OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 23-05 **March 22, 2023**

TO: All Regional Directors, Officers-In-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

RE: Guidance in Response to Inquiries about the *McLaren Macomb* Decision

On February 21, 2023, the Board issued *McLaren Macomb*, 372 NLRB No. 58, returning to longstanding precedent holding that employers violate the National Labor Relations Act (NLRA or Act) when they offer employees severance agreements that require employees to broadly waive their rights under the Act. Specifically, the Board held that where a severance agreement unlawfully conditions receipt of severance benefits on the forfeiture of statutory rights, the mere proffer of the agreement itself violates Section 8(a)(1) of the Act because it has a reasonable tendency to interfere with or restrain the prospective exercise of those rights - both by the separating employee and those who remain employed. I am issuing this Memo to assist Regions in responding to inquiries from workers, employers, labor organizations, and the public about implications stemming from that case.

The severance agreement at issue in the case contained overly broad non-disparagement and confidentiality clauses that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights. Specifically, the non-disclosure provision contained a non-disparagement clause that advised the employees that they are prohibited from making statements that could disparage or harm the image of the employer, its parent and affiliates, and their officers, directors, employees, agents and representatives. And, the confidentiality clause advised employees that they are prohibited from disclosing the terms of the agreement to anyone, except for a spouse or professional advisor, unless compelled by law to do so. The severance agreement included monetary and injunctive sanctions for breach of these provisions.[1]

The Agency acts in a public capacity to protect public rights in order to effectuate the Congressionally-mandated public policy of the Act.[2] The underlying Board policy and purpose depends on employees' freedom to engage in Section 7 rights and to assist each other and access the Agency. And, the future rights of employees as well as the rights of the public may not be traded away in a manner which requires forbearance from future

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[1] Notably, the employees' collective bargaining representative, OPEIU, was not provided with notice nor included in discussions about the permanent furloughs and related severance agreement, thus the employer was found to have violated Section 8(a)(5) of the Act.

[2] *National Licorice Co. v. NLRB*, 309 US 350, 362-64 (1940).

charges and concerted activities.[3] Thus, the Board determined, based on a plethora of nearly a century of settled law, that employees may not broadly waive their rights under the Act, and that agreements between employers and employees that restrict employees from engaging in activity protected by the Act or from filing unfair labor practice (ULP) charges with the Agency, helping other employees in doing so, or assisting during the Agency's investigatory process are unlawful.

In so finding, the Board overruled *Baylor University Medical Center*, 369 NLRB No. 43 (2020) and *IGT*, 370 NLRB No. 50 (2020), which were wrongly premised on the notion that a showing of animus and additional coercive or otherwise unlawful conduct by the employer independent of the plain, overly broad language of the severance agreement was required in order to find a violation related to the severance agreement. As the Board noted, while the presence of additional violations would enhance the coercive potential of the severance agreement, the absence of such conduct does not and cannot eliminate the potential chilling effect of an unlawful severance agreement.

With that context in mind, I offer responses to some inquiries below:

Are severance agreements now banned?

No. In fact, prior Board decisions approved severance agreements where the releases waived only the signing employee's right to pursue employment claims and only as to claims arising as of the date of the agreement.[4] Thus, lawful severance agreements may continue to be proffered, maintained, and enforced if they do not have overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees. This includes the rights of employees to extend those efforts to channels outside the immediate employee-employer relationship, such as through accessing the Board, their union, judicial or administrative or legislative forums, the media or other third parties.

Why should the circumstances surrounding the proffer not necessarily matter?

Surrounding circumstances do not matter when objectively analyzing whether a provision is facially lawful or not. And, in fact, in footnote 47 of the decision, the Board specifically said that an employer can have no legitimate interest in maintaining a facially unlawful provision in a severance agreement, much less an interest that somehow outweighs the Section 7 rights of employees.

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[3] *Mandel Security Bureau*, 202 NLRB 117, 119 (1993).

[4] *Hughes Christensen Co.*, 317 NLRB 633 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996) (severance agreement was found lawful after an examination of the facial language led to the determination that it did not unlawfully waive the employee's right of access to the Board); *First National Supermarkets*, 302 NLRB 727 (1991); *Philips Pipe Line Co.*, 302 NLRB 732 (1991).

What if an employee does not sign the severance agreement?

Whether or not the employee actually signed the severance agreement is irrelevant for purposes of finding a violation of the Act since the proffer itself inherently coerces employees by conditioning severance benefits on the waiver of statutory rights such as the right to engage in future protected concerted activities and the right to file or assist in the investigation and prosecution of charges with the Board. That the employee did not sign the agreement does not render the employer's conduct lawful.[5]

Are severance agreements issued to supervisors beyond the scope of this decision?

While supervisors are generally not protected by the Act, under *Parker-Robb Chevrolet*,[6] the Act does protect a supervisor who is retaliated against, such as being fired, because they are refusing to act on their employer's behalf in committing an unfair labor practice against employees, in other words, they are refusing to violate the NLRA per their employer's directives. So, not only would it be violative for an employer to retaliate against a supervisor who refuses to proffer an unlawfully overbroad severance agreement, but I believe that an employer who proffers a severance agreement to a supervisor in connection with *Parker-Robb Chevrolet*-related conduct, such as preventing the supervisor from participating in a Board proceeding, could also be unlawful.

Does the decision have retroactive effect, such that it may invalidate agreements entered into prior to February 21, 2023, or would a violation only be considered if an employer attempts to enforce a previously-entered into agreement?

Board cases are presumed to be applied retroactively and this decision has retroactive application. If the Board determined that there was manifest injustice requiring prospective application, it would have so advised. Further, I believe that, while an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation language under Section 10(b), maintaining and/or enforcing a previously-entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the Section 10(b) period would not be time-barred. I would note that Regions have settled cases involving severance agreements which had unlawfully broad terms that chilled the exercise of Section 7 rights by requiring the employer to notify its former employees that the overbroad provisions in their severance agreements no longer applied.

Would the entire severance agreement be null and void if there is just one overbroad provision?

While it is necessary to review the facts of each and every case in the first instance, Regions generally make decisions based solely on the unlawful provisions and would

[5] *Metro Networks*, 336 NLRB 63, 67, fn. 20 (2001); *Shamrock Foods*, 366 NLRB No. 117, slip op. at 2-3 & fn. 23 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019).
[6] 262 NLRB 402 (1982), enfd. sub. nom. *Automobile Salesmen Union v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

seek to have those voided out as opposed to the entire agreement, regardless of whether there is a severability clause or not. As mentioned previously, we have obtained settlement agreements doing just that. Relatedly, while it may not cure a technical violation of an unlawful proffer, employers should consider remedying such violations now by contacting employees subject to severance agreements with overly broad provisions and advising them that the provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions. That conduct could form the basis for consideration of a merit dismissal if a meritorious charge solely alleging an unlawful proffer is filed.

Why are former employees entitled to the same protections under the NLRA as current employees?

The Board in this case confirmed that former employees are entitled to the same protections under the Act based on the statutory language of Section 2(3), which states that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer." The Board reiterated that Section 7 rights are not limited to discussions with coworkers, as they do not depend on the existence of an employment relationship between the employee and the employer.[7] In addition, former employees can play an important role in providing evidence to the NLRB and otherwise sharing information about the working conditions they experienced, in a way that constitutes both mutual aid and protection.

What is the role of the Board with respect to the rights of parties to make private contracts?

Per its Congressional mandate to address the inequality of bargaining power between employees, who do not possess full freedom of association or actual liberty of contract, and their employers, the Board must act in a public capacity to protect public rights to effectuate the public policy of the Act. Thus, the Board in this case correctly noted that the future rights of employees as well as the rights of the public may not be waived in a way that precludes future exercise of Section 7 rights, including engaging in protected concerted activities and accessing the Agency.

What if employees themselves request broad confidentiality and/or non-disparagement clauses?

In that unlikely scenario, I would reiterate that the Board protects public rights that cannot be waived in a manner that prevents future exercise of those rights regardless of who initially raised the issue.[8]

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[7] *Cedars-Sinai Medical Center*, 368 NLRB No. 83, slip op. at 8 fn. 7 (2019); *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977); *Briggs Manufacturing Co.*, 75 NLRB 569, 570 (1947).

[8] Based on the same reasoning, unions could not lawfully waive these rights on behalf of employees.

Is OM 07-27, which addresses acceptable terms in non-Board settlement agreements, still in full force and effect?

Yes. OM 07-27 is consistent with the *McLaren Macomb* decision. It provides guidance on, among other things, non-Board settlement agreements, which include: waivers of the right to file NLRB charges on future unfair labor practices and on future employment; waivers of the right to assist other employees in the investigation and trial of NLRB cases; narrowly-tailored confidentiality clauses[9] and clauses that prohibit an employee from engaging in non-defamatory talk about the employer; and unduly harsh penalties for breach of the agreement.

How does this decision affect other employer communications with employees, such as pre-employment or offer letters?

Based on extant Board law, overly broad provisions in any employer communication to employees that tend to interfere with, restrain or coerce employees' exercise of Section 7 rights would be unlawful if not narrowly tailored to address a special circumstance justifying the impingement on workers' rights.

Are there ever confidentiality provisions in a severance agreement that could be found lawful?

Confidentiality clauses that are narrowly-tailored to restrict the dissemination of proprietary or trade secret information for a period of time based on legitimate business justifications may be considered lawful. See note 9, *supra*. However, confidentiality clauses that have a chilling effect that precludes employees from assisting others about workplace issues and/or from communicating with the Agency, a union, legal forums, the media or other third parties are unlawful.

Are there ever non-disparagement provisions in a severance agreement that could be found lawful?

It is critical to remember that public statements by employees about the workplace are central to the exercise of employees' rights under the Act. In *McLaren Macomb*, the Board referenced *NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953) and *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. sub. nom. *Nevada Service Employees, Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009), when finding an overly broad non-disparagement ban that encompassed all disputes, terms and conditions, and issues, without a temporal limitation and with application to parents and affiliates and their officers, representatives, employees, directors and agents. Thus, a narrowly-tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the

[9] *McLaren Macomb* allows for narrowly-tailored provisions, and I believe that approving a withdrawal request when a non-Board settlement has a confidentiality clause only with regard to non-disclosure of the financial terms comports with the Board's decision, would not typically interfere with the exercise of Section 7 rights, and promotes quick resolution of labor disputes.

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, may be found lawful.

Would a "savings clause" or disclaimer save overbroad provisions in a severance agreement?

While specific savings clause or disclaimer language may be useful to resolve ambiguity over vague terms, they would not necessarily cure overly broad provisions. The employer may still be liable for any mixed or inconsistent messages provided to employees that could impede the exercise of Section 7 rights. As noted in my *Stericycle* brief to the Board regarding employer rules, I asked it to formulate a model prophylactic statement of rights, which affirmatively and specifically sets out employee statutory rights and explains that no rule should be interpreted as restricting those rights, that employers may—at their option—include in handbooks in a predominant way to mitigate the potential coercive impact of workplace rules on the exercise of Section 7 rights and simplify compliance, which could also easily apply to severance agreements.[10] I noted that the description of statutory rights should focus on Section 7 activities that are of primary importance toward the fulfillment of the Act's purposes, commonly engaged in by employees (particularly in non-union workplaces, since they do not have union representatives available to bargain over rules and guide employees as to their rights), and likely to be chilled by overbroad rules, and provided suggested model language for inclusion to make it clear to employees that they had rights to engage in: (1) organizing a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment; (2) forming, joining, or assisting a union, such as by sharing employee contact information; (3) talking about or soliciting for a union during non-work time, such as before or after work or during break times, or distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms; (4) discussing wages and other working conditions with co-workers or a union; (5) taking 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) striking and picketing, depending on its purpose and means; (7) taking 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) wearing union hats, buttons, t-shirts, and pins in the workplace, except under special circumstances; and (9) choosing not to engage in any of these activities.

Are there other provisions typically contained in severance-related agreements that you view as problematic?

Confidentiality, non-disclosure and non-disparagement provisions are certainly prevalent terms. However, I believe that some other provisions that are included in some severance agreements might interfere with employees' exercise of Section 7 rights, such as: non-

[10] This example does not mean that substantive work rules law must apply when determining whether certain provisions contained in severance agreements are lawful. See *Shamrock Foods Co.*, 366 NLRB No. 117 (2018), slip op. at 3, n.12.

compete clauses; no solicitation clauses; no poaching clauses; 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; cooperation requirements involving any current or future investigation or proceeding involving the employer as that affects an employee's right to refrain under Section 7, such as if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.

As always, thank you for all you do for our Agency and the public we serve. I hope this memo provides useful guidance to you in addressing questions about the *McLaren Macomb* decision. Should you receive other inquiries about the decision that are not addressed in this memo, please contact the Division of Advice.

/s/
J.A.A.

April 19, 2023

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Comments on: Non-compete Clause Rulemaking, Matter No. P201200 (BIN not assigned)

Submitted at: https://www.regulations.gov

Comments of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in Support of the Non-Compete Clause Rule

The AFL-CIO files these comments in support of the Federal Trade Commission's (FTC) proposed rulemaking which was published in the Federal Register on January 19, 2023 (88 Fed. Reg. 3482) (hereafter "NPRM"). We strongly support the regulation as proposed in the NPRM and comment on several aspects of the proposal that are of great import to labor unions and working people. Below we explain why we support the proposed rule and offer three revisions of the proposed rule language that will clarify and strengthen the final rule.

The AFL-CIO is a democratic, voluntary federation of 60 affiliated national and international unions representing more than 12.5 million working people across the country in all sectors of our economy. The AFL-CIO and its affiliates dedicate themselves to improving wages and working conditions for all working people through organizing, giving working people a collective voice to address workplace injustices, and supporting collective bargaining to protect workers' rights and insure workplace equality, worker safety and health, and respect for all workers. The AFL-CIO and its affiliates are cognizant of the harm caused to workers when they are subject to enforceable, and even unenforceable, non-compete clauses. The high prevalence of such clauses in a variety of workplaces discourages workers from exercising their rights to

engage in protected concerted activity at the workplace and from leaving a job to obtain better working conditions. The evident anti-competitive impact of non-compete clauses also harms working people as consumers. As two scholars recently observed, "The efficiency benefits of capitalism adhere to the citizenry as workers and consumers only to the extent businesses compete for their labour and business." Kenneth G. Dau-Schmidt & Jozie M. Barton, Non-Compete Covenants, *The Oxford Handbook of the Law of Work* (Guy Davidov, Brian Langille & Gillian Lester, Editors, forthcoming 2023) at 1, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4342965.

The AFL-CIO wholeheartedly endorses the efforts of the FTC to address the unfair imposition of restrictions on workers which are created by employer implementation of non-compete clauses. We support the proposed rule in full, for many of the reasons offered by the FTC in the NPRM. In addition, we provide comments related to areas of particular concern to the labor movement that further support adoption of the proposed rule.

Support for the Proposed Non-Compete Rule

The AFL-CIO fully supports the proposed non-compete rule. The rule would impose an across-the-board ban on non-compete clauses between employers and workers, irrespective of industry, job function, or wage level. The FTC rule is based upon the Commission's preliminary conclusion that in employment relationships, non-compete clauses negatively affect labor markets, resulting in reduced wages for workers across the labor market, impacting those not bound by non-compete clauses, as well as those who are. In addition, the Commission has also preliminarily concluded that the lack of worker mobility and ability to become independent entrepreneurs caused by non-compete clauses in the labor market has spillover effects that negatively affect competition in the product and service markets as well.

Section 5 of the Federal Trade Commission Act ("FTC Act") declares "unfair methods of competition" to be unlawful (15 U.S.C. § 45(a)(1)). Section 5 further directs the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce" (15 U.S.C. § 45(a)(2)). Section 6(g) of the FTC Act authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act, including the Act's prohibition of unfair methods of competition. (15 U.S.C. § 46(g)). NPRM at 3482. Accordingly, the rulemaking is well within the legal authority of the Commission.

The proposed rule provides a sensible approach to address the problems presently posed by the proliferation of non-compete clauses in the employment context across a broad range of industries and types of jobs, including among low-wage and middle-wage workers. The proposed rule classifies it as an unfair method of competition, and therefore a violation of Section 5, for an employer to enter into, or attempt to enter into a non-compete clause with a worker; to maintain a non-compete clause with a worker; and under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause. The proposed rule defines a "non-compete clause" as 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. Generally, non-compete clauses restrict the worker from working for a competitor for a particular time period, in a particular geographic area, or from performing a particular type of work, or impose some combination of those restrictions. Under the rule, what is controlling is not what the provision is labeled, but how the provision functions. NPRM at 3509.

Other kinds of restrictive clauses such as non-disclosure agreements and client/customer no-solicitation agreements are not covered because they generally do not preclude the worker from seeking or accepting other work after they have left the employer. However, the rule prohibits such clauses if they are so broad in scope as to effectively preclude workers from seeking or accepting other work upon their departure. NPRM at 3509-10.

In addition, the terms "employer" and "worker" are broadly defined. An employer is defined as a person who hires or contracts with a worker and a worker is defined as a person who works, paid or unpaid, for an employer and includes independent contractors, employees, interns, externs, volunteers, apprentices, and sole proprietors who provide services to a client or a customer. NPRM at 3482-83. The rule provides that, as of the compliance date set forth in any final rule, an employer may not enter into or attempt to enter into a non-compete clause, or enforce an existing non-compete clause. In fact, the proposed rule requires that any previous non-compete clause must be rescinded, with notice provided to the affected employees. *Id.* at 3511-12. Lastly, the rule provides that an employer may not represent to a worker that they are bound by a non-compete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause. *Id.* at 3512. This last provision would prohibit, among other things, threatening to enforce a non-compete clause against a worker; advising a worker that due to a non-compete clause, they should not pursue another job opportunity; and claiming the worker is covered by a non-compete clause. *Id.*

We generally agree with the approach proposed in the NPRM. Broadly defining the terms of employer and worker, and making the rule applicable across industries, job classifications, and wage rates will provide a bright-line rule that is easily understood by employers and workers. As noted in the NPRM, current state law varies across the country with

three states banning most non-compete provisions in employment settings and the other 47 applying various limitations and/or legal tests. NPRM at 3494-96. Several studies demonstrate that workers are confused about the enforceability of non-competes and that even workers whose non-compete clauses are unenforceable think they are bound by their terms. *Id.* at 3486 and 3489. In addition, there is a "lack of any effective penalty for employers imposing spurious and over-broad non-competes." Dau-Schmidt & Barton, "Non-Compete Covenants," at 7. The proposed rule, due to its expansive application, will provide a bright line for workers and employers and end this confusion. The alternative rules discussed in the NPRM would fail to provide such clarity and would continue the existing circumstances where workers are subject to uncertainty.

The NPRM also cites the unequal distribution of legal resources as a reason to adopt the proposed rule. NPRM at 3531. Specifically, workers may not be able or willing to challenge non-compete clauses by filing lawsuits against deep-pocketed employers, because of workers' general lack of legal resources as compared to those of employers, even if there is a strong likelihood of success. This is a reason to adopt a bright-line rule prohibiting non-compete clauses, as opposed to one of the alternative options. It is also a reason to adopt a rule enforceable by the FTC instead of leaving individual workers to enforce their own rights under a patchwork of state laws. The NPRM notes that this will be particularly helpful for relatively low-paid workers, for whom access to legal services may be prohibitively expensive.

Current experience with the existing state laws restricting non-compete clauses shows that the cost of challenging these provisions, even where there is a strong case for lack of enforceability, is prohibitively expensive for all but the most well-paid, high-level executives. Evidence concerning workers' enforcement of their rights more generally demonstrates the same.

The evidence is that most workers sign non-compete provisions without negotiating and without the assistance of counsel. NPRM at 3503, 3531. When an employer threatens to enforce a non-compete clause or actually files for a temporary restraining order (followed by a preliminary and then permanent injunction), the cost of defending, even where there may be a meritorious defense, is often prohibitively expensive for the worker. "Even if the non-compete is unenforceable, its existence can raise barriers to job search because most employees don't understand that many non-competes are not enforceable and if there is any uncertainty about enforcement, a spurious non-compete can deter job search or competing recruitment just through an *in terrorum* effect." Dau-Schmidt & Barton, "Non-Compete Covenants," at 5.

Those findings are supported by administrative and judicial observations and research on individual enforcement of workplace rights more generally. The NLRB has recognized that "[i]ndividually, and even as a group, . . . employees often lack the information, resources, money, and security needed to pursue such litigation." *Stericycle, Inc.*, 357 N.L.R.B. 582, 583 (2011). The Supreme Court has also recognized that employees who are "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 7 (1964).

Scholarly research also supports the notion that workers, particularly low-wage workers, under-enforce their rights. As one prominent industrial relations scholar concluded, "workers will systematically underutilize their rights if decisions are made on an individual basis as a result of both the structure of benefits and costs related to exercise of rights." David Weil, *Regulating the Workplace: The Vexing Problem of Implementation*, *in* 7 ADVANCES IN INDUSTRIAL & LABOR RELATIONS 247–86 (David Lewin et al. eds., 1996). Unsurprisingly, given the reasons for workers' under-enforcement of employment protections

generally, the under-enforcement is not uniform across the labor force, but instead exists primarily among the most vulnerable workers. Litigation, according to Professors Samuel Estreicher and Zev Eigen, is "an attractive source of leverage for well-paid litigants who can afford competent counsel," but "[f]or the overwhelming number of U.S. workers . . . the U.S. court system is, for all practical purposes, *terra incognita*." "The fundamental problem of the current system," Estreicher and Eigen state, "is that the over-whelming majority of U.S. workers lack access to a fair, efficient forum for adjudicating their disputes with their employers." "[T]he current system sets different de facto standards of legal compliance for employers of low-wage earners versus high-wage earners." Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 410, 409, 414 (Cynthia L. Estlund & Michael L. Wachter eds., 2013).

The Increased Use of Non-Compete Clauses in Recent Years Has Chilled Workers' Exercise of the Right to Engage in Protected Concerted Activity and to Organize and Bargain Collectively with Their Employers

The NPRM explains that one of the basic rights of a worker who is unhappy or dissatisfied with their existing job is to quit.

> Workers have an inalienable right to quit their jobs. The Supreme Court has described this "right to change employers" as a critical "defense against oppressive hours, pay, working conditions or treatment." Strictly speaking, non-compete clauses do not prevent workers from quitting their jobs. However, non-compete clauses "burden the ability to quit, and with it the ability to demand better wages and working conditions and to resist oppressive conditions in the current job." NPRM at 3504 (citations omitted).

Workers' ability to quit their job without fear that restrictions contained in a non-compete clause will hinder their ability to earn a living will have many benefits. In addition to fostering fair competition under the FTC Act, it will further Congress' aims embodied in the NLRA. The fear of loss of earnings, together with the inability to replace that loss due to the restrictions imposed by a non-compete clause that the worker believes may be or which actually is enforceable, severely chills workers' willingness to engage in activity intended to address and remedy unfair or unsatisfactory working conditions. Section 7 of the National Labor Relations Act gives employees the right to engage in protected concerted activity to improve wages, hours, or working conditions. 29 U.S.C. §157. Section 7 provides "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." But often employees are fearful about engaging in such activity and will be all the more so if they believe their ability to find a replacement job is impaired by a non-compete clause that severely restricts their options for other work. Similarly, concern about their ability to find a replacement job may also deter workers from joining together to seek union representation. For examples of why such fears are grounded in reality, one only has to read reports about recent organizing campaigns at major employers such as Starbucks and Amazon, and employer responses to such activity, including the firing of employees who sought to organize. See, e.g., *Starbucks Corp.*, 372 NLRB No. 50 (2023) (NLRB decision holding that Starbucks unlawfully discharged two pro-union employees in Philadelphia); *Starbucks Corp.*, No. 04-CA-290968, 2022 WL 7506363 (NLRB Div. of Judges Oct. 12, 2022) (ALJ order finding that Starbucks unlawfully discharged three pro-union employees near Kansas City); *Starbucks Corp.*, No. 03-CA-285671, 2023 WL 2327467 (NLRB

Div. of Judges Mar. 1, 2023) (ALJ order finding that Starbucks unlawfully discharged seven pro-union employees in Buffalo area); *Amazon.com Servs., LLC*, No. 29-CA-261755, 2022 WL 1137178 (NLRB Div. of Judges Apr. 18, 2022) (ALJ order finding that Amazon unlawfully terminated employee for engaging in protected concerted activity). If workers believe their ability to find a new job is restricted by operation of a non-compete clause, they will be less likely to take the very real risk of job loss by exercising their legal right to organize.

In addition, the NPRM also notes that as union density has decreased, workers have less leverage to address working conditions through organizing and engaging in collective bargaining, which contributes further to the unequal bargaining power between employers and workers at the time of initial employment that allows employers to impose non-compete clauses on workers. NPRM at 3503. That is undoubtedly true. The NLRB has held that it is an unfair labor practice under Sections 8(a)(1) and (5) of the NLRA for an employer whose employees were represented by a union to unilaterally require employees to sign a non-compete agreement. In other words, such an employer must notify the union before imposing the requirement and provide an opportunity to bargain. The Board determined that the imposition of a post-employment non-compete obligation constitutes a mandatory subject of bargaining. *Minteq International Inc.,* 364 NLRB No. 63 (2016), *rev denied*, 855 F.3d 329 (DC Cir. 2017).

But that obligation to bargain attaches only if the employees are organized and have obtained union recognition from their employer. Given decades of falling union density, particularly in the private sector, a shrinking percentage of workers have the benefit of union representation. The NPRM establishes that one in five workers are bound by non-compete clauses but the percentage of the private workforce that enjoy the benefits of union representation is substantially lower. The most recent 2022 Bureau of Labor Standards statistics

demonstrate that the rate of private-sector unionization is 6%. *See* Bureau of Labor Statistics, News Release, "Union Members—2022," (Jan. 19, 2023), https://www.bls.gov/news.release/pdf/union2.pdf.

This means that the majority of workers who face an employer demand to accept a non-compete clause that will limit their options for alternate employment must respond alone without the expertise of a union or the collective power of union representation. As a result, as reflected in the NPRM, most workers accept non-compete clauses without bargaining and few consult an attorney. NPRM at 3486. Frequently the worker is not even presented with a non-compete clause until they have already accepted the work (30-40% of workers are asked to sign a non-compete after they have already accepted the position). *Id.* at 3503.

The Proposed Rule Will Be Particularly Beneficial for Low Wage Workers

The NPRM demonstrates that non-compete clauses are particularly harmful to low-wage workers. The NPRM cites to a number of instances where non-compete clauses were imposed on low-wage workers such as sandwich makers and security guards. NPRM at 3483. Newspaper reports also point to non-compete agreements imposed upon camp counselors, unpaid interns, and doggy daycare workers. *See, e.g.*, Steven Greenhouse, "Noncompete Clauses Increasingly Pop Up in Array of Jobs," *New York Times (*June 8, 2014). While employer justifications for non-compete clauses are subject to serious question across the board, there is no justification for such restrictions related to the kinds of jobs performed by low-wage workers. NPRM at 3484.

Moreover, low-wage workers are particularly ill-equipped to resist demands that they sign non-compete agreements and to challenge such clauses after they are forced to sign them. As the NPRM states: "workers—particularly low-income workers—may lack resources to litigate against their employers. As a result, mere threats to enforce a non-compete clause may

deter workers from looking for work with a competitor or starting their own business." *Id.* at 3512. Particularly right now when employers in many labor-intensive, low-wage industries are having difficulty fully staffing their operations, the impact of these unfair practices on the market for service is clear. "Non-competes may also yield the employer advantages in the product market because they raise the recruiting costs of potential competitors, thus pursuing the traditional anticompetitive strategy of 'raising rivals' costs.'" Dau-Schmidt & Barton, "Non-Compete Covenants," at 5.

Not only would the rule improve the market for services, it would remove unfair practices from the labor market as well, thereby benefiting both consumers and workers. The NPRM cites anticipated wage increases across the board from a national ban of non-competes (to the tune of $250-$296 billion dollars per year) (NPRM at 3508, 3522), but a study of the Oregon law that is limited to hourly-paid workers suggests there may be an even more positive impact on the wages of low-wage workers. Michael Lipsitz & Evan Starr, "Low Wage Workers and the Enforceability of Non-Compete Agreements" (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240.

Non-Compete Clauses Have a Particularly Detrimental Impact on Workers of Color and Women

The NPRM demonstrates that the rule would advance equity because non-compete clauses affect women workers and workers of color more negatively than other workers. NPRM at 3531. Demonstrated wage gaps exist between men and women, even more so for women of color and ethnic minorities. Institute for Women's Policy Research, "Fact Sheet: Women Earn Less Than Men Whether They Work in the Same or Different Occupations," (March 2023), https://iwpr.org/wp-content/uploads/2023/03/Gender-Wage-Gaps-2023-003.pdf. There is evidence that non-compete clauses increase racial and gender wage gaps by

disproportionately reducing the wages of women and non-white workers. The NPRM notes that firms may use the monopsony power that results from use of non-competes to discriminate with respect to wages. There is also some evidence that women are more risk-averse and therefore less willing to test the enforceability of a non-compete clause. One estimate indicates that the negative impact of non-compete clause enforceability on within-industry entrepreneurship is 15% greater for women than for men. NPRM at 3531.

As a result, the earnings of women and workers of color are reduced by twice as much as white male workers when there is stricter non-compete enforcement. Matthew Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* (June 2020), *available at* https://ssrn.com/abstract=3455381. The NPRM cites estimates that banning non-compete clauses nationally, as proposed, would close the racial and gender wage gaps by between 3.6 and 9.1%, respectively. NPRM at 3488.

Proposed Revisions to Rule Language

We recommend three minor changes to the rule language. First, the proposed rule would impose an obligation on employers to inform workers who have left their employment but remain subject to non-compete agreements that the agreement is no longer in effect and will not be enforced. Proposed Section 910.2(b)(2). But the proposal limits that obligation with the following proviso, "provided that the employer has the worker's contact information readily available." Proposed Section 910.2(b)(2)(ii). We do not believe that limitation is justified and we believe hinging the limitation on the term "readily available" will cause confusion and enable efforts to evade the requirement.

Virtually all employers will have contact information for their former employees, independent contractors and others protected by the proposed rule. Various laws require that

employers maintain such information. For example, the IRS recommends that employers retain employment tax records for at least four years. *See* Internal Revenue Service, Record Keeping, https://www.irs.gov/businesses/small-businesses-self-employed/how-long-should-i-keep-records. The practicality of paying workers and sending them other forms of notice (e.g., W-2 and 1099 forms) requires maintaining such information. And maintenance of such records in digital form makes them easily accessible. The limitation is thus unnecessary.

Moreover, the language of the limitation is undefined and will lead to confusion, litigation, and attempts at evasion. We propose that the language starting with the word "provided" be deleted and the following language substituted: "at the worker's last known home address, email address, or cell phone number." That language is drawn from other legal requirements for the provision of notice, for example, employers' obligation under the National Labor Relations Act to notify an unlawfully terminated employee of an offer of reinstatement. *See, e.g., G & T Terminal Packaging Co.*, 356 NLRB 181, 181-82 (2010), *enfd.*, 459 Fed. Appx. 19 (2d Cir. 2012) (declining to toll backpay liability where the employer had the discriminatee's "last known address," but mailed the reinstatement offer to the wrong address). Use of this more common concept is more appropriate, more easily understood, and more enforceable.

Second, we believe it would be helpful to employers to specify in the rule text the universe of former employees to whom notice must be sent. Thus, we propose that Proposed Section 910.2(b)(2)(ii) be revised further as follows: "The employer must provide the notice to a worker who formerly worked for the employer *who the employer knows or reasonably should know is subject to a non-compete clause as of the compliance date.*"

Third, the Commission has sought comments on whether limiting the prohibition to agreements and attempts to enter into agreements unduly narrows the proscription and will

permit an employer to effectively inform employees they are bound not to compete. NPRM at 3510. We agree that the prohibition should be broader and should encompass any statement in a personnel manual, employee handbook or employer policy of any kind.

Our experience strongly suggests that employees believe they are found to follow employer rules and policies even if they are not embodied in an agreement and are not enforceable under applicable contract law. The National Labor Relations Board has long recognized that fact by holding such rules and policies to be unlawful if they expressly restrict employees' exercise of their rights under the NLRA or would reasonably be construed by employees do so, even if the rules or policies have not been enforced. "Under National Labor Relations Board case law, where an employer promulgates work rules 'likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.'" *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 372 (D.C. Cir. 2007) (quoting *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), *enforced mem.,* 1999 WL 1215578, at *1 (D.C. Cir. 1999).

That general principle has been uniformly upheld by the federal courts. For example, the Second Circuit upheld the Board's conclusion that a rule in a bus company's employee handbook "prohibiting employees from making statements concerning wages, hours, the condition of buses, etc." was an unfair labor practice because employees would reasonably understand it to prevent them from engaging in protected concerted activity. *NLRB v. Vanguard Tours*, 981 F.2d 62, 66 (2d Cir. 1992). "Because of the likely chilling effect of such a rule, the Board may conclude that the rule was an unfair labor practice even absent evidence of enforcement." *Id.* at 67. The same is true here. Employees who read a personnel manual that states they may not compete with their employer even after they leave employment will believe it. They will thus be

reluctant to leave employment and, even if they do, will be chilled in the exercise of their right to compete.

Thus, we propose that Proposed Section 910.2(b)(1) be revised to read:

> Means a contractual term between an employer and a worker *or a statement in a personnel manual, employee handbook, or other statement of employment policy* that prevents *or purports to prevent* 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.

Conclusion

For the reasons discussed above, we urge the FTC to adopt the proposed rule with the minor modifications suggested above, and ban the use of non-compete clauses except in the limited and specific instances described in the proposed rule.