LABOR UPDATE

"NLRB GC Memo Circles Back on Noncompetes and 'Stay-or-Pay' Provisions in Employment Agreements"

MILLER NASH *EMPLOYMENT LAW IN MOTION* BLOG POST

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On October 7, 2024, the National Labor Relations Board (NLRB) General Counsel (GC) Jennifer Abruzzo issued GC Memorandum 25-01: "Remedying the Harmful Effects of Non-Compete and 'Stay-or-Pay' Provisions that Violate the National Labor Relations Act."

Readers may recall that in May 2023, GC Abruzzo issued GC Memorandum 23-08 taking the position that noncompete provisions and restrictive covenants, except in certain limited circumstances, violate the National Labor Relations Act (NLRA).

In this more recent October GC Memorandum 25-01, GC Abruzzo clarified that not only are these provisions unlawful, but there should be expanded worker remedies imposed to offset any harmful effects. Additionally, GC Abruzzo opined that certain "stay-or-pay" provisions also violate the NLRA as infringing employee Section 7 rights. "Stay-or-pay" provisions require employees to reimburse their employers upon separation, such as for training repayment, education expenses, sign-on bonuses, or other cash payments tied to mandatory stay periods. These types of provisions are commonly used to encourage employer investment in employee hiring and training.

The October GC Memorandum 25-01 states that the harm of restrictive covenants is that these provisions are "self-enforcing," meaning employees may decide to forgo other opportunities so that they are not viewed as breaching any contractual obligations. GC Abruzzo views this situation as having a negative impact on employee wages and benefits by harming worker mobility and leverage in negotiations. For employees that have "stay-or-pay" provisions, GC Abruzzo states there is potential additional financial burden with changing jobs as well as a required balancing between leaving employment and paying out the additional expense versus the presumptive increased income or income potential of a new position.

GC Abruzzo further argues that mere recission of future application of "stay-or-pay" provisions alone is insufficient to remedy the harm; instead there should be additional consideration paid due to the financial effect caused by these provisions. GC Abruzzo also states that extending the make-whole remedy to noncompetes would be consistent with the Board's remedies for other unlawful conduct, and employees should be allowed to show that they were deprived of a better job opportunity. In other words, GC Abruzzo states that if an employee can prove certain criteria are met, then an employer should be required to compensate the employee for the difference (pay and/or benefits) between what the employee would have made and what the employee did receive. Additionally, if an employee

was required to relocate, under these expanded remedies GC Abruzzo argues the employee also should be compensated for moving-related expenses.

GC Abruzzo suggests that these "stay-or-pay" provisions are similar to noncompete agreements and restrict employee mobility by making separation from employment financially difficult, or by increasing fear of termination. GC Abruzzo encourages the Board to find that these provisions are **presumptively unlawful**. An employer could rebut this presumption by proving that the provisions advance a legitimate business interest and is narrowly tailored to minimize infringement of employees' Section 7 rights. In other words, showing that (1) the provision was fully voluntary and 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.

The solution GC Abruzzo advances is requiring employers to rescind and replace the unlawful provision with modified terms to make it reasonable and to remedy the effects of noncompete provisions. The GC Memorandum concludes with GC Abruzzo stating she will exercise prosecutorial discretion, and grant employers 60 days to cure any pre-existing "stay-or-pay" provisions.

Notably, there are pending cases challenging the authority of the NLRB to expand its remedial powers following the U.S. Supreme Court's decision in *SEC v. Jarkesy* last term. Additionally, the results of the presidential election will likely impact the probability of this Memorandum coming into full effect.

KEY TAKEAWAYS

1. Employers should stay updated on Board decisions related to this GC Memorandum and noncompetes as well as "stay-or-pay" provisions.
2. Be aware that with President-elect Trump's incoming administration, there are likely to be many changes to the Board itself as well as the lawfulness of noncompete agreements generally.

The Miller Nash labor & employment team is tracking further developments and decisions in this area.