what the employee made with the employer and what they would have made with the other employer.

The Memorandum also leaves open the possibility that an employee who has left an employer within six months of filing a charge (the NLRA's limitations period) can file a charge and claim that because she/he was subject to a non-compete, the employee forwent a better job opportunity by complying with the non-compete.

## Stay-or-Pay Provisions

The Memorandum also addresses the legality of "stay-or-pay" provisions, which are agreements that an employee must remain with the employer for a specified period of time or else they must pay back, for example, a hiring bonus, tuition reimbursement, or some other benefit. The FTC declined to expressly bar the use of such provisions, but noted that they could, under certain circumstances, have the same effect as a non-compete and would therefore violate the FTC Act. Similarly, the General Counsel indicated her position that certain stay-or-pay provisions may violate the NLRA by interfering with employees' right to concertedly

threaten to leave or actually leave, work for a competitor with an eye toward improving working conditions, and, of course, because they interfere with a union salt"s right to engage in salting activity.

The General Counsel stated that any provision under which an employee must pay their employer if they separate from employment within a certain timeframe is presumptively unlawful, but proposed an approach that allows an employer to demonstrate that its stay-or-pay provision is lawful. Employers would be required to show that the provision is narrowly tailored and advances a legitimate business interest using a four-part test:

3. voluntarily entered into in exchange for a benefit (meaning the employee can freely decline to enter into it);
4. has a reasonable and specific repayment amount (meaning that the repayment amount does not exceed the value of the benefit;
5. has a reasonable "stay" period (which will vary based on the value of the benefit); and
6. does not require repayment if the employee is terminated without "cause" (i.e., if an employee simply is "not a good fit" rather than engaging in misconduct).

The General Counsel stated that she is exercising "prosecutorial discretion" in giving employers 60 days to cure their existing unlawful stay-or-pay provisions without concern of being the subject of an NLRB complaint after an employee files a charge. This cure period would not apply to stay-or-pay provisions entered into after October 7 nor does it apply to employers' non-compete provisions given past guidance.

## Employer Takeaways

While the General Counsel's opinions do not have the force of law, there is little question that the use of restrictive covenants, such as non-competes and stay-or-pay provisions, are current enforcement priorities for both the FTC and the NLRB. However, like the FTC, the NLRB has recognized that employers have a legitimate business interest in protecting proprietary or trade secret information which "can be addressed by narrowly tailored workplace agreements that protect those interests." Accordingly, it is critical for all employers that currently utilize restrictive covenants, including stay-or-pay provisions, to review those agreements with experienced counsel to determine whether they are narrowly tailored and otherwise satisfy the General Counsel's burden-shifting framework.

With the Presidential election pending and potential change in administration, a new agency General Counsel likely would not maintain General Counsel Abruzzo's position and enforcement priorities regarding the use of non-competes. However, in light of the shifting regulatory landscape and the myriad of state laws regarding the use of restrictive covenants, employers would be well served to ensure that the restrictive covenants in their current portfolio serve legitimate business interests, do not "function to prevent" an employee's mobility, and are otherwise compliant with state law.

Baker Donelson's Competition and Protection Team will continue to monitor and report on agency actions and other developments that impact your business operations. If you have any questions please contactLouis J. Cannon Jr., Cassandra L. Horton, John G. Calender or any member of Baker Donelson's Labor & Employment Team.

**To see previous alerts related to non-competes, please click here.*