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LEGAL UPDATE

NLRB Asserts Stay-or-Pay Provisions Are Unlawful

On Oct. 7, 2024, the General Counsel (GC) of the National Labor Relations Board (NLRB) issued a memorandum asserting that certain "stay-or-pay" provisions unlawfully infringe on employee's rights under the National Labor Relations Act (NLRA).

Background

In 2023, the NLRB GC issued a memorandum declaring that overbroad noncompete clauses are unlawful because they chill employees from exercising their rights under Section 7 of the NLRA, which generally protects employees' rights to collective action to improve their working conditions. Notably, the NLRA only provides protections for **nonsupervisory** employees, so neither the 2023 nor 2024 memorandum affects agreements with supervisors.

Overview of the 2024 Memorandum

The 2024 memorandum expands upon the 2023 memorandum by asserting that stay-or-pay provisions are similarly unlawful. Stay-or-pay provisions are contractual terms that require employees to repay their employer if they terminate (voluntarily or involuntarily) within a specified time period. Examples include training repayment agreement provisions, educational repayment contracts, quit fees, damages clauses and sign-on bonuses.

Framework to Establish Lawfulness

The memorandum states that stay-or-pay provisions are presumptively unlawful. However, employers may rebut the presumption by demonstrating that the provision advances a legitimate business interest and is narrowly tailored to minimize infringing on employee rights by showing the provision:

- **Is voluntarily entered into in exchange for a benefit** (i.e., employees may freely choose whether to do so and will not suffer an undue financial loss or adverse employment consequence if they decline);
- **Has a reasonable and specific repayment amount** (i.e., the repayment amount is no more than the cost to the employer, and the debt must be specified upfront);
- **Has a reasonable "stay" period** (reasonableness is a fact-specific determination, but generally, the greater the benefit, the greater the required period of employment may be); and
- **Does not require repayment if the employee is terminated without cause**.

Opportunity to Cure

The GC stated that the NLRB will not pursue cases involving preexisting stay-or-pay provisions if the employer cures such provisions to comply with the above framework by **Dec. 6, 2024**.

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HIGHLIGHTS & IMPORTANT DATES

- On Oct. 7, 2024, the NLRB GC issued a memorandum declaring that stay-or-pay contractual provisions entered into with nonsupervisory employees are unlawful under the NLRA.
- Employers have until Dec. 6, 2024, to cure any such contractual provisions.

Key Takeaways

Although the GC memorandum is not binding and has not been adopted by the NLRB, it provides a framework for the NLRB to establish the validity of stay-or-pay provisions and notifies employers that such provisions will be an area of focus for the NLRB's enforcement efforts going forward.

However, employers should note that similar efforts to limit noncompete agreements have been rejected by the courts, so any NLRB decisions seeking to ban or restrict noncompete clauses could face a similar legal fate. Similarly, the Trump administration is unlikely to pursue the policies set forth in the 2024 memorandum. Therefore, while employers may take steps now to comply with the GC memorandum (including reviewing and revising any existing stay-or-pay provisions or updating template agreements to remove such provisions for nonsupervisory employees), they should continue to monitor for updates.