

NLRB's General Counsel Declares "Stay-or-Pay" Provisions Unlawful, Employers Given 60 Days to Comply (Deadline: December 6, 2024)

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The top prosecutor for the National Labor Relations Board (the "NLRB") warned employers that they have 60 days to redo or eliminate contracts containing "stay-or-pay" provisions, which require employees to continue working or pay back amounts that companies fronted for college tuition, relocation, and other expenses.

NLRB General Counsel Jennifer Abruzzo recently declared that forcing employees to choose between reimbursing their employers or working at jobs they want to leave is unlawful under the National Labor Relations Act (the "NLRA"), except in limited circumstances.

In a memo to NLRB regional directors, Abruzzo outlined her strategy to not only take legal action against employers that impose "stay-or-pay" provisions on their employees but also ensure that affected employees are granted comprehensive make-whole remedies.

"Stay-Or-Pay" Provisions - What Are They?

"Stay-or-pay" provisions generally require employees to either stay with their employer for a specific period or face financial penalties for leaving early. These provisions take many forms, including:

- Training repayment agreements
- Educational repayment contracts
- Quit fees
- Damages clauses
- Sign-on bonuses tied to a mandatory stay period
- Other contracts requiring employees to repay the employer upon voluntary or involuntary separation from employment

Abruzzo argues that these provisions create significant concerns under the NLRA, particularly because they restrict employee mobility and foster a climate of fear among workers regarding termination for engaging in protected activities under the NLRA.

According to Abruzzo, employers rely on these provisions for two main reasons. First, employers seek to "lock employees in" by imposing financial barriers to leaving, such as quit fees or damages

clauses. Second, employers seek to “recoup payments toward employee benefits where an employee does not remain employed long enough for the business to reap its anticipated returns.” While recognizing that such provisions may very well reflect a legitimate business interest, Abruzzo explained that employers too often do not provide employees a voluntary choice to accept the provisions because they are contingent on employment. In the memo, she urged the NLRB to find all “stay-or-pay” provisions presumptively unlawful and to place the burden on employers to prove they are lawful.

How Employers Can Defend Their “Stay-or-Pay” Provisions

To rebut the presumption that their “stay-or-pay” provisions are unlawful, employers must demonstrate that the terms are narrowly tailored to minimize any interference with an employee’s rights under the NLRA. Specifically, employers must show that the provision:

1. **Is voluntarily executed in exchange for a benefit:** Employees must have the option to agree or decline the provision without facing financial penalties or adverse employment consequences. Further, the agreement must be offered in exchange for a benefit conferred on the employee. According to Abruzzo, being required to attend mandatory training for a specific position is not a benefit for the employee, because it ultimately improves the employee’s performance for the employer and does not provide portable skills that could be used in a different job.
2. **Specifies a reasonable and upfront repayment amount:** The repayment amount should not exceed the employer’s actual cost of the benefit conferred, and the debt must be clearly stated upfront in the employment contract.
3. **Includes a reasonable “stay” period:** The duration of the required employment should be based on factors like the cost and value of the benefit, whether the repayment decreases over time, and the employee’s income level.
4. **Excludes repayment if the employee is terminated without cause:** The provision must clearly state that no repayment is required if the employee is terminated without cause.

General Counsel’s Proposed Remedies

In the memo, Abruzzo distinguishes between voluntary “stay-or-pay” provisions made with informed consent and those entered involuntarily. For voluntary provisions that are not narrowly tailored in one or more of the ways discussed above, she recommends that employers replace the problematic terms with lawful ones. However, if the “stay-or-pay” provisions are deemed involuntary, Abruzzo warns that the entire contract must be rescinded, and the employers could be required to notify employees that the stay obligation is void and the debt is forgiven.

Abruzzo also asks the regional directors to require employers to drop any lawsuits they have against employees for failing to repay their debts and fully compensate the affected employees for any financial losses. These “losses” include reimbursing employees for any repayments they made, legal fees and related expenses, and compensation for any harm to the employee’s credit.

Abruzzo also wants to force employers to pay employees for lost job opportunities that they did not pursue because of the “stay-or-pay” provisions. According to Abruzzo, employers would be liable

for damages if employees can demonstrate: (1) there was a vacancy available for a job with a better compensation package; (2) they were qualified for the job; and (3) they were discouraged from applying for or accepting the job because of the “stay-or-pay” provision.

Additional Potential Damages for Non-Competes

In addition to Abruzzo’s proposed remedies for “stay-or-pay” provisions, Abruzzo directed the regional directors to seek monetary relief for employees affected by unlawful non-compete agreements. This builds on her May 2023 memo, in which she found that non-compete agreements violate the NLRA. (See our analysis of the May 2023 memorandum [here](#).) In the memo, Abruzzo wrote that employees prevented from securing suitable work because of non-compete restrictions should be entitled to claim lost wages for that period. Additionally, she wrote that employees who had to accept a lower-paying role in a different industry or location due to these restrictions should receive compensation for the wage difference or relocation expenses. Lastly, employees who required retraining for roles outside their field due to non-compete restrictions should be reimbursed for those costs. These remedies would apply not only to unlawfully discharged employees but also to those who resigned or were lawfully terminated but experienced hardship due to non-compete limitations.

60 Days to Cure Provision Problems

In the memo, Abruzzo gave employers a 60-day window, until December 6, 2024, to address and rectify issues with any existing “stay-or-pay” provisions that advance a legitimate business interest.

Key Takeaways for Employers

Abruzzo’s memo, like her May 2023 memo concerning non-compete agreements, is largely focused on non-union employers, which comes as no surprise considering that now only about 6% of private sector employees are unionized. Although General Counsel memos are not law, this one highlights Abruzzo’s aggressive stance against non-compete agreements and “stay-or-pay” provisions. The outcome of next week’s presidential election, however, could significantly impact her plans. Should a change in administration occur, employers can expect to see a dramatic shift in the priorities of a likely new NLRB General Counsel in 2025.

Employers are encouraged to consult with their legal counsel to ensure that any “stay-or-pay” arrangements with employees covered by the NLRA comply with the General Counsel’s directives, particularly if Vice President Kamala Harris becomes President-Elect Harris.

For more information, please contact a member of Benesch's [Labor & Employment Practice Group](#).

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