New NLRB Memo Intensifies Crackdown on Non-Compete Agreements and "Stay-or-Pay" Provisions

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The legal landscape surrounding non-compete agreements has been murky since the FTC issued a rule in April 2024 which banned most non-compete agreements. In August, a Texas federal court struck down the rule, leaving open the possibility of a future appeal. Now, the National Labor Relations Board's (NLRB) General Counsel, Jennifer Abruzzo, has added to the uncertainty. In a memo dated October 7, 2024, Abruzzo announced her intent to begin prosecuting most non-compete agreements and “stay-or-pay” provisions on December 6, 2024. GC Memorandum 25-01. Abruzzo's memo expands upon an earlier memo from May 2023, which expressed her position that non-compete agreements generally violate the National Labor Retaliations Act (NLRA). GC Memorandum 23-08.

In Abruzzo's view, a non-compete agreement that affects an employee's employment implicates Section 7 of the NLRA and is, therefore, unlawful. Section 7 guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protections,” and the right “to refrain from any or all such activities.” 29 U.S.C. § 157.

Abruzzo further argues that an employer's rescission of unlawful non-compete agreements will not sufficiently remedy the impact on employees. Abruzzo makes the argument that whether or not a non-compete agreement is enforced against an employee, the remedy should take into account the “pernicious financial harms” of non-compete agreements and place the employee in the same position they would have been in, but for the non-compete agreement.

Abruzzo outlines a few different types of “pernicious financial harms” for which employees may be eligible for relief:

The Employee Who Declined a Job with a Better Compensation Package
An employee may be entitled to the difference in pay between what the employee earned and what they could have earned if the employee can demonstrate that they: (1) declined a job opportunity with a better compensation package; (2) were qualified for the job opportunity; and (3) were discouraged from applying/accepting the job because of a non-compete agreement.

The Employee Who Complied with a Non-Compete Agreement
An employee who separated from their employer may be entitled to damages for the additional harms and costs of complying with a non-compete agreement. For example, if an employee can demonstrate they were out of work for a longer period of time than they otherwise would have been without the non-compete agreement, the employee may be entitled to payment for lost wages. Also, if an employee moved outside of the geographic region covered by the employee's

non-compete agreement in order to find work, the employee may be compensated for moving costs.

The Employee Who Accepted a Job Outside of their Industry

An employee who accepted a job with a lower total compensation package outside of their industry but within the geographic scope of their non-compete agreement may be entitled to the difference between what the employee would have received working in their industry and the employee's actual earnings.

Abruzzo notes that employees subject to anti-moonlighting provisions in their employment agreements may be eligible to similar relief.

Next, Abruzzo asserts that "stay-or-pay" provisions impact an employee's job mobility, like non-compete agreements, and generally violate Section 8(a)(1) of the NLRA. Section 8(a)(1) provides that it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the NLRA. 29 U.S.C. § 158. "Pay-or-stay" provisions are contract provisions that require an employee to repay their employer if the employee separates from the employer. For example, under a "stay-or-pay" provision, an employee may be contractually obligated to attend a training, but if the employee separates from their employer within a set period of time, the employee may be obligated to repay their employer for the cost of the training under a "pay-or-stay" provision.

Abruzzo will "urge the Board to find that any provision under which an employee must pay their employer if they separate from employment within a certain timeframe, whether voluntarily or involuntarily, is presumptively unlawful." GC Memorandum 25-01. Employers, however, may rebut the presumption that a "stay-or-pay" provision is unlawful by showing that the provision: (1) was entered into voluntarily in exchange for a benefit to the employee; (2) was reasonable as to the repayment amount; (3) outlines a reasonable "stay" period; and (4) specifies that repayment is not required if the employee is terminated without cause. Id. at 8-9. Otherwise, where an employer maintains a "stay-or-pay" provision with their employee, Abruzzo will encourage the Board to require the employer to rescind the provision and notify the employee that the provision and any associated debts are cancelled.

Key Take Aways

1. The NLRB's General Counsel intends to prosecute employers who require their employees to sign non-compete agreements, anti-moonlighting clauses, or consent to "stay-or-pay" provisions in an employment agreement.
2. Employers have until December 6, 2024, to review and revise any non-compete agreements or "stay-or-pay" provision to bring them into compliance with Abruzzo's memo.
3. Although memos from the NLRB's General Counsel are not "binding" on the Board, they do serve as guidance for regional offices, and the Board may choose to formally adopt the memo's position on an issue. If the NLRB chooses to adopt Abruzzo's position, employers may face potential liability from employees who can demonstrate they were harmed by a non-compete agreement or a "stay-or-pay" provision.
4. All of these potential recommendations likely will be subject to future legal challenges, and much of the memo's enforceability will depend on the outcome of the challenge to the FTC's non-compete ban currently playing out in the federal courts.

Porzio's team of employment and labor attorneys are ready to assist employers in reviewing, preparing, and revising employment agreements to align with the NLRB's new guidance.