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NLRB General Counsel Abruzzo Strengthens Call for Harsher Remedies for Noncompetes and Stay or Pay Provisions That Violate the NLRA

Law and the Workplace on **October 9, 2024**

On October 7, 2024, the National Labor Relations Board's ("NLRB" or the "Board") General Counsel, Jennifer Abruzzo, released MEMORANDUM GC 25-01, titled "Remedying the Harmful Effects of Non-Compete and "Stay-or-Pay" Provisions that Violate the National Labor Relations Act." GC Abruzzo states in the memo that she intends to urge the Board to find certain noncompetes unlawful and that certain "stay-or-pay" provisions – such as training repayment agreements, educational repayment contracts, and sign-on bonuses tied to a mandatory stay period – also infringe on employees Section 7 rights.

Noncompetes

As previously reported here, this is not the first time GC Abruzzo has targeted noncompetes. This memo is an expansion of her views from a May 2023 memo in which she pledged to invalidate nearly all post-employment noncompete agreements. Following that memo, in June 2024, an NLRB Administrative Law Judge ruled that non-compete and non-solicitation provisions violate the National Labor Relations Act ("NLRA" or the "Act").

The GC's most recent memo argues that noncompete provisions are often "self-enforcing" and thus employees may forgo other opportunities out of fear of breaching the contract. GC Abruzzo argues that noncompetes may have a harmful financial impact by limiting the employee's job opportunities.

Stay-or-Pay Provisions

Similar to the arguments about noncompetes, the memo states that stay-or-pay provisions like those noted above restrict employee mobility and "increase employee fear of termination for engaging in activity protected by the Act" out of concern that termination would trigger the payment obligation. GC Abruzzo argues that the only stay-or-pay provisions that should be permissible are those that are fully voluntary and work to recoup the cost of optional benefits given to employees. She urges the Board to find any provision that requires an employee to pay their employer if they voluntarily or involuntarily separate from employment within a certain timeframe is presumptively unlawful. GC Abruzzo asserts that an employer can then rebut that presumption with a legitimate business interest and by proving the provision was narrowly tailored in that it: (1) was voluntary in exchange for a benefit, (2) had a reasonable and specific repayment amount, (3) had a reasonable stay period and (4) did not require payment if the employee was terminated without cause.

Remedies

GC Abruzzo suggests that make-whole relief for employees is proper when the Board finds that an employer has an unlawful noncompete provision. The memo states that recission of the offending provision alone is not sufficient and the goal should be to place employees in the same position they would have been without the unlawful provision. The memo contends that, for example, if an individual had to move outside of their geographical region to get employment, then they should be compensated for moving costs. GC Abruzzo further states that when an employer has a voluntary stay-or-pay arrangement with informed consent in exchange for a benefit that nevertheless violates the Act because it is not narrowly tailored in one or more of the ways discussed above, the employer should rescind and replace it with a lawful provision.

In addressing considerations for deciding remedies, GC Abruzzo argues that employees subject to unlawful noncompetes or stay-or-pay provisions should have the opportunity to demonstrate that they were deprived of better employment opportunities and present evidence showing financial harms, and recommends that the Board amend its standard notice posting to solicit relevant information from employees. The memo outlines that an employee would need to demonstrate that: 1) there was a vacancy for a job with a better compensation package, 2) they were qualified for that job, and 3) they were discouraged from applying to or accepting the job because of the noncompete or stay-or-pay provision. GC Abruzzo states that if those elements are proven, the employer must compensate the employee for the difference (in terms of pay or benefits) between what they would have received and what they did receive during the same period.

Takeaways

GC Abruzzo states that she will grant employers a 60-day window beginning on October 7, 2024, to cure preexisting stay-or-pay provisions that advance a legitimate business interest. GC Abruzzo also states that she will exercise her prosecutorial discretion by declining to pursue cases where a preexisting stay-or-pay arrangement involved a tangible, transferrable benefit (such as an upfront cash payment such as a bonus or relocation stipend or payment for classes to obtain or maintain a credential), even if there is a question about whether the provision was entered into voluntarily, so long as any issues relating to the stay period, repayment amount, or repayment trigger are cured within the 60-day window.

Employers should stay updated on any future Board decisions related to noncompetes and stay-or-pay provisions. We will continue to monitor developments in this area.

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Related Professionals

- **Joshua S. Fox**
  Partner
- **Laura M. Fant**
  Special Employment Law Counsel