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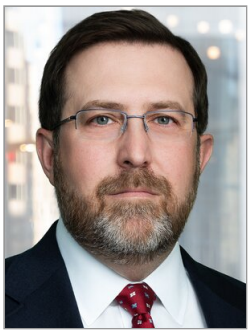
Novel NLRB Action Highlights Aggressive Noncompete Stance

By **Erik Weibust and Erin Schaefer** (July 7, 2023, 11:28 AM EDT)



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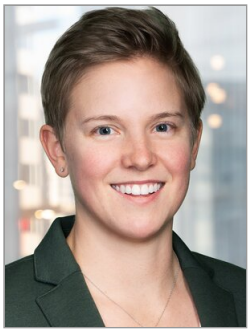

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The National Labor Relations Board has found its first target under **guidance issued** in a May 30 memo from its general counsel, which claimed that noncompete agreements may violate the National Labor Relations Act.

In its first known enforcement action targeting an employer's noncompete agreement, the NLRB issued a complaint against Michigan cannabis processor Berry Green Management Inc., an affiliate of MKX Oil Company.

The alleged labor law violations were recently resolved in a private settlement.[1] The enforcement action, which was filed on Jan. 20, predates the May 30 guidance memo.

While the settlement details are private, the NLRB's complaint against Berry Green demonstrates that the NLRB general counsel is already in a litigation posture testing the legality of her novel noncompete theory.

Background

At the end of May, the NLRB's top lawyer, Jennifer Abruzzo, issued a memo instructing the NLRB's regional directors of her position that noncompete clauses in employment contracts and severance agreements with employees protected by the NLRA — i.e., nonmanagerial and nonsupervisory employees — violate federal labor law except in limited circumstances.[2]

The memo, while not law, outlines Abruzzo's legal theory that she will present to the NLRB, which makes law primarily through adjudication of unfair labor practice cases. The memo provides guidance to the agency's field offices of the position that the general counsel is instructing them to take when investigating unfair labor practice charges, claiming that such clauses interfere with employees' rights under the NLRA.

In the memo, Abruzzo states that "the proffer, maintenance, and enforcement of such agreements" violate the NLRA where they "reasonably tend to chill employees in the exercise" of their right under Section 7 of the NLRA to take collective action, including organizing to improve their terms and conditions of employment.

Because Abruzzo considers such provisions as tending to limit an employee's access to other employment, she argues that employees may be more reticent to engage in lawful protected concerted activity that may result in their termination, such as seeking union representation and engaging in strikes.

Abruzzo acknowledged that a narrowly tailored noncompete clause may be lawful, but only in certain circumstances such as where the provision restricts an individual's managerial or ownership interest in a competing business or in connection with true independent contractor relationships. But in Abruzzo's view "a desire to avoid competition from a former employee is not a legitimate business interest that could support" subjecting an employee to a noncompete clause.

That is, of course, the law in the 46 states that currently permit noncompetes, as all such states

permit usage of noncompetes only to protect a legitimate business interest, and not to avoid fair competition.[3] However, the first case brought under this newfound authority goes way beyond just overbroad noncompetes that indicate a desire to avoid competition from a former employee.

The Berry Green Case

In the case against Berry Green the general counsel alleged, among other things, that the company violated the NLRA by maintaining overly broad or unlawful nonsolicitation and noncompete agreements.

The provisions at issue were fairly standard fare including nonsolicitation and noncompete provisions that were limited in geographic area to the state of Michigan during a two-year period, in order to protect production methods, customer and vendor information, and relationships in the burgeoning cannabis industry in Michigan.

It is unclear from the available public documents what the specific job duties the individuals subject to the agreement were in relation to the employer's business.

The general counsel demanded that Berry Green be ordered to:

- Cease and desist from maintaining these provisions and to take affirmative action, including rescinding the nonsolicitation and noncompete provisions that were in effect for six months prior to the filing of the charge, and notify each employee and former employee in writing that the provisions have been rescinded;
- Rescind any discipline or cease and desist letters or other actions to enforce the provisions; and
- Make whole any employee who suffered any pecuniary harm as a result of being subject to such a provision.

Berry Green denied the allegations, but ultimately entered into a private settlement with the individual workers who made them and, pursuant to that agreement, the employees requested withdrawal of the charge. Abruzzo withdrew the complaint on May 2 — almost a full month before she issued the noncompete memo.

Takeaways

The terms of the private non-NLRB settlement were not disclosed, but the complaint itself demonstrates how broadly the general counsel views her authority with respect to post-employment restrictive covenants, how aggressively she intends to exercise this perceived authority, and what types of provisions she deems violative of the NLRA.

Berry Green challenged the NLRB's authority to issue the complaint. The company raised several defenses, including that the alleged conduct is not unlawful under the NLRA and that the allegations and requested remedy exceed the authority Congress intended to confer upon the agency, but the defenses were not litigated.

Future targets very well may choose to litigate the same or similar defenses, and the courts will have to sort it out — perhaps even the U.S. Supreme Court, under the major questions doctrine[4] or otherwise.

Indeed, the general counsel's memo suggests that a narrowly tailored noncompete clause may be lawful, and only vaguely references nonsolicitation covenants.

However, the claims against Berry Green cover not only a two-year post-employment noncompete, but also both customer and employee nonsolicitation provisions and a nondisparagement provision reflecting enforcement of the board's Feb 21 McLaren Macomb decision, which **rendered overly broad nondisparagement provisions unlawful**.[5]

We don't know the terms of the private settlement, so it is unclear where the general counsel drew any lines in the sand, but this does show that she intends to act aggressively when it comes to all forms of post-employment restrictive covenants that she deems to have a chilling effect on employees engaging in Section 7 activity.

Time will tell whether the NLRB agrees with Abruzzo's view on noncompetes, and if it does, whether the courts will determine that the board has the authority to prohibit them.

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[1] https://news.bloomberglaw.com/daily-labor-report/nlrbs-first-noncompete-case-is-window-into-enforcement-strategy.

[2] https://www.tradesecretsandemployeemobility.com/2023/05/articles/non-compete-agreements/nlrb-general-counsel-issues-memo-targeting-noncompete-agreements-for-nonmanagerial-and-nonsupervisory-employees/.

[3] Minnesota recently passed a ban that goes into effect July 1, 2023: https://www.tradesecretsandemployeemobility.com/2023/05/articles/non-compete-agreements/10000-lakes-and-no-noncompetes-minnesota-passes-law-banning-non-competes-effective-july-1-2023/. The New York legislature has also passed a ban, although it still needs the Governor's signature: https://www.tradesecretsandemployeemobility.com/2023/06/articles/non-compete-agreements/noncompete-ban-passes-state-assembly-heads-to-new-york-governor-for-possible-signature/.

[4] https://www.law360.com/articles/1511340/ftc-authority-to-ban-noncompetes-shaky-after-epa-ruling.

[5] https://www.tradesecretsandemployeemobility.com/2023/02/articles/trade-secrets-and-confidential-information/the-nlrb-finds-unlawful-confidentiality-and-non-disparagement-provisions-in-severance-agreements-non-disparagement-non-disclosure-non-allowed/.
