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General Counsel Memorandum Urges NLRB to Find Certain Non-Compete Agreements and Stay-or-Pay Provisions Unlawful

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On October 7, 2024, the National Labor Relations Board's (Board) General Counsel, Jennifer Abruzzo, issued a memorandum urging the Board to find certain non-compete provisions unlawful and to remedy any related infringement on employee rights "as full[y] as possible." The memorandum expanded upon GC Abruzzo's position that certain "stay-or-pay provisions" also may infringe upon employees' rights to engage in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). In summary, GC Abruzzo asserted these provisions could chill employees' rights to take collective action to improve their working conditions under Section 7 of the NLRA and may result in a Section (8)(a)(1) unfair labor practice violation.

The Memorandum's Effect

The memorandum is not the official stance of the Board or binding law. Rather, it provides policy guidance and indicates the GC's enforcement initiatives. Therefore, this new memorandum warrants attention from employers because GC Abruzzo urged the Board to grant "make-whole relief" to employees disciplined or subject to enforcement actions based on overly broad provisions in an employment or non-compete agreement.

Non-Competes

GC Abruzzo asserted that an overly broad non-compete agreement enforced against "mere employment" targets conduct that "touches the concerns animating Section 7" because securing a new job is one method of improving terms and conditions of employment.

In explaining her stance, GC Abruzzo cited the "self-enforcing" nature of non-compete provisions. She asserted these provisions might cause employees to forgo certain employment opportunities in

fear of contractual liability or restrict employees' abilities to change jobs or leverage outside options for a raise, among other things. She also asserted that, after separation, non-compete provisions could cause financial burdens for employees who incur expenses to relocate, take lower-paying jobs outside their field, or pay for training to qualify for new positions.

GC Abruzzo also listed remedies to which employees may be entitled if affected by overly broad non-compete provisions. She indicated that, in remedying an unfair labor practice, the Board must place employees—to the extent possible—in the same position had an unlawful provision not existed. As a result, even if employers do not enforce a non-compete provision, they could be liable for the financial harm associated with the "self-enforcing" nature of a non-compete. Such remedies could include lost wages, the differences between pay and benefits as they relate to what employees could have received and did receive in terms of job opportunities, and other remedies associated with foreclosed job opportunities, retraining, or post-employment costs (e.g., relocation and moving-related costs, etc.). And, when resolving any uncertainties concerning whether employees would have been hired, the salary to be received, or an exact start date—such facts are resolved in favor of employees. According to the memorandum, rescinding an unlawful provision is not a sufficient remedy—employers that sue employees for breaching non-compete agreements must retract the legal action and make employees whole, including reimbursement of attorneys' fees and costs.

Stay-or-Pay

Alongside non-compete provisions, GC Abruzzo addressed how stay-or-pay provisions can violate the NLRA. Those provisions can take numerous forms, including training repayment agreement provisions (which she calls TRAPs), educational repayment contracts, quit fees, breach fees, damages clauses, sign-on bonuses, or other types of cash payments tied to mandatory stay periods, and other contracts whereby employees must pay their employers if they voluntarily or involuntarily separate within a set timeframe. GC Abruzzo also noted a stay-or-pay provision, in "its harshest form," includes a quit fee or breach fee or comes in the form of a contract that requires employees to bear certain business costs associated with training, replacement, or lost profits.[1]

GC Abruzzo likened stay-or-pay provisions to non-compete agreements, noting both restrict employees' mobility by making it financially difficult to resign and increasing fear of termination for engaging in NLRA protected activity. She concluded that such provisions presumptively violate the NLRA unless the provision is narrowly tailored to minimize interference with Section 7 rights. In particular, GC Abruzzo claimed that "quit fees, damages clauses, and other stay-or-pay provisions whose sole purpose is to force employees to remain employed by imposing fees if they separate" are unlawful.

To rebut a presumption that a stay-or-pay provision is unlawful, GC Abruzzo stated that employers must prove it advances a legitimate business interest and is narrowly tailored to minimize infringement on Section 7 rights. According to GC Abruzzo, the provision must: (1) be voluntarily entered into in exchange for a benefit; (2) have a reasonable and specific repayment amount; (3) have a reasonable stay period; and (4) not require repayment if the employee is terminated without cause or voluntarily resigns.

As for remedying the effects of unlawful stay-or-pay provisions, GC Abruzzo outlined approaches depending on the type of agreement. In short, for arrangements entered voluntarily but that fail to satisfy other requirements, employers could be required to rescind, modify, or replace any non-compliant provisions. For non-voluntary arrangements, she suggested a more robust remedy—employers should be required to rescind the offending provisions, notify employees that the

“stay” obligation has been eliminated, and render any debt nullified and unenforceable. Where employers have attempted to enforce unlawful stay-or-pay provisions, GC Abruzzo suggested employers should retract the enforcement action and make employees whole for any financial harm resulting from the attempted enforcement. According to GC Abruzzo, like non-compete agreements, employees must have an opportunity to come forward and demonstrate they were deprived of better employment opportunities.

GC Abruzzo added that retroactive application is recommended and possible. However, she discussed her prosecutorial discretion, noting, for example, that she will grant employers a 60-day window from her memorandum’s issuance date to cure any preexisting stay-or-pay provisions that advance a legitimate business interest. As a further example, she will not prosecute preexisting stay-or-pay arrangements if the employer: cancels any debt, notifies employees they no longer have repayment obligations, retracts any debt collection enforcement actions, and, if appropriate, returns any repayments collected within 60-days. GC Abruzzo further intends to prosecute any agreement entered into after the issuance of the memorandum.

What Happens Next

Employers should use this time to review their non-compete and stay-or-pay provisions and consult competent legal counsel to assess any enforcement risks in light of GC Abruzzo’s new memorandum.

ENDNOTES

[1] Under Connecticut law, certain employers cannot require employees to sign agreements containing stay-or-pay provisions—but agreements entered into as part of a program agreed to by an employer and its employees’ collective bargaining representative are permissible.

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