

# The General Counsel for the National Labor Relations Board (“NLRB”), Jennifer Abruzzo, has recently issued two memorandums significantly changing how employers must draft separation agreements and opining on the enforceability of noncompetition agreements. Can she do that?

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by Jack Sullivan

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Abruzzo has been busy. Within the last few months, she has issued two notable memorandums that could have significant impacts on how employers must comply with the National Labor Relations Act (“NLRA”). It is important to note that certain provisions of the NLRA apply to all employers, not only those that currently have unions or are facing union election petitions.

## What was the first memorandum?

Abruzzo issued a memorandum on March 22, 2023 in response to the NLRB’s decision in *McLaren Macomb*, 372 NLRB No. 58 (N.L.R.B. February 21, 2023). (We analyzed that decision in detail in another Quirky Questions blog post, linked [here](#); in sum, the NLRB held in *McLaren* that an employer offering a separation agreement with non-disparagement and confidentiality provisions was inherently coercive, and therefore was facially a violation of the NLRA.). One important thing to note: the logic and reasoning of *McLaren* likely apply equally to settlement agreements that resolve litigation brought by a former employee, in addition to separation or severance agreements entered at the time an employee’s employment ends.

The General Counsel’s memorandum in response to *McLaren* went beyond explaining the ruling. Instead, Abruzzo took the position that the decision not only applied to future separation agreements, but also applied *retroactively* – meaning that, in her view, employers who tried to enforce non-disparagement and confidentiality provisions in agreements with previously departed employees faced the risk of an unfair labor practice (“ULP”) charge under the NLRA. The memorandum also asserted that employers may maintain non-defamation clauses in separation agreements, but those clauses must be

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“narrowly-tailored, justified,” and “limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue, such that they are made with knowledge of their falsity or with reckless disregard for their truth or falsity.”

Finally, the memorandum outlined Abruzzo’s position that other provisions in separation agreements that might interfere with an employee’s Section 7 rights under the NLRA include non-compete clauses – a point on which she expanded earlier this week.

### **What was the second memorandum?**

The second memorandum was issued on May 30, 2023, and expanded upon Abruzzo’s view that non-compete clauses violate the NLRA. In this memorandum, Abruzzo asserted that employers that require and enforce non-compete agreements with employees run afoul of the NLRA. Abruzzo believes that non-competition agreements chill an employee’s exercise of their Section 7 rights under the NLRA, 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; employees’ bargaining power is undermined in the context of lockouts, strikes, and other labor disputes; 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.”

Abruzzo also argued in the memorandum that non-competition agreements discourage employees from exercising Section 7 rights because (1) any employees’ threats to resign in connection with demanding better working conditions will be seen as “futile” by the employer, since the employer knows the employee lacks access to other employment opportunities; (2) employees will refrain from actually resigning following a threat to do so in demanding for better working conditions; (3) employees are unable to seek or accept employment with competitors to obtain better working conditions; (4) employees are unable to solicit their co-workers to work for a competitor to obtain better working conditions; and (5) employees are unable to see employment with the goal of engaging in protected activity, such as union organizing, with other employees at their employer.

While Abruzzo indicated there may be “special circumstances” in which a non-competition agreement is reasonable, such as protecting proprietary or trade secret information, or narrowly-tailored provisions “that clearly restrict only individuals’ managerial or ownership interests in a competing business, or true independent-contractor relationships,” she maintained that for the most part non-competition agreements are unenforceable.

Abruzzo also categorically believes that an employer’s justification for a non-competition agreement will likely never be reasonable when the agreement is with “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,” and that “a desire to avoid competition from a former employee is not a legitimate business interest that could

support a special circumstances defense.”

**Do Abruzzo’s memoranda carry the force of the law?**

No.

In fact, the press release for the memorandum regarding *McLaren* includes a disclaimer stating that the *McLaren* memorandum represents Abruzzo’s views, not those of the NLRB.

With that said, it is important to understand that Abruzzo’s memoranda are directives to NLRB prosecutors across the country, who now will be expected to view confidentiality provisions, non-disparagement provisions, and non-competition agreements as potential ULPs under the NLRA which, in turn, subject employers accused of the ULP to a range of sanctions that have been expanded by Abruzzo during her term in office.

Finally, employers should also remember that non-competition agreements are under increasing scrutiny and greater legal restrictions across the country. In January 2023, the Federal Trade Commission proposed a rule banning almost all non-competes (on that proposed rule, our previous commentary is linked, [here](#)). The FTC received a substantial number of comments on that proposed rule. In addition, many states have passed recent legislation banning or limiting non-compete agreements, including [a law that will take effect in the state of Minnesota](#) on July 1, 2023.