Published on *The National Law Review* https://natlawreview.com

NLRB General Counsel Calls for Harsh Remedies for Employers Requiring Non-Competes, 'Stay or Pay' Provisions

Article By:

Mark L. Daniels

Michael S. Ferrell

Steven M. Swirsky

Erin E. Schaefer

National Labor Relations Board ("Board") General Counsel Jennifer Abruzzo ("Abruzzo") issued a General Counsel Memo (Memo GC 25-01) last week signaling that employers could face civil prosecution and significant monetary remedies for using non-compete and so-called "stay-or-pay" provisions in agreements with their employees.

The new memo, issued on October 7, 2024, builds on Abruzzo's earlier General Counsel Memo issued in May 2023, where, as we reported, she outlined her belief that nearly all post-employment non-competes violate employees' rights under the National Labor Relations Act (the "Act").

Since Abruzzo's May 2023 memo, employers have witnessed a number of significant developments in this space, including the Federal Trade Commission's ("FTC") issuance of a rule in April 2024 banning the use of most non-competes and a subsequent decision by a Texas federal judge blocking that FTC rule. In June 2024, an NLRB Administrative Law Judge issued a ruling in a case involving an Indiana HVAC company finding that non-competes and non-solicitation clauses violate the Act, a decision currently being appealed to the Board.

In her October 7, 2024 memo, Abruzzo again urges the Board to find non-competes with all employees who are subject to the Act's jurisdiction (nonmanagerial and nonsupervisory employees) to violate the Act except in a few limited circumstances, arguing that such provisions are frequently "self-enforcing" and deter employee mobility. She also advocates for "make whole" remedies where employers are found to have continued to maintain unlawful non-competes. Specifically, the memo argues that merely voiding such provisions is insufficient and that employees should be afforded the right to seek compensatory relief for the "ill effects" that flow from complying with "unlawful non-compete provisions."

Abruzzo suggests that employees may demonstrate their entitlement to such relief by simply showing: (1) a vacancy was available for a job offering more favorable compensation, (2) the employee was qualified for the job, and (3) the employee was discouraged or deterred from applying or accepting the job due to a non-compete provision with a current or prior employer. Significantly, the memo emphasizes that any ambiguity regarding whether the employee would actually have obtained the other job, whether the compensation package would in fact have been more favorable, and the new job's actual start date "should be resolved in favor of the employee[.]"

Although it does not identify the specific types of economic harms for which the memo argues employees should be entitled to recover, the memo discusses certain exemplary costs which suggest that employees may be entitled to seek a broad range of consequential damages. For example, Abruzzo opines that employees forced to move to a certain distance for a job to comply with an unlawful non-compete should have the right to seek reimbursement for moving-related expenses. Abruzzo had recently set out her position regarding the expanded forms of relief that should be available to employees who have been subject to such unfair labor practices in GC Memo 24-04, dated April 8, 2024.

The October 7 memo also takes aim at "stay-or-pay" provisions, *i.e.*, agreements requiring employees to repay their employers for certain expenses "in the event that they voluntarily or involuntarily separate from employment." Common examples include agreements requiring employees who depart within a certain time-frame to repay training costs, education expenses, and sign-on bonuses, either in full or on a pro-rated basis. Abruzzo argues that such provisions infringe upon employee rights in violation of Section 7 of the Act by potentially "suppressing" protected concerted activities and acting "as coercive restrictors of employee mobility, which is not a legitimate business interest."

According to the memo, Abruzzo will urge the Board to find "stay-or-pay" provisions "presumptively unlawful." In order to rebut that presumption, employers would be required to show that the provision pertains to a legitimate business interest and is "narrowly tailored" so that "it is voluntarily entered into in exchange for a benefit, has a reasonable and specific repayment amount, has a reasonable 'stay' period, and does not require repayment if the employee is terminated without cause." The memo states that if an employer can show that the provision at issue was voluntarily entered into in exchange for a benefit but cannot establish that it satisfies the remaining factors then the employer should be required to retract the provision without further penalty. Abruzzo, however, goes on to advocate that in the case of non-voluntary arrangements employers should further be required to provide "make whole" compensation to affected employees.

Abruzzo states in the memo that she will grant employers a 60-day window (i.e., until December 6, 2024) to review and "cure" existing agreements to ensure they comply with the requirements outlined in the memo before her office will issue complaints based on unfair labor practice charges challenging the use or enforcement of agreements containing what she considers to be unlawful non-competes and stay-or-pay provisions. For example, an employer, according to Abruzzo, may avoid being found in violation of the Act by amending stay-or-pay provisions to specify that reimbursement obligations thereunder are not binding upon employees who are terminated without cause.

Although it does not represent current law, GC Memo 25-01 does represent direction to the agency's Regional Directors in terms of enforcement priorities and general enforcement posture. As such, the memo is likely to set off a new flurry of unfair labor practice charges leading to NLRB investigations against employers in response to unfair labor practice charges filed by current or former employees seeking to be freed from restrictions in their agreements. It also suggests that any pre-or post-

complaint Settlement Agreements proffered by NLRB Regional Directors to remedy such alleged violations will require the employer to provide full “make whole” remedies that the General Counsel would otherwise seek in litigation—remedies that Regional Directors have generally been directed by Abruzzo not to negotiate, increasing the likelihood of litigation. And were the Board to adopt the positions advocated in the memo in decisions in cases alleging such violations, such requirements would then be governing “Board law,” subject to review at the U.S. Court of Appeals in the various circuits. However, that administrative and litigation process can be costly and take years. Given this, employers should review their existing agreements for compliance with the requirements set out in the GC Memo 25-01 before the 60-day window elapses, evaluate with legal counsel experienced with litigation before and against the NLRB about their risk tolerance and options, and stay updated on future NLRB and federal court decisions in this area. We will continue to monitor and provide updates in this area.

National Law Review, Volume XIV, Number 292