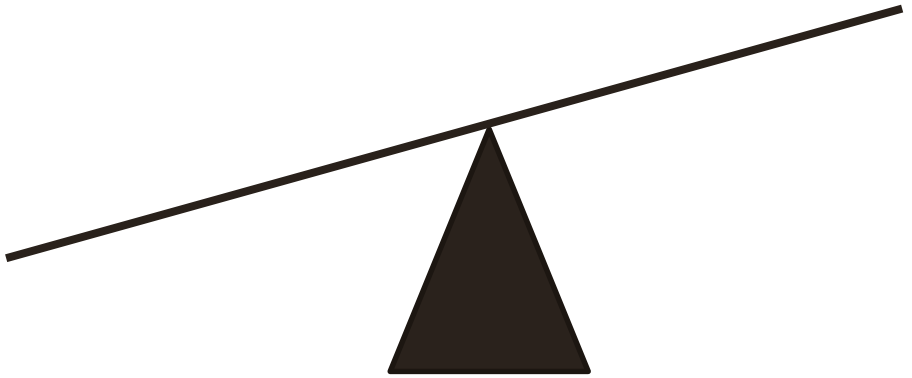
A *Tipping Point* IN EMPLOYMENT AND LABOR LAW



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National Labor Relations Board

The National Labor Relations Board (NLRB) is the federal agency that enforces the National Labor Relations Act (NLRA).

- 5-member Board appointed by the president
- Office of the General Counsel oversees 26 regional offices

What are Section 7 Rights?

Section 7 of the National Labor Relations Act:

- "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…"

Protected Concerted Activity

- **“Concerted activities”** generally means two or more employees, but includes circumstances where individual employees seek to initiate group action and where they bring group complaints to the attention of management.
- **“Mutual aid or protection”** includes employee efforts to:
  - Improve terms and conditions of employment, or
  - Improve their lot as employees through channels outside the employee-employer relationship.

Examples of PCA

- Asking for higher wages or benefits
- Protesting certain working conditions
- Filing charges with a federal, state, or local agency (e.g., OSHA, DOL)
- Speaking to coworkers about wages and other workplace issues
- Speaking to the media or other third parties about workplace issues
- Posting on social media about collective employment and workplace issues

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- **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-Disclosure.** …[A]t 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.

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- Cannot require broad waiver of employees' Section 7 rights
- Mere proffer of an agreement containing these terms is unlawful
- Even former employees have Section 7 rights
- Applies even if signing severance agreement is voluntary
- Nondisparagement and confidentiality clauses must be narrowly tailored…*but what does that mean?*

General Counsel Guidance

- GC 23-05 issued on March 22, 2023
- Guidance to the regional offices about how the GC will interpret *McLaren Macomb*
- GC's opinion, not the law

GC 23-05: Retroactive Effect

- Retroactive effect
- Possibility of continuing violations within 6-month statute of limitations period

GC 23-05: Confidentiality

- Employers may continue to restrict the dissemination of proprietary and trade secret information based on legitimate business justifications.
- Requiring that an employee keep the financial terms of the agreement confidential is lawful.
- Prohibiting employees from sharing information about the agreement with third parties is not lawful.

GC 23-05: Nondisparagement

- “Disparage” must be defined in the agreement.
- It is a defamation standard, i.e., prohibiting employees from making statements about the employer that are “maliciously untrue.”
- Cannot require nondisparagement of the employer’s “parents, affiliated entities, officers, directors, employees, agents, representatives.”

GC 23-05: Supervisors

- Supervisors are excluded from the Act's coverage but:
  - Severance agreements proffered to supervisors may not interfere with a supervisor's participation in a Board proceeding.
  - Employer may not discipline a supervisor who refuses to proffer an unlawfully overbroad severance agreement to an employee on the employer's behalf.

GC 23-05: Broad Application

- The decision is not limited to severance agreements. The GC will apply it to any employer-employee communications that infringe on Section 7 rights.
- There may be other problematic provisions in severance agreements:
  - Non-compete
  - No solicitation
  - No poaching
  - Broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement
  - Certain cooperation requirements

GC 23-05: Savings Clause

Employees have the right to: (1) Organize a union to negotiate with an employer concerning their wages, hours, and other terms and conditions of employment; (2) form, join, or assist a union, such as by sharing employee contact information; (3) talk about or solicit for a union during non-work time, such as before or after work or during break times, or distribute union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discuss wages and other working conditions with co-workers or a union; (5) take action with one or more co-workers to improve working conditions by, among other means, raising work-related complaints directly with the employer or with a government agency, or seeking help from a union; (6) strike and picket, depending on its purpose and means; (7) take photographs or other recordings in the workplace, together with co-workers, to document or improve working conditions, except where an overriding employer interest is present; (8) wear union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choose not to engage in any of these activities.

FTC Ban on Noncompetes

- On January 5, 2023, the Federal Trade Commission announced its intent to ban the use of noncompetes in employment contracts, and issued a proposed a proposed rule that would ban noncompetes entirely in the employer-employee context.
- The FTC announcement of the proposed rule called the use of noncompetes a “widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses.”
- The FTC estimates that by stopping the use of noncompetes, wages could increase by nearly $300 billion per year and expand career opportunities for about 30 million Americans.

What Does the Proposed Rule Say?

- The proposed rule would prohibit employers from entering into non-compete agreements with workers going forward.
- It would also force companies to formally rescind existing non-compete provisions AND send an individualized communication to current and former employees notifying them of the rescission.
- Noncompetes entered into as part of the sale of a business are still permissible for owner, member, or partner holding at least a 25 percent ownership interest in the entity at the time of sale.
- No exception for executive compensation, stock, bonuses etc.

What About Other Types of Agreements?

- The rule would prohibit only "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."
- Non-solicitation and non-disclosure covenants would still be permissible – BUT:
  - "functional test" to determine if clause operates as a "de facto" noncompete that would be impermissible under the rule
    - Example: training agreement to repay costs upon termination if the payment is not reasonably related to the costs incurred by the employer

What is the Timeline for Implementation?

- Comments must be received on or before April 19.
- After receiving the comments to the rule, the FTC has several options:
  - Reopen the comment period;
  - Issue a new proposed rule; or
  - Issue a final rule.
- Once FTC issues a final rule, it will be published in the Federal Register, and cannot be effective for at least 60 days after publication.
  - Litigation expected
  - Congress could pass a resolution of disapproval and the President could sign it (doubtful). Congress could also call hearings, enact new legislation, or impose funding restrictions.

What Alternatives Might Come out of This?

- Noncompetes restricted for a certain class of workers, such as lower wage workers (subject to definition)
- Noncompetes entered into as a condition of receiving executive compensation such as bonuses, stock might also be permitted
- Rebuttable presumption that noncompete is prohibited

What Should Employers do Now?

- Identify existing noncompetes so you know what you are dealing with.
- Hostility to noncompetes is here to stay regardless of what FTC does. Look at your current provisions and current practice – should you make changes?
- Consider alternate means to protect the business - review and improve policies and practices on confidential and trade secret information.
- Comment on proposed rule until April 19. https://www.regulations.gov/commenton/FTC-2023-0007-0001

What Should Employers do Now?

- Weigh the need for broad confidentiality and nondisparagement language.
- Consider maintaining two agreements – one for supervisors and other high-level employees and a separate, compliant one for non-supervisory employees.
- Review not just severance agreements, but any communication that may require waiver of Section 7 rights. This includes offer letters, employee handbook policies, employment agreements, etc.

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