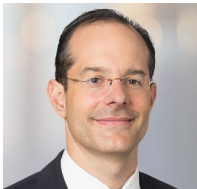


No Limits: Non-Compete Agreements Next Up on NLRB General Counsel Chopping Block

A Practical Guidance® Article by Michael Lebowich, Mark Theodore, Steven Porzio, Joshua Fox, Elizabeth Dailey, and Raymond Arroyo, Proskauer Rose LLP



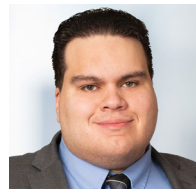
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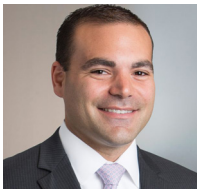
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Following the National Labor Relations Board's ("NLRB") highly-controversial decision in *McLaren Macomb* declaring most confidentiality and non-disparagement clauses in separation agreements to be [unlawful](#), General Counsel Abruzzo this week declared her intention to seek to invalidate nearly all post-employment non-compete agreements, in a [memorandum](#) stating her prosecutorial position that "the proffer, maintenance, and enforcement" of non-compete agreements violates the Act.

The General Counsel argues that, with extremely limited exception, any agreement that limits future employment interferes with Section 7 rights under the National Labor Relations Act. She argues that these clauses improperly deny employees the ability to quit or change jobs by cutting off their access to alternative employment opportunities. As a result, this prevents employees from:

- Concertedly threatening to resign to demand better working conditions
- Carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions
- Concertedly seeking or accepting employment with a local competitor to obtain better working conditions
- Soliciting co-workers to work for a local competitor as part of a broader course of protected, concerted activity –and–
- Seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace
- Since the Board only has jurisdiction over “employees” as defined by the Act, this memo has no impact on non-compete agreements for managers and supervisors who are excluded from the scope of Section 7. But, importantly, this memo affects employment relationships with union *and non-union* employees.
- This is just one of many efforts to limit the use of non-compete agreements. For example, [some states](#) already restrict or prohibit the provision of non-compete agreements to low-wage and middle-wage workers, and just a few months ago, we saw the [reintroduction of the Workforce Mobility Act](#), that seeks to prohibit the use and enforcement of post-employment non-competition agreements. Further, at the beginning of the year, the FTC [proposed an expansive new rule](#) which would impose a near-complete ban on the use of non-compete agreements by employers.

The only identified exceptions to this rule, in the General Counsel's opinion, are agreements that relate to limiting individuals' managerial or ownership interests in a competing business, or agreements that restrict independent-contractor relationships (neither of which involve future “employment”). The memo states that there may be other circumstances in which a narrowly tailored non-compete agreement's infringement on employees' rights is justified, but did not elaborate on what those circumstances may be.

Key Takeaways

- The NLRB has not yet ruled on the General Counsel's theory. But, given this very public announcement, employers relying on non-compete agreements can expect a slew of unfair labor practices challenging the agreements.

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Michael Lebowich, Partner, Proskauer Rose LLP

Michael J. Lebowich is a partner in the Labor & Employment Law Department and co-head of the Labor-Management Relations Group. He represents and counsels employers on a wide range of labor and employment matters, with a particular interest in the field of traditional labor law.

Michael acts as the primary spokesperson in collective bargaining negotiations, regularly handles grievance arbitrations, assists clients in the labor implications of corporate transactions, and counsels clients on union organizing issues, strike preparation and day-to-day contract administration issues. He also has significant experience in representation and unfair labor practice matters before the National Labor Relations Board.

His broad employment law experience includes handling of race, national origin, gender and other discrimination matters in state and federal court. A significant amount of his practice is devoted to counseling clients regarding the application and practical impact of the full range of employment laws that affect our clients, including all local, state and federal employment discrimination statutes, the Fair Labor Standards Act, the Family and Medical Leave Act, and state labor laws.

Michael has substantial experience in a wide variety of industries, including entertainment, broadcasting, newspaper publishing and delivery, utilities and lodging. He represents such clients as *The New York Times*, BuzzFeed, ABC, the New York City Ballet, PPL, Pacific Gas & Electric, Host Hotels and Resorts, and The Broadway League (and many of its theater owner and producing members). Michael also has significant public sector experience representing, among others, the City of New York and the Metropolitan Transportation Authority.

Michael is a frequent guest lecturer at Columbia Business School, the Cornell School of Hotel Administration, the New York University Tisch School for Hospitality, Tourism and Sports Management, and is an advisory board member of the Cornell Institute for Hospitality Labor and Employment Relations.

Mark Theodore, Partner, Proskauer Rose LLP

Mark Theodore is a partner in the Labor & Employment Law Department. He has devoted his practice almost exclusively to representing management in all aspects of traditional labor law matters throughout the U.S. He is Co-Chair of Proskauer's Labor-Management and Collective Bargaining Practice Group.

Mark has extensive experience representing employers in all matters before the NLRB, including representation petitions, jurisdictional disputes and the handling of unfair labor practice charges from the date they are filed through trial and appeal. Mark has acted as lead negotiator for dozens of major companies in a variety of industries, including national, multi-unit, multi-location, multi-employer and multi-union bargaining. Mark has handled lockout and strike situations, coordinating the clients efforts.

In addition, Mark has handled hundreds of arbitrations involving virtually every area of dispute, including contract interest arbitration, contract interpretation, just cause termination/discipline, benefits, pay rates, and hours of work.

Steven Porzio, Partner, Proskauer Rose LLP

Steven J. Porzio is a partner in the Labor & Employment Law Department and a member of the Labor-Management Relations Group. Steve assists both unionized and union-free clients with a full range of labor and employee relations matters. He represents employers in contract negotiations, arbitrations, and representation and unfair labor practice cases before the National Labor Relations Board.

Steve has experience conducting vulnerability assessments and providing management training in union and litigation avoidance, leave management, wage and hour, and hiring and firing practices. He provides strategic and legal advice in certification and decertification elections, union organizing drives, corporate campaigns, picketing and union contract campaigns. Steve has represented employers in a number of different industries, including higher education, health care, construction and manufacturing in successful efforts against unions in election and corporate campaigns.

In addition to his traditional labor law work, Steve assists companies with handbook and personnel policy drafting and review, daily management of employee disciplines and terminations, and general advice and counsel on compliance with federal and state employment laws.

Steve's litigation experience includes work on matters before state and federal courts, the Equal Employment Opportunity Commission, the Connecticut Commission on Human Rights and Opportunities, the New York State Division of Human Rights and various other administrative agencies. He has litigated matters involving age, race, national origin, gender and disability discrimination, wage and hour, whistleblower and wrongful termination claims.

While attending the Syracuse University College of Law, Steve served as the editor-in-chief of the Syracuse Science and Technology Law Reporter. He also received the Robert F. Koretz scholarship, awarded in recognition of excellence in the study of labor law.

Joshua Fox, Senior Counsel, Proskauer Rose LLP

Joshua S. Fox is a senior counsel in the Labor & Employment Law Department and a member of the Sports, Labor-Management Relations, Class and Collective Actions and Wage and Hour Groups.

As a member of the Sports Law Group, Josh has represented several Major League Baseball Clubs in all aspects of the salary arbitration process, including the Miami Marlins, Boston Red Sox, Los Angeles Dodgers, Kansas City Royals, San Francisco Giants, Tampa Bay Rays and Toronto Blue Jays. In particular, Josh successfully represented the Miami Marlins in their case against All-Star Catcher J.T. Realmuto, which was a significant club victory in salary arbitration. Josh also represents Major League Baseball and its clubs in ongoing litigation brought by current and former minor league players who allege minimum wage and overtime violations. Josh participated on the team that successfully defended Major League Baseball in a wage-and-hour lawsuit brought by a former volunteer for the 2013 All-Star FanFest, who alleged minimum wage violations under federal and state law. The lawsuit was dismissed by the federal district court, and was affirmed by the U.S. Court of Appeals for the Second Circuit.

Josh also has extensive experience representing professional sports leagues and teams in grievance arbitration proceedings, including playing a vital role in all aspects of the grievance challenging the suspension for use of performance-enhancing drugs of then-New York Yankees third baseman Alex Rodríguez. Josh also has counseled NHL Clubs and served on the trial teams for grievances alleging violations of the collective bargaining agreement, including cases involving use of performance-enhancing substances, domestic violence issues, and supplementary discipline for on-ice conduct. He has played a key role in representing professional sports leagues in all aspects of their collective bargaining negotiations with players and officials, including the Major League Baseball, National Hockey League, the National Football League, Major League Soccer, the Professional Referee Organization, and the National Basketball Association.

In addition, Josh has extensive experience representing clients in the performing arts industry, including the New York City Ballet, New York City Opera, Big Apple Circus, among many others, in collective bargaining negotiations with performers and musicians, the administration of their collective bargaining agreements, and in grievance arbitrations.

Josh also represents a diverse range of clients, including real estate developers and contractors, pipe line contractors, hospitals, hotels, manufacturers and public employers, in collective bargaining, counseling on general employment matters and proceedings before the National Labor Relations Board, New York State Public Employment Relations Board and arbitrators.

Josh has also recently served as an adjunct professor at Cornell University's School of Industrial Labor Relations for the past two years, teaching a course regarding Major League Baseball salary arbitration.

Prior to joining Proskauer, Josh worked for a year and a half at the National Hockey League, where he was involved in all labor and employment matters, including preparations for collective bargaining, grievance arbitration, contract drafting and reviewing and employment counseling. Josh also interned in the labor relations department of Major League Baseball and at Region 2 of the National Labor Relations Board. He was a member of the Brooklyn Law Review and the Appellate Moot Court Honor Society and served as president of the Brooklyn Entertainment and Sports Law Society.

Elizabeth Dailey, Associate, Proskauer Rose LLP

Elizabeth Ann Dailey is an associate in the Labor & Employment Law Department. Elizabeth assists clients in a variety of labor and employment matters, including motion practice, administrative proceedings, internal investigations, labor-management relations, and claims of employment discrimination. As part of her labor-management relations practice, Elizabeth has assisted in representation proceedings before the NLRB and has experience responding to unfair labor practice charges, conducting labor-related business risk assessments, and assisting with collective bargaining negotiations.

Elizabeth frequently represents clients across a variety of industries and sectors, including educational institutions, sports entities, news and media organizations, entertainment companies, healthcare institutions, and real estate companies.

Elizabeth earned her J.D. from the University of Pennsylvania Law School, where she completed a certificate program in business management from The Wharton School. While attending Penn Law, Elizabeth interned with the National Labor Relations Board Region 2 where she conducted investigations into unfair labor practices and recommended case dispositions to the Regional Director.

Raymond Arroyo, Associate, Proskauer Rose LLP

Raymond Arroyo is an associate in the Labor Department and a member of the Employment Litigation & Arbitration Group.

During his time at Proskauer, Raymond has focused on a wide range of employment matters, including employment discrimination litigation, labor/management relations, and policies, handbooks and training, among others. Raymond has gained experience across a wide variety of industries including financial services, educational institutions, and sports.

Raymond earned his J.D. from Columbia Law School. While at Columbia, Raymond worked at the Center for Public Research and Leadership as a graduate assistant, providing consulting and strategic advice to educational institutions and organizations. Raymond was also a staff editor for the Columbia Journal of Race and Law.

Prior to his legal career, Raymond was a Teach for America corps member and taught middle school in New York City.

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