

Impact for Employers: The NLRB General Counsel Doubles Down on Restrictive Covenants and Stay-or-Pay Provisions

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The General Counsel of the National Labor Relations Board (“NLRB”) issued [Memorandum GC 25-01](#) on October 7, 2024, which establishes her intent to “urge the Board not only to find certain non-compete provisions unlawful, but also, as fully as possible to remedy the harmful effects on employees when employers use and apply them.”

The General Counsel has proposed a 60-day period, starting from the issuance of the October 7 Memorandum, for employers to address and rectify any existing “stay-or-pay” provisions that may not align with legitimate business interests. This directive necessitates that employers quickly evaluate their current provisions in light of the new guidelines, as many restrictive covenants and “stay-or-pay” clauses are likely to violate Section 7, according to the General Counsel’s criteria.

Targeting Restrictive Covenants and “Stay-or-Pay” Provisions

The October 7 Memorandum takes aim at restrictive covenants and what the General Counsel identified as “stay-or-pay” provisions. With regard to both restrictive covenants and “stay-or-pay” provisions, the General Counsel believes that inappropriate use of these contractual devices intrudes upon employees’ Section 7 rights to engage in protected activity for mutual aid and protection.

The October 7 Memorandum follows the General Counsel’s [May 30, 2023 Memorandum](#), which established her position that, except in limited circumstances, the proffer, maintenance, or enforcement of non-compete provisions violates the National Labor Relations Act (“NLRA”).

Harmful Effects of Restrictive Covenants and “Stay-or-Pay” Provisions

The October 7 Memorandum explains why the General Counsel finds certain restrictive covenants and “stay-or-pay” provisions as harmful to employees. The General Counsel explains that restrictive covenants are often “self-enforcing” because employees may refuse to pursue job opportunities out of fear of breaching contractual obligations.

She notes her belief that restrictive covenants create financial burdens both during and after separation from employment because they restrict employees’ ability to change jobs or leverage options to increase their pay and sometimes require relocation or acceptance of lower-paying jobs following separation.

Impact on Section 7 Rights

The General Counsel also believes that “stay-or-pay” provisions, which require employees to repay all or a portion of their bonus and support payment if they separate from employment before the end of a specific period (such as sign-on bonuses, education repayment contractors, training repayment provisions, or retention bonuses), may interfere with employees’ Section 7 rights.

The General Counsel argues that because employees are economically dependent on their employers to sustain their income and likely do not wish to jeopardize their jobs, any obstacle to resigning, which carries an economic obligation such as repayment, tends to chill the right of employees to engage in Section 7 activity.

The General Counsel’s October 7 Memorandum further explains that employees may be chilled from engaging in protected activity to improve their working conditions because they do not want to give employers a reason to separate (even without cause) and trigger the repayment obligation. Thus, a retention bonus paid up front, which requires repayment if an employee fails to remain employed during the entire retention period, may violate the General Counsel’s interpretation of Section 7.

Remedies for Restrictive Covenants

The October 7 Memorandum is notable for the General Counsel’s identification of additional remedies she believes would be appropriate for an employer’s unlawful use of both restrictive covenants or “stay-or-pay” provisions.

With respect to restrictive covenants, the General Counsel finds that “where the Board finds an employer has maintained an unlawful noncompete provision, rescission alone will fail to remedy all the harms caused by the provision, and make-whole remedies to unwind discipline or legal enforcement actions, while also necessary, will not be sufficient.”

According to the General Counsel, employees should be permitted to come forward during the notice-posting period and demonstrate that they were deprived of a better job opportunity due to the violation. An employee would have to show that:

- there was a vacancy available for a job with a better compensation package,
- they were qualified for the job, and
- they were “discouraged” from applying for or accepting the job because of the non-compete provision.

Assuming the provision is deemed unlawful, and the employer is otherwise unable to defend the charge, an employee making the threshold showing would be entitled to back pay to compare the difference between the current job and the job that might have been available had the employee applied. Employees would also be allowed to demonstrate that they were out of work for a longer period than they otherwise would have been due to the unlawful non-compete.

Employees who were required to move out of town as a result of a geographic non-compete may be eligible for moving-related costs and the cost of any retraining efforts undertaken to qualify for a new position in a new industry. Of course, much of this is highly speculative from a damages standpoint.

Presumption of Unlawfulness for “Stay-or-Pay” Provisions

For “stay-or-pay” provisions, the General Counsel urges the NLRB to find that any provision under which an employee must pay their employer if they separate from employment is presumptively unlawful. The General Counsel says that an employer may only rebut that presumption by demonstrating the provision advances a legitimate business interest and is narrowly tailored to minimize any infringement on Section 7 rights.

The General Counsel states that to rebut, the employer must demonstrate:

- an employee voluntarily entered into an exchange for mutual benefit,
- the repayment obligation is reasonable in amount, and
- the employer only requires a reasonable “stay” period.

The NLRB would also limit or even prevent the enforcement of these provisions in the event that an employer terminates without cause.

Proposed Remedies for “Stay-or-Pay” Violations

The General Counsel’s proposed remedies for “stay-or-pay” violations are similar to those she identified for unlawful restrictive covenants. If employees are discouraged from accepting more lucrative employment, a back-pay remedy in the amount of the difference is an element of damages the NLRB could seek. The challenge for most employers is that they will not know they are accruing a liability in most instances.

Training Obligations and Up-Front Payments

The General Counsel notes her belief that training obligations are particularly problematic. With respect to mandatory training, where the benefit largely inures to the employer rather than the employee, she believes such provisions are unlawful.

In other words, she says that a “stay-or-pay” arrangement cannot be truly voluntary when tied to mandatory training for the job. She additionally argues that mandatory training is only truly voluntary if an employee can decline the training opportunity without jeopardy of retaining a job.

The General Counsel also finds problems with up-front payments in certain circumstances. She states that a reasonable stay period (or an unreasonable stay period) must be determined on fact-specific inquiries based on factors such as the cost of the benefit, its value to the employee, and whether the repayment amount decreases over time. This is particularly problematic for employers, as it will be difficult to identify any clear legal guardrails with respect to the evaluation by the NLRB of these provisions.

Compliance Window and Legal Implications

The General Counsel states that she would grant employers a 60-day compliance window from the date of the October 7 Memorandum to cure any pre-existing “stay-or-pay” provisions that advance a legitimate business interest.

This means that employers must immediately identify any problematic provisions based on the October 7 Memorandum. Our analysis is that most restrictive covenants would be deemed violative of Section 7, and many “stay-or-pay” provisions would be deemed unlawful under the General Counsel’s generalized criteria.

Prosecution of Pre-Existing Arrangements

The General Counsel makes it very clear that she intends to prosecute pre-existing “stay-or-pay” arrangements that fail the test set forth in the October 7 Memorandum. This means that employers must confer with legal counsel to assess the vulnerability of their restrictive covenants or “stay-or-pay” arrangements.

The courts have already entered a nationwide injunction against the Federal Trade Commission on its administrative overreach of restrictive covenants. Unfortunately for employers, the October 7 Memorandum reflects the General Counsel’s view and prosecutorial direction to the Regional Offices.

An unfair labor practice charge filed, investigated, and adjudicated could take years before it could be appealed to the courts. Employers, therefore, will face substantial uncertainty and should consult with their legal counsel to assess these risks.

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Topics

Non-Compete, National Labor Relations Act (NLRA), National Labor Relations Board (NLRB), Employment, Employer Policies, Employee, Unlawful Employment Practice, Section 7 Of The National Labor Relations Act, Employer Policy, Noncompetition Agreement, Labor And Employment, Noncompete Covenant

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