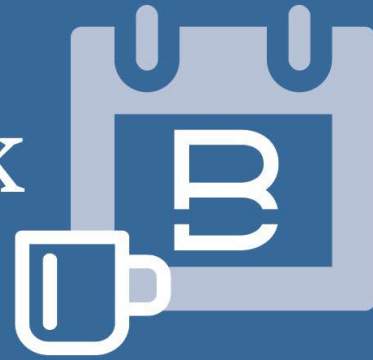


The Work Week

Bassford Remele Employment Practice Group



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Welcome to another edition of *The Work Week with Bassford Remele*. Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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NLRB's Abruzzo Issues Memorandum on the Detrimental Effects of Non-Compete and Stay-or-Pay Provisions: A Summary and Recommendations for Employers

[Marshall T. Hall](#)

On October 7, 2024, General Counsel of the National Labor Relations Board (“NLRB”), Jennifer A. Abruzzo (“Abruzzo”), issued a memorandum addressing the detrimental effects of non-compete and “stay-or-pay” provisions. The memorandum expands on a previous one written in May 2023, which reasoned that non-compete provisions generally violate the National Labor Relations Act (“NLRA”). Primarily, Abruzzo contends that non-compete provisions are often “self-enforcing,” because they create fear of legal repercussions and discourage employees from pursuing better job opportunities, thereby limiting the ability to improve one’s income and employment terms.

As a result, Abruzzo states that there is a need for remedies that go beyond rescission of the unlawful provision, such as “make-whole” relief to address the financial harms caused by attempts from both employers and employees to comply with such provisions. The “make-whole” relief seeks to return employees to a position they would have been in, but for the unlawful provision. This relief is suggested to cover such expenses as: lost wages, relocation costs, and retraining expenses. Abruzzo further recommends an amendment to “standard relief” posting in the workplace to inform employees of their right to such relief.

Furthermore, the memorandum also addresses “stay-or-pay” provisions, which require employees to pay their employer upon separation from employment, especially when employees leave before a specified period. These provisions can occur in various forms, such as training repayment agreements, sign-on bonuses tied to mandatory stay periods, and quitting fees. Abruzzo argues that these provisions, like non-competes, ultimately restrict employee mobility and increase the fear of termination for engaging in a

protected activity. As a result, Abruzzo proposes a framework for assessing the lawfulness of such provisions, and suggests that they are presumptively unlawful, unless they are narrowly tailored to minimize interference with employee rights in Section 7 of the NLRA.

The framework states that a lawful provision must: (1) be voluntarily entered into in exchange for a benefit; (2) contain a reasonable and specific repayment amount; (3) have a reasonable “stay” period; and (4) not require repayment if an employee is terminated without cause. If a stay-or-pay provision is considered unlawful, Abruzzo recommends that the remedy is based on the nature of the violation.

For example, if the provision was voluntarily entered into, but is otherwise not narrowly tailored to the framework, then Abruzzo suggests rescission and replacement of the provision. If an arrangement is non-voluntary, then an employer should also rescind the provision, but additionally nullify any debt, and notify its employees. If an employer attempts to enforce an unlawful agreement, the employer should retract the action and make employees whole for any financial harms. Similar to non-compete provisions, employees should have the opportunity to demonstrate lost employment opportunities due to unlawful stay-or-pay provisions. Abruzzo recommends amending the standard notice posting to inform employees of their right to relief.

Abruzzo considers the framework a novelty idea, and as a result, she mentions exercising prosecutorial discretion in certain circumstances. Overall, employers have a 60-day window to cure any preexisting stay-or-pay provisions that advance a legitimate business interest. In such circumstances, Abruzzo states that she will decline to issue a complaint if the employer cures defects related to: (a) repayment amounts; (b) stay periods; or (c) repayments triggered within the 60-day window. Moreover, Abruzzo mentions declining to pursue cases where preexisting stay-or-pay arrangements involve tangible and transferable benefits, in the event that other requirements are met therein. However, Abruzzo will prosecute preexisting arrangements that fail the defect test and seek retroactive application (absent extenuating circumstances). Abruzzo will also issue complaints for unlawful stay-or-pay arrangements entered into after the memorandum’s issuance, without a 60-day reprieve.

As a result, employers should consider the following:

- **Non-Compete Provisions:** (1) Review Existing Agreements: Ensure that any non-compete clauses are not overly broad and exist as a necessary measure to protect legitimate business interests; (2) Focus on Legitimate Interests: Tailor any non-compete agreements to essential roles, such as those necessary to protect business or trade secrets and client relationships.
- **Stay-or-Pay Provisions:** (1) Ensure Agreements are Voluntary: Ensure that any stay-or-pay provision is entered into voluntarily and offers a clear benefit to the employee; (2) Provide Reasonable Terms: Set reasonable repayment amounts, reasonable repayment periods, and avoid requiring repayment if the employee is terminated without cause; (3) Amend Any Existing Agreements: Ensure that all existing agreements are for legitimate business interests, and make any amendments by December 7, 2024 to comply with the 60-day window.

- **General Recommendations:** (1) Review Current Practices: Conduct a review of all non-compete and stay-or-pay agreements to ensure they comply with the latest NLRB guidance by Abruzzo; (2) Provide Additional Training: Explain the implications of the NLRB guidance by Abruzzo on non-compete and stay-or-pay provisions to HR and legal teams and how to draft compliant agreements; (3) Discuss Agreements with Employees: Explain the purpose and terms of any agreements that are restrictive in nature to employees, and ensure transparency while employees understand such measures; (4) Discuss Alternative Measures with Board Members and Executives: Explore any potential alternatives to recruit and retain talent, such as competitive salaries and benefits, and additional career development opportunities.

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