FP Snapshot on the Staffing Industry: NLRB GC's Crackdown On "Stay-or-Pay" Provisions and Non-Competes Demands Your Attention

Insights
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Welcome to this edition of the FP Snapshot on the Staffing Industry. In this edition, we will take a look at the NLRB General Counsel's October 7 memorandum attacking "stay or pay" provisions and non-compete agreements and highlight its impact on staffing firms. This development is especially significant for the staffing industry, where non-compete agreements and stay-or-pay provisions are commonly relied upon to retain employees and safeguard business interests.

Snapshot Look at the NLRB General Counsel's October 7 Memo

To provide a backdrop, in May 2023, the NLRB's GC attacked non-compete agreements and urged NLRB regional directors to find that many employer-mandated non-compete agreements infringe on employees' rights under Section 7 of the National Labor Relations Act (NLRA). Last week's Memo not only further outlines her opposition to non-competes, but also targets "stay-or-pay" provisions.

GC Jennifer Abruzzo notes that certain "stay-or-pay" provisions infringe on employees' Section 7 rights in many of the same ways non-compete agreements do. "Stay-or-pay" is the term used by the GC to refer to a variety of contractual provisions, e.g., training repayment provisions (sometimes referred to as "TRAPs"), educational repayment contracts, quit fees (or breach fees), damages clauses, sign-on bonuses or other types of cash payments tied to a mandatory stay period, and other contracts under which an employee must pay their employer should the employee leave employment, either voluntarily or involuntarily.

The GC urges the NLRB regional directors and the Board to find any provision in which an employee must pay their employer if they separate from employment within a certain timeframe presumptively unlawful.

For a deeper dive into the situation, you can read our full Insight here.

What Do Staffing Firms Need to Know?

This latest guidance could have significant impact on staffing firms which commonly rely on non-compete agreements and stay-or-pay provisions to retain their workforce and protect their business interests.

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interests.

In the staffing industry, both non-compete agreements and stay-or-pay provisions often appear in contracts with temporary workers, independent contractors, and healthcare professionals in travel or per diem roles.

- **Stay-or-pay provisions** typically apply to costs associated with sign-on bonuses, credentialing fees, licensure, pre-employment screening, and continued education or training.
- **Non-compete provisions** may be used with field staff, but, perhaps more importantly, with the firm's internal employees. They are often used to protect proprietary information such as client information, candidate and employee data, financial information such as pricing models, bill rates, and markups; the company's recruitment, sourcing, and client acquisition strategies; and internal metric data such as fill rate, time-to-hire, employee turnover, as well as proprietary analytic tools are protected.

Some Considerations: Best practice suggests that staffing firms act swiftly to assess their existing agreements for compliance with this new NLRB position to avoid coming under scrutiny in the near future. As noted in the full Insight, this new Memo does not yet carry the force of law but could be used to set the NLRB's agenda – and thus should be taken seriously. Notably, from a business perspective, NLRB proceedings are not shielded from the public. This means that even if your company utilizes arbitration provisions in its contracts, your company could face public proceedings, enforcement actions, and potential reputational damage if contractual provisions are challenged – even in a non-unionized environment.

Timing Issue: GC Abruzzo warns that companies have a narrow 60-day window (which began on October 7) to amend or eliminate what she has deemed to be unlawful provisions. Taking steps toward mitigation to avoid penalties, which could include back pay, damages, and legal fees, will be crucial for staffing firms.

Check State Laws: The laws in the states in which you operate also may play in a role in your decisions related to stay-or-pay provision and non-compete agreements, so make sure you work with counsel and familiarize yourself with any local obligations that could impact you. In particular, those doing business in Minnesota now have to navigate a law preventing businesses from entering into contracts that restrict their customers from hiring workers placed at their jobsites – which has an outsized impact on staffing operations. You can read more about that law here.

Next Steps: Now is the time to consult with legal counsel and to evaluate whether you should update existing contracts and policies. Importantly, your company may want counsel to review and ensure your agreements and policies align with the NLRB's four-part test, as detailed in the Memo and full Insight, for lawful repayment agreements to help your company avoid legal risks and to protect your business reputation and interests.

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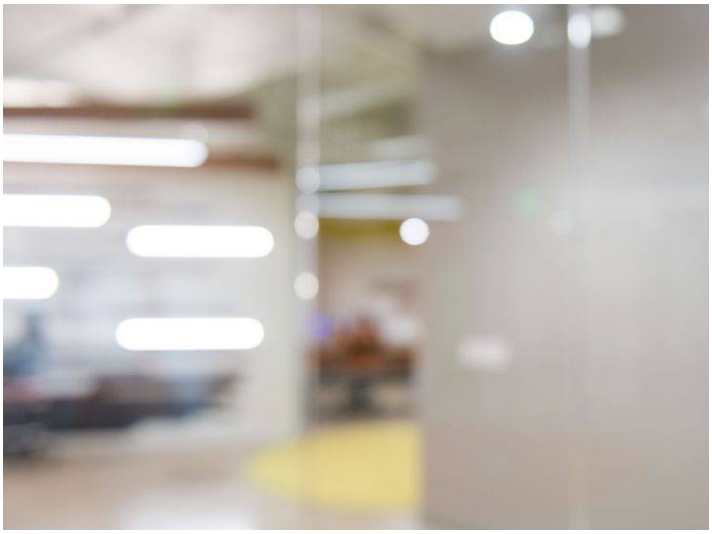

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