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The NLRB's General Counsel Renews Attack on Non-Competes and Targets Stay-or-Pay Provisions

On October 7, 2024, the General Counsel for the National Labor Relations Board ("NLRB") issued Memorandum 25-01 ("Memo 25-01"), renewing the attack on non-compete provisions and targeting stay-or-pay provisions. Beyond urging the NLRB to find many forms of non-compete agreements unlawful, the General Counsel also advocates for generous new remedies to be available to employees when employers are found to have maintained unlawful non-compete provisions.

Memo 25-01 also proposes a new legal standard for evaluating the lawfulness of stay-or-pay provisions, under which an employee must pay their employer if they separate from employment. The General Counsel asserts such stay-or-pay provisions should be found to violate Section 7 of the National Labor Relations Act ("NLRA"), unless there is evidence of (1) voluntary agreement, (2) informed consent, and (3) a benefit conferred on the employee. Stay-or-pay agreements also must be "narrowly tailored" to protect employees' right to engage in protected activity.

The General Counsel Renews the Attack on Non-Competes

In Memo 25-01 the General Counsel reasserts the position taken in its earlier Memo 23-08 that "the proffer, maintenance, and enforcement of" non-compete agreements[1] violates the NLRA except in limited circumstances. Again, the General Counsel maintains that many non-competes restrict employee job opportunities and impose added financial burden, citing wage and benefit differentials, relocation costs and training requirements to qualify for other positions not covered by the non-competes.

Proposed Remedies for Employees Subject to Unlawful Non-Competes

The General Counsel argues that employers should be required to pay for financial losses incurred by their former employees who are subject to unlawful non-competes, even if the employer has never attempted to enforce the non-compete against any employees. Therefore, just maintaining an unlawful

[1] In Memo 23-08, the General Counsel generally describes non-competes as agreements "between employers and employees [that] prohibit employees from accepting certain types of jobs and operating certain types of businesses after the end of their employment."

non-compete would be enough to trigger employer liability, as traditional rescission and "make-whole" remedies would be insufficient mechanisms to restore employees who have been harmed. The General Counsel thus proposes an expanded "make-whole relief" that could impose a significant financial burden on employers if adopted by the NLRB.

According to the General Counsel, employers should restore employees monetarily if the employee suffers financial harm because of an unlawful non-compete. More specifically, if current or former employees show (1) there was a vacancy available for a job with better compensation, (2) they were qualified for the job, and (3) the unlawful non-compete provision discouraged them from applying for or accepting the job, then employers should be required to "compensate the employee for the difference (in terms of pay or benefits) between what they would have received and what they did receive during the same period."

In addition, the General Counsel suggests employers should be required to cover any other costs incurred due to an employee's compliance with an unlawful non-compete provision, including lost wages. For example, a former employee may show an unlawful non-compete provision discouraged them from applying for or accepting a job, thereby prolonging their period of unemployment. An unlawful non-compete also may cause an employee to accept a job with lesser compensation because the lesser job is outside the geographical scope of the non-compete. In this latter example, the General Counsel believes the employee should be entitled to the difference between what they would have received and what they did receive because they were foreclosed from pursuing other job opportunities due to the non-compete provision's restriction for the duration that the restriction was in effect.

Stay-or-Pay Provisions Targeted

The General Counsel takes a similarly aggressive stance against stay-or-pay provisions.[2] The General Counsel argues these provisions have a "tendency to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the NLRA because of the reality of the employer-employee relationship whereby employees are economically dependent on their employers and fearful of losing their jobs.

Memo 25-01 addresses two variations of stay-or-pay provisions. The first type effectively forces employees to remain in their jobs by imposing financial barriers to separation, such as quit fees, damages clauses and other stay-or-pay provisions whose sole purpose is to force employees to remain employed by imposing fees if they separate. The General Counsel maintains that all these types of provisions are unlawful under the NLRA.

[2] Stay-or-pay provisions are defined in Memo 25-01 as "any contract under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain timeframe."

The second type of stay-or-pay provision is designed for the employer to recoup payments toward employee benefits where an employee does not remain employed long enough for the business to reap its anticipated returns. The General Counsel acknowledges this may reflect a business interest. The General Counsel, however, advocates for finding these stay-or-pay provisions are presumptively unlawful, thereby shifting the burden of rebutting this presumption onto employers. To rebut this presumption, the General Counsel proposes a four-part test where the employer must prove the stay-or-pay provision:

1) Is voluntarily agreed upon in exchange for a benefit;
2) Contains a reasonable and specified repayment amount;
3) Has a reasonable "stay" period; and
4) Does not require repayment if an employee is terminated without cause.

Voluntary Agreement

Stay-or-pay provisions that condition employment on agreeing to the provision, or otherwise deprive employees of the power to freely choose, are not voluntary, according to the General Counsel. On the other hand, a stay-or-pay agreement entered into when an employer pays for the employee's elective education coursework would be voluntary, because the employee could have chosen not to take the classes or funded their education via alternative means.

Reasonable Repayment and Stay Period

The required repayment amount, to be lawful under Memo 25-01's proposed framework, must be reasonable. The General Counsel suggests a reasonable repayment fee should be no more than the cost of the benefit to the employer, and the employee must be informed of the amount before entering into the agreement. Otherwise, per the General Counsel, an employee who agrees to a debt without knowing the amount is deprived of the power to make an informed choice.

Similarly, the stay period must be reasonable. While the General Counsel concedes that "reasonableness" is highly fact-specific, Memo 25-01 lists several considerations, such as "the cost of the benefit bestowed, its value to the employee, whether the repayment amount decreases over the stay period, and the employee's income." This is an ambiguous test that may give rise to many compliance issues if adopted by the NLRB.

No Repayment for No-Cause Terminations

According to the General Counsel, repayment cannot be required if the employee is terminated without cause. The General Counsel posits that this requirement would better safeguard employees' rights to engage in protected activity, such as unionizing, because termination based on protected activity is termination without cause as a matter of law. Thus, if employees are terminated for engaging in protected activity, they cannot be required to pay under the stay-or-pay agreements.

Remedies for Unlawful Stay-or-Pay Provisions

The General Counsel proposes two remedies for unlawful stay-or-pay provisions. The first remedy suggested would rescind the unlawful provision and replace it with a compliant one. This remedy would be available only when the provision was voluntary, the employee gave informed consent, and the agreement was in exchange for a benefit. The second remedy, which would be available for stay-or-pay provisions that either were involuntary or lacked informed consent, would be harsher: rescission of the unlawful provision and elimination of the entire repayment debt owed by the employee.

Prosecutorial Discretion

The General Counsel announced the intent to exercise prosecutorial discretion and allow employers 60 days to cure any preexisting stay-or-pay provisions that would be considered unlawful under this proposed framework. Otherwise, the General Counsel states the intention to prosecute all other stay-or-pay agreements in violation of this new standard, both preexisting agreements and those formed after the publication date of Memo 25-01.

Employer Takeaways

The General Counsel's opinion in Memo 25-01 is not binding legal precedent unless it is formally adopted by the NLRB. Given the NLRB's ruling in McLaren Macomb and the general regulatory trend toward heightened scrutiny of restrictive covenants, the NLRB's adoption of the General Counsel's position, or some version thereof, is very plausible. However, given the impending Presidential election and potential change in administration, there is also a likelihood that the next General Counsel will adopt a different stance altogether.

With the ever-shifting regulatory landscape of non-compete and stay-or-pay provisions, as well as the recently developing state laws on these issues, it is crucial for employers to regularly review their policies and employee agreements to ensure that any non-compete or stay-or-pay provisions are narrowly tailored to serve a legitimate business interest and are compliant with applicable law.

We will closely follow the NRLB's handling of Memo 25-01, as well as other state and federal developments involving non-competition and stay-or-pay provisions. Meanwhile, if you have questions about the enforceability of your organization's non-compete or stay-or-pay provisions, including evaluating whether your policies, practices and employment agreements are compliant with state and federal law, or drafting a non-compete or stay-or-pay provision that complies with the laws in your jurisdiction, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.KutakRock.com.