CLIENT ALERTS & INSIGHTS

Major Shift in Federal Labor Board's Position on Restrictive Covenants

JULY 22, 2026

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Featured Practices: Trade Secrets, Restrictive Covenants & Unfair Competition, Intellectual Property, Labor & Employment

Key Takeaways:

- The NLRB has shifted its stance and now considers non-compete agreements generally lawful under federal labor law, reversing its previous position that most non-competes were presumptively illegal.
- This change reduces the risk of federal enforcement actions against employers who use non-compete and non-solicitation agreements, but employers should remain cautious as state laws may still impose significant restrictions.
- Employers should review and update their restrictive covenants to ensure they are reasonable and enforceable under state law, document clear business justifications for any enforcement actions, and pay special attention to states where non-competes remain heavily restricted or banned.

Non-compete agreements are no longer considered presumptively illegal under federal labor law.[1] On June 26, 2026, the National Labor Relations Board (NLRB) released advice memoranda signaling this dramatic change in how the federal government views non-compete agreements in the workplace.[2] This is welcome news for employers who use non-competes and similar restrictive covenants to protect their businesses.

From Presumptively Illegal to Generally Lawful

Under the Biden administration, NLRB General Counsel Jennifer Abruzzo took the employee-friendly position that most non-compete agreements violated the NLRA because they "chill" employees' ability to exercise their Section 7 rights by, for example, making it harder for workers to threaten to leave for a competitor in order to negotiate better conditions.[3]

That position has now been reversed. In the *Biotricity, Inc.* advice memorandum, issued under current General Counsel Crystal Carey, the NLRB provides the clearest statement yet of the new position: "Non-compete agreements do not as a general matter impact employees' rights under Section 7."[4]

Post-employment non-solicitation clauses were also given the green light by the NLRB. In *Bayada Home Health Care,* the federal agency concluded that a non-solicitation provision in a separation agreement was lawful because it did not interfere with employees' ability to engage in protected activity during employment.[5]

Takeaways for Employers:

The NLRB has issued the strongest signal yet that it will not pursue enforcement actions against non-compete agreements based on the theory that they generally chill employee rights. The pendulum has swung decisively toward a more restrained, employer-friendly enforcement posture at the federal level. Employers should not, however, interpret this as blanket approval for all restrictive covenants. The following steps will help ensure enforceable agreements:

- Review all restrictive covenants in post-employment agreements to ensure they are reasonable in scope and enforceable under applicable state law.

- If you need to enforce a non-compete or a confidentiality provision against a departing employee, including through civil litigation, be sure to document clear, independent business justifications.
- Verify that your agreements comply with state law, with particular attention paid to California, Minnesota, Montana, North Dakota, Oklahoma, and Wyoming, where non-competes are severely restricted or banned.

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[1] *Biotricity, Inc.*, Advice Memorandum, No. 04-CA-340174 (N.L.R.B. Div. of Advice June 26, 2026), https://apps.nlrb.gov/link/document.aspx/09031d45842ddb7b

[2] *Id*.

[3] Jennifer A. Abruzzo, Gen. Couns., Nat'l Labor Rels. Bd., Memorandum GC 23-08, *Non-Compete Agreements that Violate the National Labor Relations Act* (May 30, 2023), https://apps.nlrb.gov/link/document.aspx/09031d4583a87168

[4] *Biotricity*, supra note 1.

[5] *BAYADA Home Health Care*, Advice Memorandum, No. 27-CA-341402 (N.L.R.B. Div. of Advice June 26, 2026), https://apps.nlrb.gov/link/document.aspx/09031d45842ddb7a.