Legal Update Article

Shaping Restrictive Covenants in Retail: Insights from Labor Board Guidance

By Valerie L. Hooker

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Meet the Authors

Valerie L. Hooker
Principal
(305) 577-7648
Valerie.Hooker@jacksonlewis.com

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In the evolving retail landscape, where competition is fierce and intellectual property is paramount, the use of restrictive covenants has long been a cornerstone for protecting proprietary information and safeguarding competitive advantages. In May 2023, the general counsel for the National Labor Relations Board (NLRB) issued a memorandum stating non-competes generally violate the National Labor Relations Act, except under rare circumstances. This came after the Federal Trade Commission announced a Notice of Proposed Rulemaking that would ban non-competes in employment agreements.

In December 2023, the NLRB's Division of Advice issued a memorandum on non-competes that may suggest that the NLRB's position is not as sweeping as first presented. Below are highlights from the memo that may affect how retailers approach the drafting of these agreements:

1. *Non-Solicitation of Customers Are Generally Lawful, So Long As the Customer Pool Is Not Limited:* The Division evaluated a provision titled "Non-compete Agreement" that defined "not compete" to mean "the Employee shall not … solicit or seek the business of any customer [] of the Company …." The Division found this provision lawful because it defined "not compete" in a way that does not prevent an employee from obtaining new employment, including employment with a competitor. The Division found the restriction on soliciting the company's customers did not "deny them the ability to quit or change jobs" absent a showing of "such a limited pool of customers in the industry" that the provision would have effectively foreclosed any future employment opportunities.

2. *Confidentiality Provisions Are Generally Lawful, So Long As They Do Not Prohibit Disclosure of Employee Information:* The Division evaluated a non-disclosure provision that prohibited the employee from disclosing or using "any information related to the Employer's business and the business of the Employer's present or prospective customers, including, but not limited to, any promotional concepts, marketing plans, strategies, drawings, customer lists or other information not otherwise made available to the general public." The Division found this provision was lawful as it applied only "to information about the Employer's business" and provided examples of "things that are clearly proprietary and trade secrets." Significantly, the Division noted the provision did *not* reference any *employee* information, such as "wage information or anything else relating to terms and conditions on employment." Provisions that purport to prevent employees from disclosing such information would violate the NLRA.

3. *Return of Property Provisions Are Lawful:* The Division also evaluated a provision that required the return of all Employer property and found it to be lawful. Thankfully, not much analysis was needed here.

4. *Best Interest Restrictions May Be* Un*lawful:* The Division found a provision that required the employee to "devote her full time to the conduct of the business of the Employer and

shall not directly or indirectly, during the term of this AGREEMENT engage in any activity competitive with or adverse to the Corporation's business or welfare whether alone, or as a partner, officer, director, Employee, advisor, agent or investor of any other … entity or person" was unlawful, however. The Division noted the provision had the "tendency to chill employees in the exercise of their Section 7 rights." The Division found the provision could be read to: (1) prevent employees from joining a union as it may be "adverse" to the company; and (2) broadly prevent outside employment, which would prevent an employee from working as a "paid union salt" (a union organizer who accepts a job intending to organize other employees). The Division did not specifically address the tension between its finding and the common law duty of loyalty. The Division noted, however, the employer's "interest of ensuring full-time salaried employees devote their working time to the Employer while the Employer is contractually obligated to pay them does not rebut the presumption that this rule has a reasonable tendency to chill Section 7 activity." If a company wants to include a "best interest" provision, then it should consider using narrower language (e.g., eliminate a broad prohibition on activity that is "adverse" to the company), and limit the restriction on outside employment to work with competitive businesses.

Retailers must ensure restrictive covenant agreements are narrowly tailored to protect proprietary information, trade secrets, and customer relationships, without unnecessarily infringing on employees' rights and ability to access employment opportunities. Retailers may also want to explore alternative strategies for protecting proprietary information, such as implementing robust cybersecurity measures, incentivizing employee loyalty through non-restrictive means, and fostering a culture of trust and collaboration.

Retailers should review their existing restrictive covenant practices to assess the language, scope, and potential impact of such agreements on employees' rights. The goal should be to foster a fair and respectful workplace environment while safeguarding employees' competitive edge in an increasingly competitive landscape.

Please contact a Jackson Lewis attorney with any questions.