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NLRB General Counsel Further Cautions on Employers' Use of Noncompetes and 'Stay-or-Pay' Provisions

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On October 7, Jennifer Abruzzo, General Counsel for the National Labor Relations Board (NLRB), issued a memorandum reinforcing her stance that most post-employment noncompete agreements violate Section 7 of the National Labor Relations Act (NLRA). In the memorandum, Abruzzo urges the NLRB to take action to remedy the "harmful effects" of the use and application of noncompetes and scrutinizes certain "stay-or-pay" provisions.

The memorandum is not the official legal position of the NLRB; however, if it is adopted and broadly applied by the NLRB, it could have significant impacts on the business operations of many employers — with one important limitation. The NLRA does not apply to managerial or supervisory employees. Given that noncompetes and stay-or-pay provisions tend to be directed at these higher-level employees, the memorandum could be of limited application.

First, Abruzzo advocates in the memorandum for the NLRB to require employers to pay "make whole" damages to employees who have signed an unlawful noncompete or against whom an unlawful noncompete has been enforced.[1] To do so, current and former employees would be permitted to demonstrate that they were deprived of a better job opportunity as the result of a noncompete.[2] Damages could include, for example, the difference between the wages they would have received and what they did receive because they were foreclosed from pursuing certain competitive opportunities.

Second, Abruzzo targets "stay-or-pay" provisions, arguing that these provisions function like noncompetes by financially binding employees to their roles, thus limiting their freedom of choice. Traditional "stay-or-pay" provisions tie cash payments of some form (e.g., training costs, educational coverage, or bonuses) to employees remaining in their role. Employees must repay the financial benefits if they terminate their employment within a certain timeframe. According to the memorandum, "Employers do not have a legitimate business interest in forcing employees to remain employed in a given workplace against their will through the use of coercive contractual arrangements." Abruzzo therefore urges the NLRB to find that such provisions be deemed presumptively unlawful.[3]

The NLRB's position on noncompetes and "stay-or-pay" provisions is consistent with what many see as a growing trend disfavoring enforcement of such restrictive covenants, particularly among low wage earners. For example, the memorandum cites to the Federal Trade Commission's (FTC) recent Non-Compete Clause Rule, which attempted to broadly ban essentially all noncompetes. The FTC's Rule was set aside by a federal court in Texas in August; however, the more than 300-page guidance issued alongside the Rule is proving to be fertile ground for anti-noncompete advocates. Abruzzo previously entered into a memoranda of understanding with the US Department of Justice's Antitrust Division, the FTC, and the Consumer Financial Protection Bureau to "advance a whole of government approach to the anticompetitive and unfair effects of restrictions on mobility."

Notably, the makeup of the NLRB and its associated rulings can be impacted by the sitting administration. As such, the November elections could alter the leadership, composition, and policies of the NLRB, including the current focus on restrictive covenants. Nevertheless, employers should continue to review and assess the need for and use of restrictive covenants and adopt a state-by-state, case-by-case analysis for their use and justification, as this restrictive trend has existed in state courts and legislatures nationwide for a number of years and is unlikely to be impacted by a change in administration regardless of political party. Employers should also be prepared for current and former employees to use Abruzzo's memorandum, as well as the FTC's 300-page Rule guidance to argue against the imposition of restrictions. Alternative strategies, such as confidentiality agreements, non-solicitation clauses, and robust trade secret protections should be considered to better safeguard business interests.

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[1] The October 7 memorandum adds to Abruzzo's earlier May 2023 guidance, in which she took the position that, except in limited circumstances, "the proffer, maintenance, or enforcement of non-compete provisions" violates the NLRA. A detailed discussion of the May 2023 memorandum can be found in our prior alert, here.

[2] The memorandum sets forth a three-part test for employees to show that they were deprived of such an opportunity: (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 noncompete provision.

[3] An employer may rebut this presumption by showing that the provision advances a legitimate business interest and is narrowly tailored. To do so, they must show the 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.

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