Legal Update Article

NLRB General Counsel Declares "Stay-or-Pay" Provisions Unlawful: What Employers Need to Know

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Takeaways

- NLRB GC Abruzzo expanded her theory that certain restrictive covenants are unlawful by also including "stay-or-pay" provisions.
- Employers could soon face expanded remedies for proffering, maintaining, or enforcing non-compete and "stay-or-play" provisions deemed unlawful.
- Employers have until Dec. 6, 2024, to cure preexisting provisions.

Related link

- GC 25-01 Remedying the Harmful Effects of Non-Compete and "Stay-or-Pay" Provisions that Violate the National Labor Relations Act

National Labor Relations Board General Counsel (GC) Jennifer Abruzzo issued a memorandum (GC Memo 25-01) arguing certain "stay-or-pay" provisions are unlawful under the National Labor Relations Act.

Although not binding, the Oct. 7, 2024, memo outlines a proposed framework to determine the lawfulness of such provisions. It also signals the GC's intention to prosecute and seek make-whole relief in cases involving preexisting stay-or-pay provisions unless employers cure any defects by Dec. 6, 2024.

Rebuttable Presumption; Curing

A stay-or-pay provision is any agreement under which employees must pay their employer if they separate from employment within a certain period. Examples include sign-on or relocation bonuses, educational repayment contracts, and training repayment agreement provisions (TRAPs).

In the memo, the GC argues that these provisions restrict employee mobility by creating financial barriers to quitting and chill employees from exercising their rights under the Act for fear that termination will trigger a payment obligation.

According to GC Abruzzo, stay-or-pay provisions violate the Act unless they are narrowly tailored to minimize any interference with employees' protected rights. The GC said she intends to urge the Board to find these provisions presumptively unlawful.

The proposed framework suggests employers can rebut the presumption by proving that the provision (1) advances a legitimate business interest and (2) is narrowly tailored to minimize infringement of employee rights under Section 7 of the Act.

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To be narrowly tailored, a stay-or-pay provision must:

1. Be fully voluntary and in exchange for a benefit conferred on the employee unrelated to mandatory training;
2. Have a reasonable and specific repayment amount specified in advance and no more than the employer's cost of the benefit bestowed;
3. Have a reasonable "stay" period, the length of which will vary based on factors such as the cost of the benefit bestowed, the benefit to the employee, whether the repayment amount decreases over time, and the employee's income; and
4. Not require repayment if the employee is terminated without cause.

Employers have 60 days, through Dec. 6, 2024, to cure any existing stay-or-pay provisions that advance a legitimate business interest. The GC will not pursue cases involving preexisting stay-or-pay provisions if the employer takes affirmative action to successfully conform the provisions to the framework and provides notice to employees of the changes.

Any stay-or-pay agreements proffered or enforced after Oct. 7, 2024, the memo warns, will not receive the 60-day reprieve to avoid the issuance of a complaint.

Make-Whole Remedies

Importantly, the memo calls for significant make-whole remedies and soliciting information regarding stay-or-pay provisions from all employees. It also outlines the broad make-whole remedies available in non-compete cases, building upon GC Memo 23-08 issued on May 30, 2023, which argued that certain non-compete agreements are unlawful under the Act.

Implications

Employers — whether unionized or not — should consult with experienced labor counsel to thoroughly assess any stay-or-pay agreements for employees covered by the Act. While most private sector employees are covered, some groups of workers are expressly excluded, such as bona fide supervisors.

The General Counsel is the prosecutorial arm of the Board, so the memo may indicate how the Board will rule on these agreements in the future. The memo could represent a significant shift in how repayment agreements may soon be viewed under the Act. It is important to review your agreements to best mitigate risks.

Please contact a Jackson Lewis attorney with any questions.

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