

Client Alert

Global Human Capital and Compliance

OCTOBER 18, 2024

For more information,
contact:

Amanda A. Sonneborn
+1 312 764 6940
asonneborn@kslaw.com

Peter J. Wozniak
+1 312 764 6948
pwozniak@kslaw.com

Andrew Cockroft
+1 312 764 6917
acockroft@kslaw.com

Samuel Isaak Rubinstein
+1 212 790 5374
srubinstein@kslaw.com

King & Spalding

Chicago
110 N Wacker Drive
Suite 3800
Chicago, Illinois 60606
Tel. +1 312 995 6333

New York
1185 Avenue of the Americas
34th Floor
New York, New York 10036
Tel. +1 212 556 2100

NLRB General Counsel Announces Intention to Pursue Expansive Remedies for Non- Compete Agreements and to Target So-Called “Stay or Pay” Agreements

On October 7, 2024, National Labor Relations Board (“NLRB”) General Counsel Jennifer A. Abruzzo issued Memorandum GC 25-01, where she argues for expansive remedies for employers who violate the National Labor Relations Act (“NLRA”) by proffering, maintaining, or enforcing non-compete agreements.

Additionally, the Memorandum declares that so-called “stay or pay” agreements are presumptively unlawful under the NLRA. A “stay or pay agreement” refers to an agreement whereby an employee receives payment in exchange for the employee’s promise to return payment in the event they fail to stay with the employer for a specified period. The General Counsel contends that such agreements include training repayment agreements, educational repayment contracts, quit fees, damages clauses, sign-on bonuses, and relocation stipends.

While the guidance in the General Counsel’s memorandum does not have the force of law, it does instruct regional offices to begin implementing the General Counsel’s theories.

GENERAL COUNSEL ABRUZZO SEEKS EXPANSIVE REMEDIES FOR NON-COMPETE AGREEMENTS

General Counsel Abruzzo has long targeted employer non-compete agreements as potentially violative of the NLRA. On May 30, 2023, she issued a memorandum contending that except in limited circumstances, “the proffer, maintenance, and enforcement of such agreements violate [the NLRA],” on the grounds that non-competes chill union activity by



increasing the risks of unemployment for employees (i.e., not only could they lose their current position for union activity, they will not be able to seek a new position with another employer).

In this new memorandum, the General Counsel suggests the NLRB expand the remedies available to employees subject to non-compete agreements. Rather than just rescinding the non-compete agreement, the General Counsel advises that it is appropriate to remedy the harmful financial effects associated with the maintenance of an unlawful non-compete agreement by: (1) compensating employees for the difference between what they would have received if they were not foreclosed from pursuing better job opportunities because of the non-compete agreement and what they actually did receive; (2) lost wages for a former employee who is out of work for a longer period than they would otherwise have been due to the non-compete agreement; (3) compensating moving-related costs for individuals who had to move outside of the geographic region covered by the non-compete agreement to obtain employment within the industry; and (4) compensating costs of any retraining efforts undertaken to be eligible for a position in a different industry not covered by the non-compete agreement.

Additionally, in a footnote, the General Counsel advises that the employer must be required to reimburse employees for legal fees and costs associated with defending a breach of contract claim based on a non-compete agreement, as well as retracting the legal action.

GENERAL COUNSEL ABRUZZO TARGETS AT “STAY-OR-PAY” PROVISIONS

In addition to the expanding attack on non-compete agreements, this General Counsel Memorandum contends that “stay or pay” agreements (i.e., an agreement to pay an employee a specified amount in exchange for a promise to refund the payment if the employee fails to stay with the employer for a minimum period) are “presumptively unlawful” under the NLRA. The Memorandum contends that the following constitute such “stay or pay” agreements: training repayment agreements, educational repayment contracts, quit fees, damages clauses, sign-on bonuses, and relocation stipends. General Counsel Abruzzo advises that this presumption could be rebutted with evidence that the agreement (1) was voluntarily entered into 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 Memorandum provides General Counsel Abruzzo’s view of when agreements satisfy these various conditions. For example, General Counsel Abruzzo opines that relocation stipends or sign-on bonuses are only “fully voluntary” if an employee is provided the option to defer the payment. She explains that if the employee is required to either accept or decline the payment outright, the employee could not have voluntarily accepted payment in exchanged for a promise to stay with the employer for a certain time.

In recognizing the potential havoc this new guidance may unleash on employers, the General Counsel has provided a limited sixty-day period to cure any preexisting stay-or-pay provisions, but not to any stay-or-pay provisions that are entered into after October 7, 2024.

Accordingly, barring a change in control of the White House after Election Day, employers need to be prepared to defend their signing bonuses, educational repayment agreements, and other so-called “stay-or-pay” arrangements.

THE MEMORANDUM CONTINUES A PATTERN OF EVER-EXPANDING REMEDIES AT THE NLRB

Although the NLRB and the federal circuit court of appeals have not weighed in on the General Counsel’s positions—and it will take some time to do so—employers need to be prepared for protracted litigation over remedies.



The current Democrat-majority of the NLRB is a favorable audience for the General Counsel’s requests. In *Thryv, Inc.*, 372 NLRB No. 22 (2022), the NLRB took an expanded view of remedies, requiring employers to “compensate affected employees for all direct or foreseeable pecuniary harms suffered as a result of the respondent’s unfair labor practice.” While the extraordinary remedy announced in *Thryv* is still being litigated in the federal circuit court of appeals, the General Counsel’s Memorandum is in line with the recent trend of ever-expanding remedies that employers need to consider.

NEXT STEPS

Employers should develop an action plan in light of this enforcement guidance. Suggested steps include:

- Identify all current and former workers who are subject to non-compete agreements or “stay-or-pay” arrangements.
- Review existing stay-or-pay arrangements that are in effect before October 7, 2024, in their entirety to determine whether they meet the General Counsel’s requirements and whether they should be modified.
- For any candidates hired after October 7, 2024, determine whether it is appropriate to offer a stay-or-pay arrangement and whether it should be modified in accordance with the General Counsel’s Memorandum.
- Plan for compliance going forward, including assessing and revising existing agreements/templates to eliminate potentially unlawful clauses.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 24 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.” View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY
ATLANTA	CHICAGO	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
AUSTIN	DALLAS	GENEVA	MIAMI	RIYADH	TOKYO
BRUSSELS	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.