NLRB Counsel Cracks Down On "Stay-or-Pay" Provisions and Non-Competes: 7 Steps Employers Should Consider in Response

Insights
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The National Labor Relations Board's chief lawyer just said that many "stay-or-pay" provisions – agreements where workers are asked to repay their employer if they separate from employment – violate federal law, and also reminded employers that she believes many non-compete agreements also run afoul of existing law. If that wasn't enough, NLRB General Counsel Jennifer Abruzzo's October 7 memorandum also said that employers have just 60 days to cure such unlawful agreements and could face potentially drastic monetary remedies if they don't. We'll answer the key questions you have about GC Memorandum 25-01 – including the legal authority it carries – and provide you with seven steps you should consider given this new attack on common workplace practices.

Why Did the NLRB's Counsel Issue This Memo?

GC Memorandum 25-01 takes aim not only at "stay-or-pay" provisions but also expands on the GC's prior attack on non-compete agreements. It's another broadside against employers, urging NLRB regional directors to find these agreements infringe on employees' rights under Section 7 of the National Labor Relations Act (NLRA). Two key events precipitated yesterday's Memo:

- Abruzzo previously announced her belief that many non-compete agreements violate federal labor law – regardless of whether you have a unionized workforce. You can read all about her May 2023 Memo here. That Memo remains in effect.
- A separate federal agency – the Federal Trade Commission – took a broader step and attempted to ban most non-compete agreements, but a Texas federal court struck down that rule a few months ago. Read the full summary here.

Is This Memo the New Law of the Land?

Not yet – but it does carry some weight you need to know about.

- While GC Memos like this one don't represent the official legal position of the entire agency, they do represent the policy and guidance for all Regional Offices investigating and prosecuting charges against employers. They set the tone for the enforcement posture across all of the NLRB's 26 Regions, which remain the first point of interface for virtually all stakeholders (unions, employers, employees, and even third party ULP charge filers) who find themselves in front of the agency.

- This memo will almost certainly generate a whole new wave of NLRB investigations, many of which will target employers who have not had much experience dealing with the Board or its processes.
- And the Board itself could adopt the position(s) urged in this Memo through a formal decision, which would then cement it into law.

What Are "Stay-or-Pay" Provisions?

The term "stay-or-pay" provision generally refers to "any contract under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain timeframe." According to the Memo, stay-or-pay provisions can take a variety of forms, such as:

- training repayment agreement provisions (TRAPs);
- educational repayment contracts;
- quit fees;
- damage clauses;
- sign-on bonuses or other types of cash payments tied to a mandatory stay period; and/or
- other contracts requiring employees to pay their employer if they voluntarily or involuntarily separate from employment.

Does This New Memo Apply to My Workforce?

Most likely, yes. The Memo relies and expands on the May 2023 Memo regarding non-compete agreements and applies to all employees that are not supervisors or management level.

What Are the 4 Key Takeaways From This New Memo?

According to General Counsel Abruzzo, employers might commit unfair labor practices in violation of the NLRA if they maintain unlawful non-compete agreement provisions, including stay-or-pay provisions. Below are the four most critical points discussed in the Memo.

- **Unlawful Repayment Provisions:** Stay-or-pay provisions entered as of October 7 and going forward are unlawful under the NLRA unless they satisfy the General Counsel's new burden-shifting framework and other very specific, employee-friendly requirements.
- **Curing Period:** Employers have 60 days to "cure" existing stay-or-pay provisions by unilaterally altering contract terms to conform to the General Counsel's demands. Otherwise, they will be subject to prosecution. Unlike the FTC's non-compete ban that would have just required

employers to provide notice about how existing agreements were no longer valid, the General Counsel demands employers actually makes changes to contract provisions. For example, they may need to reduce a two-year stay requirement to something "reasonable," like one year.

- **Financial Remedies for Keeping Unlawful Provisions:** If an employer maintains unlawful stay-or-pay provisions or non-compete provisions, the NLRB is going to seek financial "make whole" remedies – not just rescission. This could include the difference between what the employee makes and what they could have made absent the provision, plus attorneys' fees, repairing damages to credit scores, etc.
- **Information Expedition:** The General Counsel is asking the Board to solicit information on stay-or-pay provisions from employees in all cases to ensure the full compensation of related harms. To solicit such information, the General Counsel recommended the Board post a notice alerting employees (1) about potential entitlement to differential damages (e.g., wages or benefits) if they were discouraged from pursuing, or were unable to accept other job opportunities due to the non-compete provision; (2) that they may be entitled to other compensation if they separated from employment and had difficulty securing comparable employment due to the non-compete provision (e.g., accepting a lower paying job, moving outside the geographical area, or incurring retraining costs to qualify for jobs in a different industry); and (3) directing individuals to contact the Regional office during the notice-posting period if they have evidence related to differential damages or other compensation.

How Can My "Stay-or-Pay" Provisions Satisfy the General Counsel?

GC Abruzzo urged the Board to find that any provision under which an employee must pay their employer if they separate from employment (voluntarily or involuntarily) within a certain timeframe is presumptively unlawful. However, she announced a new burden-shifting framework where companies may rebut the presumption by providing that the stay-or-pay provision advances a **legitimate business interest** and is **narrowly tailored** to minimize any infringement on Section 7 rights through a four-part test:

- **Voluntarily entered in exchange for a benefit.** If the employee can decline to enter the arrangement without losing their job or suffer adverse consequences at work, then the employee is not forced to enter a stay-or-pay arrangement. In other words, a stay-or-pay provision is voluntary when an employee can pay out of pocket instead of entering into your stay-or-pay arrangement. For example, if an employee needs a certain credential to be eligible for promotion, a stay-or-pay arrangement to finance that undertaking would be permissible. Likewise, subsidies covering the cost of classes necessary to obtain or maintain a mandatory credential for an employee's current job (e.g., degree, license, certification, etc.) may be conditioned on a stay-or-pay provision if the classes are selected at the employee's discretion from any third-party vendor, and the employee is not forced to take the classes through the employer.

- **Reasonable and specific repayment amount*.*** The repayment amount is "reasonable" when it is no more than what the employer spent on providing the benefit. Also, the repayment amount has to be specified upfront. For example, the amount of cash payments or advances must be stated in the stay-or-pay contract. Where other benefits are concerned, the amount must at least be disclosed before the employee accepts the benefit subject to a stay requirement.
- **Reasonable "stay" period*.*** The "stay" period will be fact-specific and based on four main factors: cost of the benefit; the value to the employee; whether the repayment amount decreases over the course of the stay period; and the employee's income.
- **Does not require repayment if the employee is terminated without cause*.*** The repayment provision must state that the debt will not become due if the employee is terminated without cause. For example, if an employee knows they have a debt that will come due if they are fired without cause, which could include termination for an unlawful reason, then the employee will have an even greater fear of engaging in Section 7 protected activities.

What 7 Steps Should Employers Consider Now?

Even if your company has never dealt with the NLRB, your choice to continue using stay-or-pay provisions and non-compete agreements could now very well come under scrutiny – and you should prepare for the possibility that employees will file unfair labor practice charges against you. With a reminder that the Memo is not yet the law of the land but does bear significant attention, here are six steps you should consider taking to best position yourself.

- **Take inventory of all existing employment agreements in your organization.** Take note of whether there are programs or contractual provisions in which you pay for a certain employee benefit upfront, but later seek for repayment when the employee leaves the company.
- **Work with your legal counsel** to understand the associated risks and potentially steep cost of defending your stay-or-pay provisions before the NLRB.
- **Make sure you understand the risks** you might face under the GC's 2023 Memo that attacks non-compete agreements (which you can read about here) as violating federal labor law. While the full Board has not yet formally adopted the positions articulated in that Memo, it remains a constant risk.
- **Decide whether you want to pause, refrain from, or even continue to use "stay-or-pay" provisions.** If you decide to continue, consult your legal counsel to ensure the provision is well-written and properly executed under GC Memo 25-01's four-part test.
- Carefully articulate and specify in the repayment agreements any **special circumstances or legitimate business interests** in advance.
- Consider offering your managers and supervisors a **refresher on the NLRA** – especially if you operate in a non-union environment and your managers may not even understand that this law applies to your organization – and make them aware of how an unfair labor practice charge could trigger legal exposure in a variety of contexts.

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- Review the credentials, trainings, classes, or programs related to your **existing repayment agreement provisions**.

Conclusion

We will continue to monitor NLRB, FTC, and other agency actions that impact your day-to-day operations and provide updates as necessary, so we recommend you sign up for our Fisher Phillips Insight Service to ensure you receive direct and timely updates. If you have questions, please contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our Employee Defection and Trade Secrets Practice Group or Labor Relations Practice Group.

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