LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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NLRB General Counsel Continues Challenge to Non-Compete Agreements, Announces Position on Sign-On Bonuses and Other "Stay-or-Pay" Provisions

We previously reported that the National Labor Relations Board (NLRB or the Board) General Counsel Jennifer Abruzzo issued a memorandum in May 2023 advancing the position that non-compete agreements between employers and employees that limit employees from accepting certain jobs at the end of their employment, interfere with employees' rights under Section 7 of the National Labor Relations Act (the Act). On October 7, 2024, the General Counsel issued another memorandum that expands her position on non-compete agreements by stating her opposition to certain repayment arrangements often included in sign-on bonus and retention bonus programs and policies to reimburse for relocation costs, training and education courses, that are commonly referred to as "stay-or-pay" provisions.

The General Counsel's memorandum does not represent a statement of the current law nor does it establish new law. Rather, it is the latest effort by the General Counsel, in her advocacy role, to try to reinterpret the NLRA, which, in this case, may serve to restrict employers' actions to protect their legitimate interests.

New Potential Penalties for Unlawful Non-Compete Agreements

The General Counsel's May 2023 memorandum stated her position that most non-compete agreements violate employees' Section 7 rights. General Counsel Abruzzo's rationale for this position is that non-compete agreements may deter employees from resigning or threatening to resign in protest of working conditions. In the October 2024 memorandum, the General Counsel states her intent to pursue expansive remedies against employers found to have maintained unlawful non-compete agreements.

Specifically, according to the General Counsel, where an employer has been found to have maintained a non-compete agreement or provision that is unlawful under the Act, the employer should be ordered to post a notice of its violation and, during the notice-posting period (usually 60 days), current employees should be permitted to come forward to show their entitlement to damages. The memo states that an employee need prove only the following: (1) There was a vacancy available for a job with a better compensation package; (2) they were qualified for the job; and (3) they were discouraged from applying for or accepting the job because of the non-compete provision. The employer would then be required to compensate the employee for the difference (in terms of pay or benefits) between what the employee would have earned and what they did earn during the same period. Additionally, former employees would be able to come forward to claim any damages, such as reductions in earnings or increased time between jobs, that they experienced due to the non-compete agreement or provision.

To be clear, these remedies are not current Board law. While they only represent the General Counsel's

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newly formulated enforcement strategy, such remedies become a relevant factor in an employer's risk assessment over the use and enforcement of non-compete agreements.

The Burden to Justify Stay-Or-Pay Provisions Will Fall on the Employer

The GC memorandum defines a stay-or-pay provision as "any contract under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain time frame." Stay-or-pay provisions are generally tied to employee benefits such as sign-on bonuses, retention bonuses, payments for relocation costs and reimbursement for tuition and other costs associated with educational programs and training courses. The memo also describes so-called "quit fees" and damages clauses as arrangements that impose a financial penalty on the employee for their separation from employment untethered to a pre-payment or benefit previously provided to the employee.

The General Counsel's view is that all stay-or-pay provisions similarly have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights by limiting employee mobility and by "increas …[ing] employee fear of termination for engaging in activity protected by the Act." *In her opinion, all stay-or-pay provisions are presumptively unlawful.* They will be found to violate the Act unless an employer rebuts this presumption by providing that the provision advances a legitimate business interest and is narrowly tailored to minimize infringement on Section 7 rights. An employer can meet this standard by proving that the stay-or-pay provision: (1) is voluntarily entered into in exchange for a benefit; (2) has a reasonable and specific repayment amount; (3) has a reasonable "stay" period; and (4) does not require repayment if the employee is terminated without cause.

General Counsel Abruzzo explains that where a stay-or-pay provision was voluntarily entered into with informed consent but is not narrowly tailored in one or more ways discussed above, the employer should be ordered to rescind the unlawful provision and replace it with a lawful one. However, where the arrangement was not entered into with informed consent, the General Counsel will seek an order that includes the cancellation of the debt to the employer.

The outsized reach of the General Counsel is illustrated by her proposed mandatory rewrite of sign-on bonus arrangements:

> *With respect to cash payments, such as a relocation stipend or sign-on bonus, in my view a stay-or-pay provision can only be considered fully voluntary if employees are given the option between taking an up-front payment subject to a stay-or-pay or deferring receipt of the same bonus until the end of the same time period. Only in this way can employees who anticipate possibly engaging in protected concerted activity avoid becoming indebted to their employer without a significant financial downside. If the only alternative was to decline the cash payment outright, that "choice" would be illusory. . . .*

In addition, the memo urges that the remedies for an unlawful "stay-or-pay" provision should be the same as an unlawful non-compete, as they both restrict employment mobility. Therefore, the General Counsel's position is that the posting requirement for a violation should include notice that individuals will be entitled to damages if they show that: (1) There was a vacancy available for a job with a better compensation

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package; (2) they were qualified for the job; and (3) they were discouraged from applying for or accepting the job because of the stay-or-pay provision. If the employer attempted to enforce an unlawful "stay-or-pay" provision, there will be additional remedies, such as the employee's legal fees or compensation for damage to their credit.

The GC memorandum offers employers a 60-day window to "cure" pre-existing stay-or-pay provisions that advance a legitimate business interest by altering the provisions' terms to conform with the requirements set forth above. Stay-or-pay provisions that do not adhere to the General Counsel's requirements will be subject to prosecution after December 6, 2024.

What Employers Should Do

While the memorandum is not binding on the Board, it does provide direction to the NLRB regional offices to investigate and prosecute unfair labor charges. Additionally, it is reasonable to expect the current Board to give careful consideration to the General Counsel's arguments and recommendations as cases involving these provisions and agreements come before the Board in the future. How receptive to these sweeping changes the federal courts and, ultimately, the U.S. Supreme Court will be, remains to be seen.

Employers should carefully consider the arguments and opinions laid out in the memo when evaluating the need for non-compete agreements with different categories of employees, the terms of those agreements and the specific business interests that the agreements are designed to protect in light of the prospect of expansive remedies for current and former employees bound to non-compete agreements.

Similarly, as to "stay-or-pay" arrangements, employers would be well served to consult with legal counsel to evaluate their existing agreements in light of the General Counsel's new, far-reaching perspective on these common benefit terms, including consideration of the 60-day window (until December 6, 2024) to modify existing "stay-or-pay" provisions, to assess the risks of future unfair labor practice claims.

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