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NLRB Finds Its First Noncompete Target—and Its Charges Go Well Beyond an "Overbroad" Noncompete

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The National Labor Relations Board (NLRB) has found its first target under recent guidance issued in a memo from its General Counsel claiming that noncompete agreements may violate the National Labor Relations Act (NLRA). According to Bloomberg Law, "[t]he NLRB's first enforcement action against an employer's noncompete agreement targeted a Michigan cannabis processor and ended with a recent private settlement resolving the alleged labor law violations." (The enforcement action predates the guidance memo). Bloomberg obtained redacted documents from the case via a Freedom of Information Act request.

As we previously reported, on May 31, 2023, the NLRB's top lawyer, Jennifer Abruzzo, issued a General Counsel memo instructing the Labor Board's Regional Directors of her position that noncompete clauses for employees protected by the NLRA (i.e., nonmanagerial and nonsupervisory employees) in employment contracts and severance agreements violate federal labor law except in limited circumstances. The memo, while not law, outlines her legal theory that she will present to the National Labor Relations Board, 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, NLRB General Counsel 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 General Counsel Abruzzo considers such provisions as tending to "cut[] off" an employee's "access to other employment opportunities," she asserts that they "chill[] employees from engaging in Section 7 activity because employees know that they will have greater difficulty replacing their income if they are discharged for exercising their statutory right to organize and act together to improve working conditions," including in the context of 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 47 states (soon to be 46) which permit noncompetes, as all such states permit usage of noncompetes only to protect a legitimate business interest, and not to avoid fair competition. 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."

In that case, which the General Counsel brought against Michigan-based cannabis company Berry Green Management, Inc. (an affiliate of MKX Oil Company) ("Berry Green"), the General Counsel alleged, among other things, that Berry Green "maintained the following overly broad or otherwise unlawful rules in its Confidentiality, Non-Solicitation, and Non-Compete Agreement":

(a) **Provision 2(a)** – Non-Solicitation. Employee represents, warrants, covenants and agrees that during the Term, he or she will not (i) recruit or solicit any employee, contractor or sales agent of Employers to discontinue such employment or engagement; seek to employ or retain any such employee, contractor or agent; or cause any business, person, firm, or corporation which competes directly with Employers to seek or solicit the employment or retention of any such employee, contractor or agent; or (ii) solicit or encourage any person or any business, firm, corporation or other entity which has a business or commercial relationship with Employers to seek to discontinue such relationship or reduce the volume or scope of such relationship.

(b) **Provision 1** – Non-Competition. Employee represents, warrants, covenants, and agrees that during the Term, he or she will not, directly or indirectly, either:

a. have any interest in (whether as founder, proprietor, officer, director or otherwise) or enter the employment of any individual, partnership, joint venture, corporation or other business entity directly engaged in the Business in the State of Michigan.

b. be engaged as an independent contractor or any individual, partnership, joint venture, corporation, or other business entity directly engaged in the Business in the State of Michigan;

c. solicit, divert or take away, or attempt to solicit, divert, or take away any customer or the business of any customer with respect to the product or services of [the Employer] or its Affiliates;

d. attempt to cause any customer to refrain, in any respect, from maintaining or acquiring any product or service provided or offered by [the Employer].

. . .

and **Provision 4 – Reasonable Restrictions.** The term of this Agreement shall be the term of Employee's employment with Employers and for two (2) years following Employee's termination, resignation, or completion of Employee's employment with one or more Employers. The geographic scope shall be the State of Michigan. The Parties agree that the duration, activities restricted, and geographic scope of the provisions set forth in this Agreement are reasonable and are reasonably necessary to protect the business and good will of the Parties. Employee acknowledges and agrees that Employers have invested significant time and money to develop the production methods, customer and vendor lists and relationships, and related information with respect to its products and the Michigan market for cannabis products and would be substantially injured if such information became available to competitors or the public. If any court determines that the duration, activities

restricted or geographic scope or any combination thereof, are unreasonable and that such provision is to that extent unenforceable, the Parties agree that the provision will remain in full force and effect for the greatest time-period, with respect broadest type of activities described, and in the greatest geographic area that would not render it unenforceable.

(c) **Provision 6 – Non-Disparagement.** Employee agrees and covenants that he/she will not at any time make, publish or communicate to any person or entity or in any public forum any defamatory or disparaging remarks, comments or statements concerning the Employers or their businesses, or any of its employees, officers, and existing and prospective customers, suppliers, investors, and other associated third parties. This Section 6 does not, in any way, restrict or impede the Employee from exercising protected rights to the extent that such rights cannot be waived by agreement or from complying with any applicable law or regulation or a valid order of a court of competent jurisdiction or an authorized government agency, provided that such compliance does not exceed that required by law, regulation or order. Employee shall promptly provide written notice of any such order to MCB.

According to the Complaint, by maintaining these contractual provisions, Berry Green "has been interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act." The General Counsel demanded that Berry Green be ordered to cease and desist from maintaining these provisions "or in any like or related manner interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act" and to take affirmative action, including:

(b) Rescind the Confidentiality, Non-Solicitation and Non-Compete Agreements that were executed, enforced, or in effect at any time since November 24, 2021, and advise each employee and former employee, individually, in writing, that the Agreement has been rescinded and they are released from its obligations.

(c) Rescind in writing any and all directives, disciplines, cease and desist letters, or other actions issued to employees or former employees as a result of the enforcement of the Confidentiality, Non-Solicitation and Non-Compete Agreement described in paragraph 7 at any time since November 24, 2021, and notify such employees or former employees, in writing, that this has been done and that the disciplines, directives, cease and desist letters, or other actions will not be used against them in any way.

(d) Make whole those employees and former employees who suffered financial loss due to the discipline, directive, cease and desist letter, or other action imposed relating to the Confidentiality, Non-Solicitation and Non-Compete Agreements that were issued, enforced, or otherwise in effect at any time since November 24, 2021, including direct or foreseeable pecuniary harms suffered, plus interest computed in accordance with current Board policy, plus reasonable search-for-work and interim employment expenses.

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. General Counsel Abruzzo withdrew the Complaint on May 2, 2023 – almost a full month before she issued the General Counsel Memo. The terms of the private non-Board 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, raising 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 Supreme Court, under the Major Questions Doctrine or otherwise.

Indeed, while the General Counsel Memo suggests that a narrowly tailored noncompete clause may be lawful, and only vaguely references non-solicitation covenants, the claims against Berry Green cover not only a two-year post-employment noncompete, but also both customer and employee non-solicitation provisions and a non-disparagement provision reflecting enforcement of the Board's recently issued McLaren Macomb decision which rendered overly broad non-disparagement provisions unlawful. 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 it intends to act aggressively when it comes to all forms of post-employment restrictive covenants that it deems to have a chilling effect on employees engaging in Section 7 activity.

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