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Insights

NLRB GENERAL COUNSEL TARGETS NON-COMPETES AND STAY-OR-PAY PROVISIONS

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SUMMARY

Last week, the National Labor Relations Board's General Counsel Jennifer A. Abruzzo (the "**GC**") announced her position that "stay-or-pay" provisions in employment agreements are unlawful under the National Labor Relations Act (the "**NLRA**"). The GC also reiterated and built on an earlier memo in which she took the position that almost all non-competes are similarly unlawful under the NLRA because they infringe on "Section 7" rights (which include the right to union and engage in other "protected concerted activity"). Employers—even if "non-union"—should consider the following questions.

Q: IS MY WORKFORCE EVEN COVERED BY THE NLRA?

A: PROBABLY.

"Non-union" employers sometimes believe (mistakenly) that the NLRB has no jurisdiction over them. In fact, most private sector employees are at least **covered by** the NLRA. Some employees in certain industries (railroads, airlines) and employees of very small employers with insufficient connection to interstate commerce are excluded from the NLRA. "Managerial employees" and "supervisors" do not have Section 7 rights, but those terms are narrowly defined. "Managerial employees" means those with power to set employer policy or deviate from established policy, and "supervisors" must truly supervise other employees (with power to hire, fire and discipline, for example, or effectively recommend those actions). As a starting point, employers should determine which of its employees have rights under the NLRA.

Q: WHAT IS THE GC'S AUTHORITY TO ISSUE THIS MEMORANDUM IN THE FIRST PLACE? ARE EMPLOYMENT AGREEMENTS REALLY THE NLRB'S PURVIEW?

A: THE GC INTERPRETS AND ENFORCES RIGHTS CONFERRED BY THE NLRA.

The NLRB has the final say regarding rights conferred by the NLRA. But the GC, and a number of regional and field offices, have independent authority to investigate charges accusing employers of unfair labor practices ("**ULP**"). The GC periodically issues memos providing guidance on *how* the NLRA should be interpreted, and how regional offices should investigate and bring complaints based on ULPs. The GC's memos do not have the force of law, but they provide an important alert to both employers and employees regarding the GC's policy objectives and intended course of action in responding to ULP charges. Employers on the receiving end of a ULP may bring legal challenges testing the GC's extension of the NLRA to restrictive covenants, but for now, the GC's memo will inform enforcement actions—and the GC has made clear she expects the NLRB's regional offices to pursue complaints against employers with regard to non-competes and "stay or pay" provisions.

Q: DO *ALL* NON-COMPETES VIOLATE THE NLRA?

A: ACCORDING TO THE GC, NOT *ALL*, BUT MOST.

Last year, the GC took the position that most non-competes unlawfully chill the exercise of Section 7 rights. The GC reasoned that non-competes could be construed by employees to "deny them the ability to quit or change jobs by cutting off their access to other employment opportunities." Therefore, employees may be "chilled" from advocating for better working conditions because of fear that they would have difficulty replacing lost income if discharged for exercising their rights. Employees bound by non-competes may also be less likely to make concerted threats to resign as leverage to improve employment conditions.

The GC conceded that some "narrowly tailored" non-competes **might** be justified by "special circumstances." However, the GC provided no examples. Instead, the GC provided examples of business interests and justifications that would **not** justify a non-compete: retaining employees and protecting investments in training those employees, or an employer's interest in protecting proprietary or trade secret information which the GC argued "can be addressed by narrowly tailored workplace agreements." Employers should work from the assumption that the GC believes most non-competes unlawfully chill the exercise of Section 7 rights.

Q: DO MY "STAY-OR-PAY" AGREEMENTS VIOLATE THE NLRA?

A: PROBABLY, UNLESS THEY SATISFY CERTAIN FACTORS SET FORTH BY THE GC IN HER RECENT MEMORANDUM.

Under a "stay-or-pay" agreement, an employee is subject to a monetary penalty or repayment obligation for leaving their employment. For example, an employer may require an employee to reimburse the employer for moving costs, training fees, or educational expenses if the employee leaves. The GC's position is that stay-or-pay agreements are **presumptively unlawful** because they hold a potentially significant debt over an employee's head that could discourage them from engaging in any behavior that displeases the employer—including the exercise of Section 7 rights—

for fear of being terminated, triggering that debt obligation. The GC went so far as to compare the financial penalties of stay-or-pay agreements to indentured servitude.

That said, the GC recognizes that **some** stay-or-pay provisions could be narrowly tailored to protect legitimate business interests. For example, a stay-or-pay agreement can be enforced if it is optional, offered in exchange for a benefit, contains a "reasonable" and specific repayment amount and "stay" period, and foregoes repayment if the employee is terminated without cause. Employers should carefully review any existing stay-or-pay agreements to ensure they meet these criteria.

Q: WHAT CAN THE NLRB DO IF WE HAVE NON-COMPETES OR STAY-OR-PAY AGREEMENTS?

A: EMPLOYEES MAY FILE AN UNFAIR LABOR PRACTICE CHARGE, AND THE GC HAS INSTRUCTED NLRB REGIONAL OFFICES TO PURSUE THOSE CLAIMS.

Regional Offices may seek "make-whole relief" for employees who can demonstrate that they lost opportunities for other employment as a result of unlawful employment agreement provisions. For example, the NLRB may order an employer to pay an employee the difference between the pay and benefits they **would have** received at a better-paying job for which they were qualified but could not apply due to their fear of violating a non-compete. However, with respect to stay-or-pay agreements, employers have a 60-day grace period (i.e. through December 6, 2024) to revise **preexisting** unlawful stay-or-pay agreements to the GC's criteria discussed above. Any new stay-or-pay agreement entered into after October 7 must immediately comply with the criteria stated above.

Q: DOES THE GC'S POSITION APPLY TO OTHER KINDS OF AGREEMENTS?

A: PROBABLY.

Based on comments in the GC's memoranda, it seems like that she will view employe non-solicitation covenants as a violation of Section 7 rights. However, narrowly tailored customer non-solicitation covenants may be permissible - especially if limited to customers with whom the employee had material business contact.

Q: WHAT SHOULD WE DO IF OUR EMPLOYMENT AGREEMENTS HAVE NON-COMPETES OR STAY-OR-PAY PROVISIONS?

A: REVIEW THEM WITH YOUR EMPLOYMENT COUNSEL AND CONSIDER RISK TOLERANCE.

Employers who have employment agreements with non-competes and stay-or-pay agreements should consult counsel. This is especially important for employers that include non-compete

provisions in agreements with employees who **are** covered by the NLRA—including, for example, middle managers and sales employees. Employers that continue to include non-competes in agreements with such employees do so at the risk of an unfair practice charge, and potential "make-whole" remedies by the NLRB.

Employers may also consider whether employment provisions **other than** non-competes and stay-or-pay agreements can achieve the same business interests. For example, non-disclosure and confidentiality agreements may protect trade secrets and other confidential or proprietary information, and the GC has acknowledged they are likely still enforceable. And, as noted above, appropriately tailored customer non-solicitation provisions may also be permissible. Employers should also consult state law restrictions on post-employment restrictive covenants, as this article focuses only on the NLRB GC's position regarding these provisions.

CONCLUSION

The GC's most recent memorandum may be subject to legal challenges; it may even face the same fate as the Federal Trade Commission's broad rule prohibiting most non-compete agreements, which has been enjoined by a federal court. Additionally, depending on the results of the upcoming presidential election, the NLRB's position on these and other issues could change substantially: GC Abruzzo may be replaced, and the composition of the NLRB's Board could change. Employers should contact their employment and labor counsel to review their employment agreements and consider their options.

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