Work**Smarts** Half-Day Seminar

Employment Agreements Under Attack:
An Update on the Attempts to Limit Employers' Ability to Enforce Non-Competes and Other Restrictive Covenants

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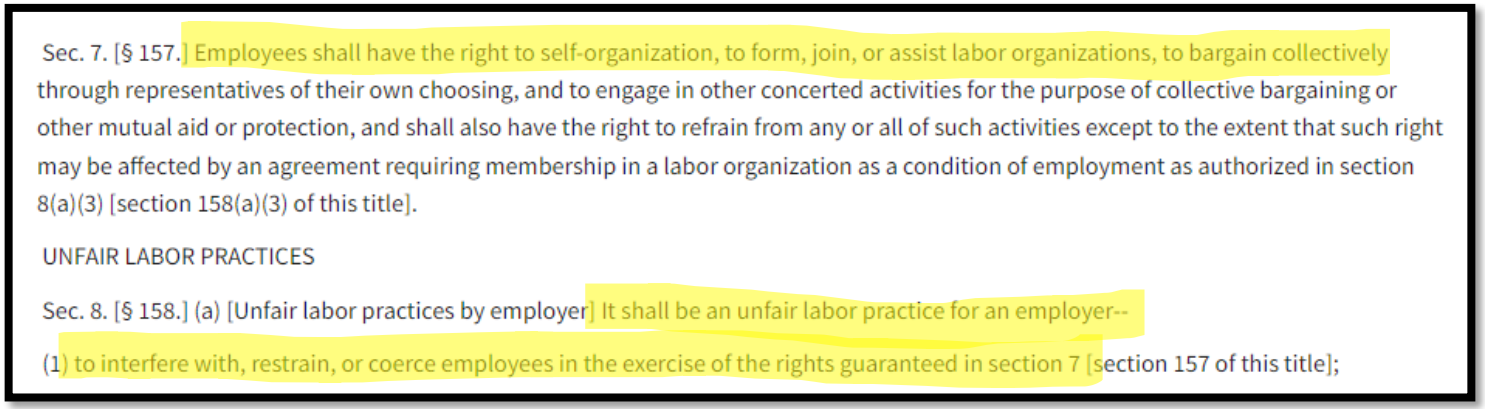
Nation Labor Relations Board Restricts Non-disparagement and Confidentiality Provisions in Nonmanagerial Employment Contracts

NLRB's Decision

- *McLaren Macomb*, 372 NLRB No. 58 (2023).
  - Issue: NRLB analyzed whether an employer violates Section 8(a)(1) of the National Labor Relations Act (NLRA) by offering severance conditioned upon a nondisparagement and confidentiality agreements.



Sec. 7. [§ 157.] Employees shall have the 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

NLRB's Decision

The severance agreement at issue contained the following clauses at issue:

Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

Non-Disparagement. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

NLRB's Decision

Prior decisions allowed the use of such terms:

- Previously, the NRLB evaluated confidentiality and nondisparagement clauses by ***carefully scrutinizing the language*** of the provisions to determine if they "broadly required" the employee to waive certain Section 7 rights.
- The NRLB had provided that confidentiality and nondisparagement provisions are unlawful ***when they prohibit employees from cooperating with the Board in investigations and litigation of unfair labor practice charges.***
- In 2020, the NRLB issued two decisions overturning precedent and shifting the focus of their analysis to the ***circumstances under which the employer presented the severance agreements to employees***. These decisions permitted the use of confidentiality and non-disparagement provisions in severance agreements, provided the circumstances surrounding the severance did not involve an employee discharged in violation of the Act or another unfair labor practice evidencing animus towards the exercise of Section 7 activity.

NLRB's Decision

New Decision:

- HOLDING: Nondisparagement and confidentiality provisions were unlawful because they ***interfered with, restrained, and coerced employees in the exercise of their Section 7 rights under the Act.*** By conditioning receipt of severance benefits on acceptance of the nondisparagement and confidentiality provisions, the employer violated Section 8(a)(1) of the Act

NLRB's Decision

New Decision:

- ANALYSIS: The NLRB has overturned its 2020 decisions and found they mistakenly did not take the actual language of the severance agreement into account. However, the NLRB upheld its prior precedent that ***"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, and that employers' proffer of such agreements to employees is unlawful."***

NLRB's Decision

New Decision:

Why was the **non-disparagement** provision unlawful?

1. It violated employees' Section 7 rights because ***"[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act."***
2. When a provision prohibits ***"any statement asserting that the [employer] had violated the Act,"*** that encompassed ***"employee conduct regarding any labor issue, dispute, or term and condition of employment," and chilled "efforts to assist fellow employees, which would include future cooperation with the Board's investigation."***

NLRB's Decision

New Decision:

Why was the **confidentiality** provision unlawful?

1. It violated employees' Section 7 rights ***because it precluded employees from "disclosing even the existence of an unlawful provision contained in the agreement,"*** thereby tending to ***coerce employees from filing unfair labor practice charges or assisting the NLRB in an investigation.***
2. The confidentiality provision was also unlawful ***because it prohibited employees from discussing the severance agreement with former coworkers who may receive similar agreements, as well as union representatives or other employees seeking to organize.***

NLRB's Decision

Application considerations:

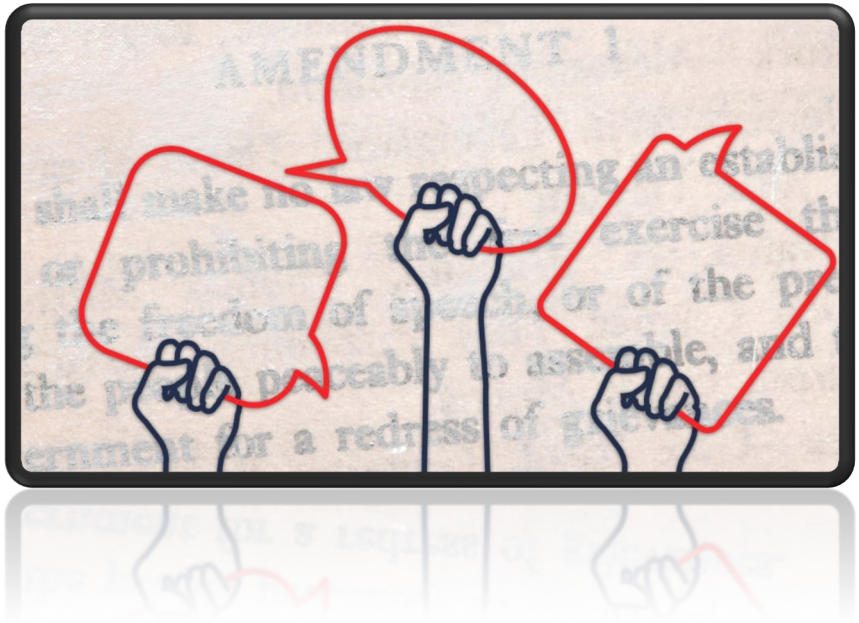
- It only applies to non-disparagement and confidentiality provisions. What about non-compete or non-solicitation provisions?
- It only applies to ***nonmanagerial*** employees with Section 7 rights under the Act.
  - Section 2(11) of the NLRA defines "supervisor" (i.e., a manager), which depends on factors such as whether the employee has authority to hire, fire, discipline, or responsibly direct the work of other employees.
- Narrowly tailored non-disparagement and confidentiality provisions may still be allowed. NLRB acknowledges but does not clearly define how to "narrowly tailor" a forfeiture of Section 7 rights.

NLRB's Decision

How will this impact an employer's ability to mitigate exposure?

NLRB's Decision

How does this protect nonmanagerial employees?



FTC Proposes to Ban Non-Competes

FTC’s Proposed Rule

- Federal Trade Commission’s Proposal
  - Passed 3-1 on January 5, 2023
  - If enacted in its current form, what would it prohibit?

FTC's Proposed Rule

- FTC--Who are They?
  - Lina Khan
  - Rebecca Slaughter
  - Alvaro Bedoya
  - Christine Wilson (resigned on March 31, 2023)

FTC's Definitions

- Definition of "Non-Compete Clause"
  - A contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer

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  - Includes *De Facto* Non-Compete Agreements

FTC's Definitions

- Definition of "Worker"
  - A natural person who works, whether paid or unpaid, for an employer. The term includes, without limitation, an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer. The term worker does not include a franchisee in the context of a franchisee-franchisor relationship; however, the term worker includes a natural person who works for the franchisee or franchisor. Non-compete clauses between franchisors and franchisees would remain subject to Federal antitrust law as well as all other applicable law.
  - **Includes Independent Contractors**

FTC's Proposed Rule

- Unfair Methods of Competition
  - It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

FTC's Proposed Rule

- What about Existing Non-Compete Agreements?
  - FTC would require employers to rescind exiting non-compete agreements.
  - Notice Requirement

FTC's Proposed Rule

- Exceptions?
  - Only when selling a business entity or ownership
- Supersedes any State Law
- Does not Ban Non-Solicits or Non-Disclosures

FTC’s Proposed Rule

FTC's Proposed Rule

- FTC Cited the Following Reasons for its Proposal:
  - Non-Competes Reduce Wages
  - Non-Competes Stifle New Business and New Ideas
  - Non-Competes Can Exploit Workers and Hinder Economic Liberty
  - Employers Have Other Ways to Protect Trade Secrets

FTC’s Proposed Rule

- Comment Period Ended on April 19, 2023
  - Over 26,000 Comments Submitted
    - Chamber of Commerce
    - SHRM
    - Unions

FTC's Proposed Rule

- The Million-Dollar Question: Will it be Enacted?
  - Does the FTC Have Authority?
  - Legal Challenges

FTC's Proposed Rule

- Look to the States
  - Already (Effectively) Banned Non-Competes
    - California (of course)
    - North Dakota
    - Washington, D.C.
    - Oklahoma
  - Banned Non-Competes for Low-Wage Workers
    - Maine
    - Maryland
    - New Hampshire
    - Rhode Island
    - Washington

Congress Proposes Workforce Mobility Act

The Workforce Mobility Act

The U.S. Congress has joined a growing number of states and the FTC in attempting to ban non-compete agreements.

The Workforce Mobility Act

What does it say?

The proposed Workforce Mobility Act would provide that “no person shall enter into, enforce, or attempt to enforce a noncompete agreement with any individual who is employed by, or performs work under contract with, such person with respect to the activities of such person in or affecting commerce.”

The Workforce Mobility Act

What does it say?

"Noncompete agreement" is defined as "an agreement, entered into after the date of enactment of [the] Act between a person and an individual performing work for the person, that restricts such individual, after the working relationship between the person and individual terminates, from performing:

a) any work for another person for a specified period of time;
b) any work in a specified geographical area; or
c) any work for another person that is similar to such individual's work for the person that is a party to such agreement."

The Workforce Mobility Act

What does it say?

Exceptions: The 2 narrow exceptions would be:

1) the seller of a business entity may enter into an agreement to refrain from engaging in a similar business in the geographic area where the business being sold has conducted business prior to the agreement. This exception extends to agreements by senior executive officials who have a severance agreement as part of the conditions of sale (i.e., a buyout provision); and

2) Second, a partner of an enterprise may enter into an agreement that, upon dissolution of the partnership or dissociation of the partner from the partnership, the partner will refrain from engaging in a similar business in the geographic areas where the partnership has conducted business prior to the agreement.

The Workforce Mobility Act

Application

Not applicable to nondisclosures: Notably, the legislation would not apply to nondisclosure agreements that prohibit employees, from disclosing an employer's trade secrets "with respect to the activities of such person in or affecting commerce,"—even when such agreements extend beyond an employee's employment with the employer.

The Workforce Mobility Act

Enforcement

The legislation would (1) provide enforcement authority to the FTC and U.S. Department of Labor, (2) provide a private right of action for employees, and (3) provide state attorney generals with a right to bring civil actions.

The bill also includes other provisions the FTC proposed Rule does not include:

- Authorizing the DOL to investigate and prosecute employers that attempt to enforce non-competes under the proposed Act, with a **statute of limitations of four years.**
- A violation of the Act would be treated as an unfair or deceptive act or practice prescribed under section 22 18(a)(1)(B) of the Federal Trade Commission Act.

What Does this Mean for You?

Best Practices

- Pay Attention to Your Employment Agreements
  - Use Remaining Tools
    - NDAs
    - Non-Solicit
    - Unfair Competition

Best Practices

- Litigation?
  - Pros & Cons
    - Sometimes Necessary to Protect Business
    - Costly
    - Unpredictable

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Thank You

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