

Management Rights Clause Does Not Give Management Right to Skip Bargaining Over Non-Compete and Confidentiality Agreement D.C. Court of Appeals Says

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In [Minteq v. NLRB](#), the United States Court of Appeals for the District of Columbia Circuit held an employer committed an unfair labor practice under Section 8 (a)(5) by failing to notify and bargain with a union over its requirement that new employees sign a non-compete and confidentiality agreement as a condition of employment.

A brief primer on labor law before delving into the issues. Non-competition and non-disclosure agreements are typically mandatory subjects of bargaining. However, if a mandatory subject of bargaining is raised by an employer, and the topic is already covered by the terms of a collective bargaining agreement (CBA) (such as a management rights clause), there is generally no obligation to raise or discuss the issue with the other party. If it is a mandatory subject of bargaining, and is not included within the scope of the agreement (as here), then the employer or union has a duty to negotiate to impasse before making the change.

Now to the case. The Minteq CBA included a standard management rights clause that gave the employer the right “to control and regulate the use of machinery, facilities, equipment and other property of the company.” There was no express reference to the ability to impose post-termination restrictions on employees or require them to assign intellectual property rights of inventions or other software created by them during their employment.

In 2012, Minteq began requiring new employees to sign the non-compete and confidentiality agreements. In addition to post-termination restrictive covenants, the agreements provided that employment remained at-will and prohibited the employees from soliciting or encouraging company customers or suppliers to terminate their relationships with the company “in an adverse manner.” Minteq argued that the topics of these provisions were not mandatory subjects of bargaining because they were included within the scope of the management rights clause. The Court of Appeals rejected Minteq’s argument, finding that the management-rights clause did not

cover all of the provisions of the non-compete and confidentiality agreement. For example, the CBA did not impose obligations on employees after they leave employment. Once Minteq lost the argument that its right to enter into the agreements was covered by the management rights clause, the finding of an unfair labor practice was inevitable.

The case did not end there. The Board also found that the non-solicitation and non-interference of customers and suppliers provision was an unfair labor practice under Section 8 (a)(1). The Board believed that the provision was impermissibly vague and might be construed as a limiting the right of employees to engage in certain Section 7 activities, such as appeals to customers and suppliers during a strike. The Board also found the at-will status provision was inconsistent with the terms of the CBA.

This case serves as a helpful reminder to employers that post-employment covenants generally are considered mandatory subjects of bargaining by the National Labor Relations Board. Before introducing new terms and conditions of employment, employers must keep in mind the breadth of the scope of mandatory subjects of bargaining and the need to notify and bargain with the union over new terms such as a non-compete clause.

If you have any questions about this case, collective bargaining, or non-competes, please contact [Tom Luetkemeyer](#) in Hinshaw's Chicago office or your regular Hinshaw attorney.

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Topics

Non-Compete, National Labor Relations Act (NLRA), National Labor Relations Board (NLRB), Bargaining, Collective Bargaining Agreements, Confidentiality Agreement, Section 7, Unfair Labor Practice, Collective Bargaining, Section 8