

Insights: Alerts

NLRB General Counsel Continues Targeting Non-Competes And Other Standard Employment Fare

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Since being confirmed by the Senate in July 2021, National Labor Relations Board (“NLRB” or “Board”) General Counsel Jennifer Abruzzo has issued [26 memoranda](#). Many of the GC Memos issued during GC Abruzzo's tenure present novel theories, including [GC Memo 23-08](#), in which GC Abruzzo opined that, with limited exceptions, employee non-compete provisions are unlawful under the National Labor Relations Act (“Act”).

After Memo 23-08 was issued in May 2023, the Board's Regional Directors [began issuing complaints](#) against a number of employers, alleging the restrictive covenant provisions in their employment agreements were unlawful as they interfered with employees exercising rights under Section 7 of the Act. Foreshadowing what was to come, [one of the complaints](#) targeted various restrictive covenant provisions and a training repayment provision in agreements used by an Ohio employer, seeking rescission of the unlawful provisions and make-whole monetary relief for the individual employees.

Yesterday, GC Abruzzo issued [GC Memo 25-01](#) (“Memo 25-01” or the “Memo”), in which she formally identifies the “make-whole” remedies associated with maintaining unlawful non-compete agreements. The Memo also introduces GC Abruzzo's theory regarding the unlawfulness of most “stay-or-pay” provisions, which generally refers to any contract under which an employee must pay their employer if they separate from employment (e.g., training repayment provisions, educational repayment contracts, and sign-on bonuses requiring employees to repay the bonus in the event they separate within a particular timeframe). Finally, the Memo explains the circumstances in which employers can avoid potential prosecution based on existing stay-or-pay arrangements by amending them in accordance with the framework announced by GC Abruzzo within the next 60 days.¹

Remedies For Maintaining Unlawful Non-Compete Agreements

GC Abruzzo explains her belief that where an employer is found to have maintained an unlawful non-compete provision, rescission of the unlawful provision, standing alone, fails to make the affected individual whole. She then outlines the manner in which the Board's Regions should seek make-whole relief to compensate employees for the “ill effects of unlawful non-compete provisions.”

First, GC Abruzzo explains that employees should be permitted to demonstrate they were deprived of a better

job opportunity as a result of the non-compete provision. According to the Memo, an employee may make this showing by simply demonstrating (1) there was a vacancy available for a job with a better compensation package; (2) they were qualified for the job; and (3) were discouraged from applying for or accepting the job because of the non-compete provision. Critically, GC Abruzzo suggests that any uncertainty about whether the employee would have been hired by the other company, the salary they would have earned, or their exact start date “should be resolved in favor of the employee....”

Second, the Memo suggests that affected employees who separated from their employer should be entitled to additional relief for “harms or costs” associated with complying with the unlawful non-compete provision during the post-employment period. While the Memo does not include a detailed list of the potential harms or costs recoverable in this regard, it provides a number of examples. For instance, the Memo states that where an individual was forced to move outside of a particular geographic region to obtain employment as a result of the non-compete, the individual should be compensated for moving-related costs. The examples provided suggest GC Abruzzo will broadly seek to recover consequential damages resulting from an unlawful non-compete.

Stay-or-Pay Provisions Violate the Act

According to GC Abruzzo, like non-compete provisions, stay-or-pay provisions restrict employee mobility and chill employees from engaging in protected activity to try to better their working conditions in their current job for fear that termination would trigger the payment obligation associated with such provisions. GC Abruzzo then describes a proposed framework for assessing the lawfulness of so-called stay-or-pay provisions.

First, GC Abruzzo explains her plan to urge the Board to find any stay-or-pay provision presumptively unlawful where the provision requires an employee to pay their employer if they separate from employment within a certain timeframe. GC Abruzzo thereafter suggests that in order to rebut this presumption, an employer must prove that the provision “advances a legitimate business interest” and is “narrowly tailored to minimize any infringement on Section 7 rights.”

The Memo explains that to make this showing the employer must demonstrate that the provision:

1. Was 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.

GC Abruzzo notes in the Memo that the voluntariness criterion is satisfied in the case of training repayment agreements so long as the training is optional. Conversely, stay-or-pay arrangements associated with mandatory training provided by or arranged through the employer – such as orientation sessions, on-the-job training, or other specific instruction the employer requires the employee to attend – “cannot be truly voluntary” in the opinion of GC Abruzzo. As for stay-or-pay arrangements involving cash payments to employees, such as a relocation or sign-on bonus, GC Abruzzo supposes that the arrangement “can only be considered fully voluntary if employees are given the option between taking an up-front payment subject to a stay-or-pay or deferring receipt of the bonus until the end of the same time period.”

GC Abruzzo also explains that in order to be reasonable, any repayment amount must be “no more than the cost to the employer of the benefit bestowed.” To satisfy the specificity requirement, the employee must be informed of the specific repayment amount before assuming the stay requirement.

Whether a “stay” period is reasonable will be determined on a case-by-case basis and based on factors such as the cost of the benefit provided, its value to the employee, whether the repayment amount decreases over the course of the stay period, and the employee's income. The greater the employer's cost in providing the benefit, the longer the stay period may be.

The presumption against unlawfulness cannot be satisfied where the relevant provision obligates an employee to repay an amount even where their employment is terminated without cause. For example, a provision that permits an employer to recover a debt when it terminates an employee “for any reason whatsoever” is unlawfully coercive.

In describing the appropriate remedy for unlawful stay-or-pay arrangements, GC Abruzzo explains in the Memo that where the arrangement was voluntarily entered into in exchange for a benefit but fails to satisfy any of the remaining criteria, the employer should merely be ordered to rescind the unlawful provision and replace it with a lawful provision. However, GC Abruzzo explains that a more robust remedy is necessary in the case of non-voluntary arrangements. Under such circumstances, she will encourage the Board to also notify employees that any “stay” obligation has been eliminated and that any debt has been nullified and will not be enforced against them. Importantly, GC Abruzzo suggests that employers who have attempted to enforce an unlawful stay-or-pay agreement should be required to cease and desist enforcement efforts and make affected employees whole for any financial harms resulting from its attempted enforcement. This would include requiring the employer to return any repayments made by the employee in response to the enforcement efforts.

GC Abruzzo further reasons that employees should be provided an opportunity to demonstrate they were deprived of better employment opportunities in the same manner as employees faced with an unlawful non-compete provision.

Finally, GC Abruzzo explains that employers have until December 6, 2024, to “cure” preexisting stay-or-pay provisions that violate the requirements announced in the Memo. For example, if a stay-or-pay provision includes a repayment amount that is greater than the cost of the benefit provided, the employer can avoid potential prosecution by reducing the repayment amount to a level no greater than the cost of the benefit. Similarly, if an arrangement requires repayment where an employee is terminated without cause, the employer will avoid potential prosecution by amending the provision to clarify that any repayment obligation is voided where the employee is terminated without cause.

Key Takeaways

Memo 25-01 reflects a broader trend at the federal, state, and local levels: a sharpening intolerance for restrictive covenants limiting worker mobility. While the GC Memos are not binding law, it is clear that GC Abruzzo and the Board's Regional Directors intend to continue aggressively targeting overbroad restrictive

covenant and stay-or-pay arrangements.²

Given the potential for significant make-whole remedies for unlawful employment agreement provisions, employers should take steps to ensure the legality of their form employment agreements. Restrictive covenant provisions should be narrowly tailored to protect the employer's legitimate business interest. Employers should likewise consider removing certain restrictive covenant provisions from employment agreements for employees whose departure would not pose a risk to any legitimate business interests, as courts and government agencies alike are increasingly likely to target employers requiring low-level employees to execute non-compete or non-solicitation agreements.

Employers who use stay-or-pay arrangements should review their existing agreements and assess whether they satisfy the criteria set forth by GC Abruzzo in the Memo. If employers' existing agreements do not satisfy the criteria, they should consider amendments to the provisions to avoid the threat of prosecution by the Board.

If you have any questions about this Alert or the effect of GC Memo 25-01, please contact one of the authors or attorneys in our firm with whom you are regularly in contact.

Footnotes

¹Both "supervisors" and "managerial employees," as those terms are defined in the Act, are excluded from coverage under the NLRA. As a result, the framework set forth in Memo 25-01 would not apply to them.

²GC Abruzzo and the Board's Regional Directors appear poised to expand efforts targeting agreements limiting worker mobility beyond employment agreements to include company-to-company agreements. Indeed, last month, the Board's Regional Director in Newark, New Jersey issued a complaint against a building services company, alleging that employee non-hire or "no poach" provisions in the company's contracts with building clients violate the Act.

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