CLIENT ALERT: NLRB General Counsel Seeks Harsher Remedies for Unlawful Non-Compete and Stay-or-Pay Agreements in Latest Memorandum

On October 7, 2024, National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo issued Memorandum GC 25-01 where she takes the position that most "stay-or-pay provisions" violate the National Labor Relations Act ("NLRA") and that employees are entitled to make whole relief for an employer's use of an unlawful non-compete provision. The memorandum expands on the opinions set forth in Abruzzo's May 2023 memorandum, where she argues that most non-competes are unlawful under the NLRA, and reiterates her intent to prosecute employers who require employees to enter into overly restrictive agreements.

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 within a certain timeframe, whether the termination is voluntary or involuntary. Abruzzo urges the NLRB to find stay-or-pay provisions, including such provisions as training repayment agreements, educational repayment contracts, quit fees, damages clauses, and sign-on bonuses, "presumptively unlawful." Abruzzo argues that only fully voluntary stay-or-pay provisions that work to recoup the cost of optional benefits should be deemed lawful. She proposes that an employer may rebut the presumption of illegality by establishing the stay-or-pay provision advances a legitimate business interest and is narrowly tailored to minimize infringement on Section 7 rights. Specifically, Abruzzo says employers must demonstrate a stay-or-pay provision: (1) is voluntarily entered into in exchange for a benefit; (2) has a reasonable and specific repayment amount; (3) has a reasonable "stay" period; and (4) does not require repayment if the employee is terminated without cause.

Abruzzo recommends specific remedies if the NLRB adopts her position that stay-or-pay provisions are presumptively unlawful. First, if an agreement is voluntarily entered into but does not meet the proposed four-part test, she argues the employer should be ordered to modify the provision to ensure lawfulness. Second, Abruzzo argues that employers should be required to rescind non-voluntary provisions and notify employees that the "stay" obligation has been eliminated and any debt will not be enforced against them. If an employer attempts to enforce an unlawful stay-or-pay agreement the employer generally would be required to retract the enforcement action and make employees whole for any financial harms resulting from the attempted enforcement.

Employee Remedies for Non-Competes

Abruzzo takes the position that make-whole relief that compensates for economic damages is a proper remedy when the NLRB determines an employer utilized an unlawful non-compete. This is a shift from the NLRB's practice of ordering rescission of unlawful contract terms to remedy unfair labor practices. Abruzzo argues that "rescission alone" will fail to remedy all the harms caused by an unlawful non-compete agreement and that remedies that unwind discipline or legal enforcement actions are similarly insufficient.

Abruzzo details when and how employees may seek remedy for possible economic damages, explicitly allowing for remedy during the notice-posting period, after separation but during the term of the non-compete agreement, and after the non-compete agreement concludes. Make-whole relief would be available if an employee demonstrates: (1) there was a vacancy available for a job with a better compensation package; (2) they were qualified for the job; and (3) they were discouraged from applying for or accepting the job because of the non-compete provision.

Abruzzo further recommends that the NLRB amend its standard notice posting to alert employees that they may be entitled to damages and that they should contact an NLRB regional office if their employment efforts were negatively impacted by a non-compete provision.

Employer Takeaways

While General Counsel Memoranda do not have the effect of law, they do give insight into the Board's current posture with respect to adjudicating claims of NLRA violations. Abruzzo's October 7, 2024 memorandum is the latest in a series of memoranda that articulate her position that former employees enjoy protections under the NLRA and that an employer's mere proffer of an agreement that would chill Section 7 rights may constitute an unfair labor practice. Abruzzo intends to invalidate non-competes and stay-or-pay provisions retroactively. However, she states that she will grant employers a 60-day period, through December 6, 2024, to cure preexisting stay-or-pay provisions that advance a legitimate business interest.

Considering the above, employers should anticipate that NLRB regional offices will adopt the positions set forth by Abruzzo and closely scrutinize non-compete and stay-or-pay agreements. Employers should be cautious when drafting and entering into non-compete and stay-or-pay agreements with employees who fall under the protection of Section 7 of the NLRA. Employers are encouraged to contact their MBJ attorney with questions regarding the legality of non-compete and stay-or-pay agreements in light of this recent memorandum.

Shane R. Goodrich and Grant D. King are attorneys with Morgan, Brown & Joy, LLP, and may be reached at (617) 523-6666, or at sgoodrich@morganbrown.com and gking@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

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