

# NLRB ISSUES MEMORANDA ON MONETARY DAMAGES AVAILABLE TO NONCOMPETE AND “STAY OR PAY” AGREEMENTS

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**On October 7, the National Labor Relations Board (NLRB), which manages many aspects of the employer-employee relationship in both unionized and non-unionized workforces, issued a memorandum that impacts many of the country’s workplaces. The memorandum follows up on the NLRB’s Memorandum from earlier this year which expressed its position that non-competition agreements (as differentiated from non-solicit agreements) are an unlawful employment restraint.**

This most recent memorandum has two objectives. First, the NLRB's General Counsel instructed the NLRB Regional Offices to pursue and seek monetary remedies from employers that deprive employees of job opportunities based on enforcement of an unlawful competition provision. The NLRB seeks to provide an avenue for recovery if an employer issues an unlawful noncompete agreement, with the result an employee does not, or cannot, pursue a position, despite: (1) a job vacancy that offered superior pay to their current position; (2) for which they were qualified; and (3) they did not pursue the position because of the employer's noncompete agreement. On behalf of these employees, the NLRB states that it will pursue “make whole” damages from the employer, allowing the employee to recover an amount of money equal to the compensation they would have earned in the other position.

Secondly, the NLRB's General Counsel states that certain “stay or pay” arrangements infringe employee's rights under Section 7 of the National Labor Relations Act. These provisions, which require an employee to pay the employer if the employee separates from employment, either voluntarily or involuntarily, within a certain period of time. These provisions often arise when employers have expended money and/or resources for new hires to train them for a position or to supply them equipment for the new job. The NLRB states that these “stay or pay” provisions are illegal unless the employer can show: (1) the agreement was entered into voluntarily in exchange for a benefit; (2) the agreement has a “reasonable and specific

repayment amount;" (3) the agreement has a "reasonable stay period;" and (4) the employer does not require repayment if the employee is terminated without cause or laid off.

This Memorandum is not "law." The memorandum is, instead, a guidepost for how the NLRB's General Counsel believes the law should develop. For this memorandum to become law, the NLRB will need to issue a regulation, or series of regulations, that become the force of law. However, the NLRB can still issue complaints against employers based on their memoranda, at which time employers will be required to contest the legitimacy of the complaints as lacking legal authority.

**Take Away For Employers:** Have your noncompete and "stay or pay" agreements reviewed by legal counsel to advise on possible revisions that will better allow your organization to navigate around the NLRB's memoranda.

## Related Practices

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## Practice Area Contact

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