WSBA LABOR AND EMPLOYMENT SECTION

The Latest On Washington Non-Competition Agreements

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Presenters: Kelby Fletcher, Sheryl Willert, Jesse Wing

By itself, a non-competition agreement seems contrary to free enterprise and at-will employment if not outright unlawful. Isn't competition the cornerstone of our economy?

In 1975 the Washington Supreme Court determined in ***Sheppard v. Blackstock Lumber****,* 85 Wn2d 929 (1975), that non-competition agreements can be a restraint of trade and unlawful under the state Little Sherman Act, RCW 19.86.030, and Washington's Constitution at art.12 section 22[1]. The constitutional provision provided in part that no business shall engage in "any manner whatever for the purpose of fixing the price or limiting the production…. of any product or commodity." Washington may be the only state to rely on a constitutional provision in analysis of non-competition agreements. That would be consistent with this state's "long, proud history of being a pioneer in the protection of employee rights." ***Drinkwitz v. Alliant Techsystems, Inc.,*** 140 Wn.2d 291 (2000).

While Washington may be a 'pioneer', California may be the leader. It outlawed non-competition arrangements in the 1880s.

The Washington court went on to state a partial restraint may be enforced "if reasonable." And that would be determined only if it is no greater than required for the protection of the employer and does not impose undue hardship on the employee and is not injurious to the public.

What was 'reasonable' under ***Sheppard*** and its progenies was fact dependent. Someone once said you could take the same non-comp agreement and set of facts to each of 54 King County Superior Court judges and get at least 20 different answers as to 'reasonableness' in terms of temporal scope, geographic scope and whether the agreement could be void *ab initio.*

Over time, the Washington court did provide some bright lines. Most notably, in ***Labriola v Pollard Group, Inc.,*** 152 Wn.2d 828 (2004), the Court determined continued employment was not consideration for a 'mid-course' non-competition tendered to an already employed employee. It reconciled earlier decisions and held additional consideration was required in order for an employer to create an enforceable agreement with a current employee. This may include "increased wages, a promotion, a bonus, a fixed term of employment or perhaps access to

protected information." Here, again, there is the bright line of a requirement for additional consideration. But what constitutes the additional consideration is left for the facts of the case.

A concurring opinion in ***Labriola*****,** by Justice Madsen, observed "employers can take measures to protect legitimate business interests *but may not unreasonably restrict the freedom of current or former employees to earn a living.*" (Emphasis supplied.) She also noted, "[n]on compete agreements designed to stabilize a company's current workforce through unreasonable restraints are similarly unenforceable." This, then, harkens to the notion freedom of movement by employees to maximize earnings may be jeopardized by contracts which tie an employee to an employer in a given industry or profession.

Indeed, lawyers are the only class of workers who cannot be tied to a non-competition agreement through RPC 5.6(a). This is based on the notion a client should have the freedom of choosing the legal service provider of their choice. But how should that be different for any other profession? Physicians, for example, like lawyers, are in a fiduciary relationship with those whom they serve. ***Loudon v. Mhyre***, 110 Wn.2d 675 (1988).

The number of employees subject to non-competition agreements seemed to explode in the 2000s. Sandwich makers had them in New York. A hardware store clerk in a small store here in King County had one. What was once a mark of distinction for 'C' level employees, and perhaps a few higher-level executives, trickled down to become standard for hourly workers. By 2020, it was estimated 28 million workers were subject to non-comps. See, e.g., 64 J. Law & Econ. 53 (2021).

Finally, in 2019, the Legislature enacted, with considerable lobbying and skill of Jesse Wing and others, what is now RCW 49.62, attached. It provides several bright lines which did not earlier exist.

The statute tells us:

"Workplace mobility is important to economic growth and development." RCW 49.62.005.

The definitions of non-competition and non-solicitation agreements are found at RCW 49.62.010.

A non-comp is "void and unenforceable" unless the terms are disclosed in writing "no later than the time of the acceptance of the offer of employment…." If the employee is earning, at the date of initial hire, less than what the statute requires, later earnings may trigger the non-comp so long as the employer discloses the terms which may later come into force. Earnings must exceed an amount to be adjusted for inflation for employees and independent contractors. For the former, the 2023 amount is $116,593.18 and for the latter, $268,252.59. And if there is a 'layoff' [an undefined term] the employer must pay the former employee for the duration of the non-comp less interim earnings. RCW 49.62.020(1) and RCW 49.63.040.

There is a presumptive maximum duration of a non-comp of 18 months. A longer duration may be enforceable only upon "clear and convincing evidence" of the necessity for the longer period. RCW 49.62.020(2).

Non-comp provisions requiring litigation outside of WA or waiving the protections of the statute are void and unenforceable. RCW 49.62.050.

Prohibitions against moonlighting are void unless the employee is earning at least 2x the state minimum wage. RCW 49.62.080.

If a non-comp violates the statute or if a non-comp is reformed or modified, a court or arbitrator is required to award the greater of actual damages or a penalty of $5000, plus fees and costs of the employee. RCW 49.62.080.

Through RCW 49.62.090, the statute "displaces conflicting tort, restitutionary, contract and other laws of this state pertaining to liability for competition by employees…." Importantly, the statute "does not revoke, modify or impede the development of the common law." RCW 49.62.090.

But it is not only at the state level where non-comps are under scrutiny.

The National Labor Relations Board's General Counsel issued a memorandum earlier this year which asserts non-comps may interfere with employee rights to engage in concerted activity through Section 7 of the National Labor Relations Act. The memo is attached. Of some interest is the General Counsel's analogy at fn. 14 of non-comps to peonage outlawed by the Thirteenth Amendment, citing to ***Pollock v. Williams***, 322 U.S. 4 (1944).

And the Federal Trade Commission is also looking at whether non-comps violate the Federal Trade Commission Act. It has proposed rulemaking to add a sub-chapter 'J' to part 210 of 16 C.F.R. This would make an unfair method of competition for an employer to enter, or attempt to enter, a non-comp. And for any non-comp the employer currently has, it would have to rescind it.

Axolotl Basics Co., Inc. [ABC] is a Delaware corporation with its principal place of business in New York City. It has offices in various other cities and some of its executives, including Bette Meddlesome, work remotely.

ABC has a unique product protected by patents: A computer chip capable of containing 100 gigas of transistors – more than any other chip manufacturer. This chip is vital for any AI developers. ABC spent billions to develop this chip.

In Ms Meddlesome's case, they began work in Chicago in 2012 as the Chief Opportunity Officer [COO] and moved to Ephrata, WA in 2018. They began work for ABC at an annual salary of $90,000. In her work, she has contact with all customers of ABC and participates in developing business and marketing plans for ABC. They had an employment contract with the following provisions:

- **Venue for any disputes is New York County [a/k/a Manhattan], New York.**
- **Disputes are to be resolved through arbitration of "any dispute originated by Employee against ABC, its officers, directors and employees."**
- **Delaware law is to be used in the forum for "any disputes."**
- **Employee "shall not solicit any customer, potential customer or past customer of ABC for a period of three years following termination of employment, regardless of the reason for the termination."**

By July 2023 Meddlesome was earning $430,000 base salary and had stock options worth bazillions of dollars. However, in September 2023, ABC decided to compress its Senior Management and do away with the role of COO and several other 'C' level employees. The tide was running out on the C level folks.

Meddlesome was offered a separation package of one year of base salary and accelerated vesting of several tranches of options. The separation package incorporated the terms of the previous employment agreement.

They did not sign the separation package. Instead, they was recruited by Xenon Yertl Zebra, Inc [XYZ] to be its COO. XYZ is in development stages of using quantum computing to develop a chip superior to that of of ABC's chip. XYZ has received significant funding from several prominent investors, including Peter Steal and Felon Tusk.

ABC's lawyer, Avocado E.L. Abogado, sent a nastygram message to Meddlesome stating ABC would initiate a civil action in New York in which it would seek an injunction based on its non-solicitation clause and inevitable disclosure of trade secrets. It would also initiate an arbitration in New York to seek damages under the Delaware version of the uniform Trade Secrets Act and the federal Defend Trade Secrets Act. ABC believes, according to its lawyer, the market for its chips would invariably be the same as for XYZ.

Meddlesome comes to you for advice. What advice do you tender?

Same general facts except:

A. Meddlesome is at a salary of $118k at the time of separation and the threat of an injunction acton in NY and demand for arbitration is made in 2024.

Scenario B: Meddlesome is the only person laid off by ABC.

Scenario C: ABC agrees to initiate the civil action arbitration in WA state.

Scenario D: ABC agrees to reduce the temporal scope of its non-solicitation agreement to 18 months but still desires to litigate and arbitrate in NY.

If you were the Washington Attorney General, what thoughts might you have about all of this?

Chapter 49.62 RCW
NONCOMPETITION COVENANTS

Sections

RCW 49.62.005 Findings. The legislature finds that workforce mobility is important to economic growth and development. Further, the legislature finds that agreements limiting competition or hiring may be contracts of adhesion that may be unreasonable. [2019 c 299 § 1.]

RCW 49.62.010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Earnings" means the compensation reflected on box one of the employee's United States internal revenue service form W-2 that is paid to an employee over the prior year, or portion thereof for which the employee was employed, annualized and calculated as of the earlier of the date enforcement of the noncompetition covenant is sought or the date of separation from employment. "Earnings" also means payments reported on internal revenue service form 1099-MISC for independent contractors.

(2) "Employee" and "employer" have the same meanings as in RCW 49.17.020.

(3) "Franchisor" and "franchisee" have the same meanings as in RCW 19.100.010.

(4) "Noncompetition covenant" includes every written or oral covenant, agreement, or contract by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind. A "noncompetition covenant" does not include: (a) A nonsolicitation agreement; (b) a confidentiality agreement; (c) a covenant prohibiting use or disclosure of trade secrets or inventions; (d) a covenant entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest; or (e) a covenant entered into by a franchisee when the franchise sale complies with RCW 19.100.020(1).

(5) "Nonsolicitation agreement" means an agreement between an employer and employee that prohibits solicitation by an employee, upon termination of employment: (a) Of any employee of the employer to

leave the employer; or (b) of any customer of the employer to cease or reduce the extent to which it is doing business with the employer.

(6) "Party seeking enforcement" means the named plaintiff or claimant in a proceeding to enforce a noncompetition covenant or the defendant in an action for declaratory relief. [2019 c 299 § 2.]

RCW 49.62.020 When void and unenforceable. (1) A noncompetition covenant is void and unenforceable against an employee:

(a)(i) Unless the employer discloses the terms of the covenant in writing to the prospective employee no later than the time of the acceptance of the offer of employment and, if the agreement becomes enforceable only at a later date due to changes in the employee's compensation, the employer specifically discloses that the agreement may be enforceable against the employee in the future; or

(ii) If the covenant is entered into after the commencement of employment, unless the employer provides independent consideration for the covenant;

(b) Unless the employee's earnings from the party seeking enforcement, when annualized, exceed one hundred thousand dollars per year. This dollar amount must be adjusted annually in accordance with RCW 49.62.040;

(c) If the employee is terminated as the result of a layoff, unless enforcement of the noncompetition covenant includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement.

(2) A court or arbitrator must presume that any noncompetition covenant with a duration exceeding eighteen months after termination of employment is unreasonable and unenforceable. A party seeking enforcement may rebut the presumption by proving by clear and convincing evidence that a duration longer than eighteen months is necessary to protect the party's business or goodwill. [2019 c 299 § 3.]

RCW 49.62.030 When void and unenforceable against independent contractors. (1) A noncompetition covenant is void and unenforceable against an independent contractor unless the independent contractor's earnings from the party seeking enforcement exceed two hundred fifty thousand dollars per year. This dollar amount must be adjusted annually in accordance with RCW 49.62.040.

(2) The duration of a noncompetition covenant between a performer and a performance space, or a third party scheduling the performer for a performance space, must not exceed three calendar days. [2019 c 299 § 4.]

RCW 49.62.040 Dollar amounts adjusted. The dollar amounts specified in RCW 49.62.020 and 49.62.030 must be adjusted annually for inflation. Annually on September 30th the department of labor and industries must adjust the dollar amounts specified in this section by calculating to the nearest cent using the consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index, for the twelve months prior to each September 1st as calculated by the United States department of labor. The adjusted dollar amount

calculated under this section takes effect on the following January 1st. [2019 c 299 § 5.]

RCW 49.62.050 Unenforceable provisions. A provision in a noncompetition covenant signed by an employee or independent contractor who is Washington-based is void and unenforceable:

(1) If the covenant requires the employee or independent contractor to adjudicate a noncompetition covenant outside of this state; and

(2) To the extent it deprives the employee or independent contractor of the protections or benefits of this chapter. [2019 c 299 § 6.]

RCW 49.62.060 Franchisor restrictions. (1) No franchisor may restrict, restrain, or prohibit in any way a franchisee from soliciting or hiring any employee of a franchisee of the same franchisor.

(2) No franchisor may restrict, restrain, or prohibit in any way a franchisee from soliciting or hiring any employee of the franchisor. [2019 c 299 § 7.]

RCW 49.62.070 Employees having an additional job—When authorized. (1) Subject to subsection (2) of this section, an employer may not restrict, restrain, or prohibit an employee earning less than twice the applicable state minimum hourly wage from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed.

(2)(a) This section shall not apply to any such additional services when the specific services to be offered by the employee raise issues of safety for the employee, coworkers, or the public, or interfere with the reasonable and normal scheduling expectations of the employer.

(b) This section does not alter the obligations of an employee to an employer under existing law, including the common law duty of loyalty and laws preventing conflicts of interest and any corresponding policies addressing such obligations. [2019 c 299 § 8.]

RCW 49.62.080 Violation of this chapter—Relief—Remedies. (1) Upon a violation of this chapter, the attorney general, on behalf of a person or persons, may pursue any and all relief. A person aggrieved by a noncompetition covenant to which the person is a party may bring a cause of action to pursue any and all relief provided for in subsections (2) and (3) of this section.

(2) If a court or arbitrator determines that a noncompetition covenant violates this chapter, the violator must pay the aggrieved person the greater of his or her actual damages or a statutory penalty of five thousand dollars, plus reasonable attorneys' fees, expenses, and costs incurred in the proceeding.

(3) If a court or arbitrator reforms, rewrites, modifies, or only partially enforces any noncompetition covenant, the party seeking enforcement must pay the aggrieved person the greater of his or her

actual damages or a statutory penalty of five thousand dollars, plus reasonable attorneys' fees, expenses, and costs incurred in the proceeding.

(4) A cause of action may not be brought regarding a noncompetition covenant signed prior to January 1, 2020, if the noncompetition covenant is not being enforced. [2019 c 299 § 9.]

RCW 49.62.090 Conflict of laws. (1)(a) Subject to (b) of this subsection, this chapter displaces conflicting tort, restitutionary, contract, and other laws of this state pertaining to liability for competition by employees or independent contractors with their employers or principals, as appropriate.

(b) This chapter does not amend or modify chapter 19.108 RCW.

(2) Except as otherwise provided in this chapter, this chapter does not revoke, modify, or impede the development of the common law. [2019 c 299 § 10.]

RCW 49.62.100 Retroactive application. This chapter applies to all proceedings commenced on or after January 1, 2020, regardless of when the cause of action arose. To this extent, this chapter applies retroactively, but in all other respects it applies prospectively. [2019 c 299 § 11.]

RCW 49.62.110 Construction. This chapter is an exercise of the state's police power and shall be construed liberally for the accomplishment of its purposes. [2019 c 299 § 12.]

RCW 49.62.900 Effective date—2019 c 299. This act takes effect January 1, 2020. [2019 c 299 § 13.]

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

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[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.

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[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.

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[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

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("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

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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.