

National Labor Relations Board General Counsel Takes on Stay-or-Pay Agreements

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On October 7, 2024, the General Counsel (GC) of the NLRB issued a Memorandum (GC 25-01) which addressed her strategy in cases before the Board involving what are known as stay-or-pay agreements.

Stay-or-pay agreements or provisions are those under which employees are obligated to pay employers upon separation. A common example is a training agreement under which an employee must reimburse an employer for expenses of training if the employee leaves employment before a certain time. Another is the requirement to return signing bonuses which must be repaid if an employee leaves before a certain period. The GC contends that most such agreements violate the National Labor Relations Act because they restrict an employee's options such as seeking a raise or leveraging a job offer for better pay or benefits at the existing employer. The Memorandum addresses the GC's approach to obtaining extensive make whole remedies for employees who are disadvantaged by the effects of stay-or-pay agreements.

While too detailed to address in this blog, the GC's concepts for remedies are quite far reaching but consistent with her prior efforts to obtain liberal remedies, some of which the Board has endorsed. The Memorandum also details the GC's view of how such agreements or provisions interfere with the Act's Section 7 rights, namely restricting employee mobility and increasing fear of termination for engaging in protected activity. Her contention is that these types of agreements chill protected activities because of the threat of enforcement and resulting financial hardship on employees.

The Memorandum devotes much detail to a discussion of what types of these agreements might be permitted under the Act. The elements considered are: voluntary entry into such agreements, the legitimate business interests on behalf of employers for the agreements, a reasonable and specific amount for repayment, a reasonable period for the stay, and no requirement for repayment if the employment is terminated without cause. The Memorandum concludes with the GC's position on enforcement as applied to existing stay-or-pay agreements. Given the common use of these types of provisions, employers should take notice and seek advice from counsel about the issues raised by the Memorandum.

No doubt, there will be challenges to the GC's legal position in individual cases, but in the meantime, the attorneys of Sandberg Phoenix's Employment and Labor Law Team stand ready to advise on this important development.