October 11, 2024

NLRB GC Proposes Significant Penalties for Employers' Use of Non-Compete and Stay-or-Pay Agreements

On October 7, the Office of the General Counsel of the National Labor Relations Board (Board) released Memorandum GC 25-01, which not only reiterates General Counsel Jennifer Abruzzo's recommendation that the Board find certain non-compete provisions unlawful under the National Labor Relations Act (NLRA) (see May 2023 Memorandum GC 23-08), but also lays out her position that "stay-or-pay" provisions and moonlighting prohibitions are unlawful. The Memorandum recommends that, as a remedy for such unlawful provisions, employers be required to compensate employees for the difference between their pay and other benefits and what they could have earned in other employment but for such provisions. The General Counsel's recommendations are broad in scope, and if adopted by the Board, would apply to high and low-wage earners alike, whether or not represented by a union, but generally speaking would not apply to statutory supervisors who are not covered by the NLRA (i.e., those who hire, supervise and discipline others). However, given that the Board has extended rights under the NLRA to statutory supervisors in other circumstances, it is conceivable that if the Board adopts the General Counsel's newest recommendations, it might likewise attempt to extend these rights to supervisors in certain circumstances.

Non-Compete/Moonlighting Provisions

Memorandum GC 25-01 discusses the purported harms to employees caused by the existence of non-compete provisions, which the General Counsel states "may have a harmful financial impact on employee wages and benefits by explicitly restricting employees' job opportunities" and which may create additional financial burdens for employees, such as requiring an employee to relocate for new work, to accept lower-paying work or to pay for training to qualify for a position not covered by the non-compete provision. To remedy those purported harms, the General Counsel recommends that the Board seek "make-whole relief" by permitting employees to demonstrate that they were deprived of a better job opportunity as a result of an existing non-compete obligation. For employees to make that showing, the General Counsel recommends requiring them to show that (1) there was a vacancy available for a job with a better compensation package, (2) the employee was qualified for the job, and (3) the employee was discouraged from applying for or accepting the job because of the non-compete obligation. If the employee can make such a showing, the employer must compensate the employee for the difference in terms of pay or benefits between what they would have received and did receive. The General Counsel also stated that the same relief would be warranted where an anti-moonlighting policy or provision discourages employees from pursuing or accepting a second job.

The General Counsel further recommends that employees who separated from their employment and were affected by their employer's non-compete provision be entitled to make-whole relief "for additional harms or costs associated with complying with the unlawful non-compete provision during the post-employment period, until those restrictions expired." Specifically, the General Counsel proposes that employees could be entitled to lost wages when they can show they were out of work for longer than they otherwise would have been but for the non-compete obligation. Where an individual accepted a job that provided less compensation in terms of pay or benefits, the General Counsel recommends that such individual be entitled to the difference between what they would have received from another employer absent the non-compete provision and what they did receive. Finally, the General Counsel recommends that employees who were compelled to relocate or obtain job training due to the restrictions of an existing non-compete provision be compensated for any costs related to such relocation or training borne by the employee.

Stay-or-Pay Provisions

Memorandum GC 25-01 also sets forth the General Counsel's opinions and recommendations regarding stay-or-pay provisions. Such provisions generally encompass "any contract under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain timeframe." As examples of provisions included under that definition, the Memorandum specifically references agreements for employees to repay a sign-on bonus, relocation stipends and training costs as well as quit fees tied to mandatory periods. Agreements to repay tuition reimbursements, which are commonly used by employers, would also likely fall within that definition. According to the General Counsel, such provisions have a tendency to interfere with, restrain or coerce employees in the exercise of their rights under the NLRA by causing a chilling effect on employees obtaining better economic circumstances through organizing, striking or seeking new employment for fear of losing their job and being subject to financial penalties.

Given her stance against stay-or-pay provisions, the General Counsel recommends that the Board "find that any provision under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain timeframe is presumptively unlawful." Accordingly, she suggests that an employee be compensated for the difference in pay or benefits between that provided by their current job and what they could get in another job where the employee can show that (1) there was a vacancy available for a job with a better compensation package, (2) the employee was qualified for the job, and (3) the employee was discouraged from applying for or accepting the job because of the unlawful stay-or-pay provision.

Acknowledging certain legitimate employer interests in having stay-or-pay provisions, the General Counsel also recommends a framework for employers to rebut the presumption that such provisions are unlawful "by proving that the stay-or-pay provision advances a legitimate business interest and is narrowly tailored to minimize any infringement on [NLRA] rights." Specifically, to rebut the presumption of unlawfulness, the General Counsel recommends that employers be required to show that the stay-or-pay provision (1) was voluntarily entered into in exchange for a benefit, (2) has a reasonable and specific repayment amount not in excess of the benefit bestowed and/or the cost to the employer, (3) has a reasonable "stay" period based on the amount of the benefit, and (4) does not require repayment if the employee is terminated without cause.

Notwithstanding that the General Counsel disfavors stay-or-pay provisions, Memorandum GC 25-01 suggests that such provisions entered into voluntarily may be modified in order to make them reasonable under the aforementioned factors, similar to how courts blue pencil unreasonable non-compete provisions and other restrictive covenants in order to make them enforceable. The Memorandum recommends, however, that any stay-or-pay provision entered into involuntarily, or any provision whereby the employer did not disclose the debt amount to be repaid, be eliminated and any debt thereunder be nullified. Additionally, the General Counsel recommends that where an employer attempts to enforce an unlawful stay-or-pay provision, the employer should be forced to retract such enforcement action and make the employee whole for any financial harms resulting from the attempted enforcement.

In recognition of the fact that her recommendations regarding stay-or-pay provisions contain "new, specific requirements," the General Counsel announced her intention to exercise her prosecutorial discretion to decline to issue a complaint in certain circumstances. Employers will be given a 60-day window from the issuance of the Memorandum to cure any existing stay-or-pay provisions that advance a legitimate business interest. The General Counsel also announced she will not issue a complaint for preexisting stay-or-pay provisions that were entered into involuntarily where the employee received a tangible, transferable benefit (e.g., an up-front cash bonus or relocation stipend) as long as the stay-or-pay provision is otherwise made reasonable within the 60-day window.

Proposed Changes to Notice Postings

With both non-compete and stay-or-pay agreements, the General Counsel recommends that the Board amend its standard notice posting to notify employees (1) that they may be entitled to a differential if they were discouraged from pursuing, or were unable to accept, other job opportunities due to a non-compete or stay-or-pay provision; (2) that they may be entitled to other compensation if they separated from employment and had difficulty securing comparable employment due to a non-compete or stay-or-pay provision; and (3) about how to contact the Regional Office during the notice-posting period if they have evidence related to points (1) and (2). The General Counsel also recommends that the notice be mailed to employees' homes to ensure that both current and former employees who are or were subject to unlawful provisions be given the opportunity to read the notice and take steps to come forward during the notice-posting period. The General Counsel's notice recommendations would essentially encourage employees to come forward en masse to seek equitable and financial relief from previously enforceable non-compete and/or stay-or-pay provisions, which could in turn lead to substantial financial liability for employers utilizing such agreements.

The Bottom Line

The General Counsel's latest memorandum contains wide-ranging proposals that, if adopted by the Board, would significantly impact employers that utilize non-compete or stay-or-pay agreements and/or maintain moonlighting policies. Indeed, unlike employees who seek relief in state or federal court from non-compete agreements, the General Counsel's recommendations, if adopted, would make it significantly easier for employees not only to invalidate what the General Counsel considers to be unlawful agreements but also to obtain significant make-whole remedies through the Board's complaint procedures. Given this, employers should confer with labor counsel and consider whether to seek to revoke or cure, in the next 60 days, agreements that have long been considered appropriate and enforceable in the employment setting, which may soon be viewed as unlawful.

Authors

Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com

Glenn W. Dowd
Partner

Hartford, CT | (860) 275-0570

gwdowd@daypitney.com

Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com

Rachel A. Gonzalez
Partner

Parsippany, NJ | (973) 966-8201

New York, NY | (212) 297-5800

rgonzalez@daypitney.com

Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com

James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com

Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com

Howard Fetner
Counsel

New Haven, CT | (203) 752-5012

hfetner@daypitney.com

Jonathan E. Kohut
Associate

Parsippany, NJ | (973) 966-8116

jkohut@daypitney.com