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October 2024

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Recent Developments Affecting Non-Competes and Employee Mobility

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Employers take note: a series of recent developments could impact the way that companies across the country handle non-competition restrictions and retention rules. First, recent developments in the legal challenges to the FTC's Non-Compete Clause Rule (the Rule) suggest that the Rule is unlikely to go into effect anytime soon. Second, the National Labor Relations Board's (NLRB) General Counsel recently issued additional guidance relating to non-competes and "stay-or-pay" provisions, which will likely impact the NLRB's prosecution of employers for the use of such agreements.

Recent Developments in Litigation Regarding the FTC's Non-Compete Rule: Appeals and Dismissals

On October 4, 2024, ATS Tree Services, LLC (ATS) voluntarily dismissed its lawsuit challenging the Federal Trade Commission's (FTC) Rule, a recently-promulgated regulation prohibiting most employee non-compete agreements. ATS arrived at its decision following the outcome of *Ryan, LLC v. FTC*, wherein the U.S. District Court for the Northern District of Texas issued a permanent injunction against the Rule on August 20, 2024. ATS's own lawsuit in the U.S. District Court for the Eastern District of Pennsylvania had proven less successful by comparison. The voluntary dismissal—ending litigation without a ruling on the merits—came after a string of unfavorable decisions for ATS, including denials of a pre-*Ryan* motion challenging the Rule and a post-*Ryan* motion to stay proceedings. Judge Kelley Hodge had noted that "[i]f ATS is satisfied with the outcome in *Ryan* and believes it sufficiently addresses their claims, it is not obligated to continue litigating this case." ATS seemingly came around to that view.

This latest ATS development refocuses attention on Ryan as well as *Properties of the Villages, Inc. v. FTC*. In *Properties*, the U.S. District Court for the Middle District of Florida entered a limited injunction to enjoin the FTC from enforcing the Rule on August 14, 2024, granting relief to the plaintiff-employer and becoming the second court in the nation to find that the FTC had overstepped its authority.

The FTC has filed notices of appeal for both the *Ryan* and *Properties* judgments on August 20, 2024 and August 15, 2024, respectively. But the agency faces an uphill battle in both cases, given that the Fifth and Eleventh Circuits tend to be conservative.

NLRB GC Memo 2501 Introduces an Additional Complication for Employers Using Non-Competes

On October 7, 2024, NLRB General Counsel Jennifer Abruzzo issued memorandum GC 25-01, providing regional offices around the country guidance on whether and how to prosecute cases against employers who use non-competes and/or so-called "stay-or-pay" provisions. GC Abruzzo's position that non-competes violate the NLRA has been known since her May 30, 2023, memorandum where she opined that most non-compete agreements are unlawful because they "reasonably tend to chill employees in the exercise of Section 7 rights" under the National Labor Relations Act (NLRA). In this new memo, however, GC Abruzzo announces her intention to prosecute employers for using non-competes, and she extends her view to retention rules that require workers to repay certain company expenses if the worker resigns before a certain date. She states in the memo that these provisions, "[l]ike non-compete" agreements, unlawfully restrict employee mobility and notes that they can take various forms, such as training repayment agreement provisions, educational repayment contracts, quit fees, damage clauses, sign-on bonuses or other types of cash payments tied to a mandatory stay period, and more.

GC Abruzzo explains that while non-competes restrict employee mobility ***directly***, stay-or-pay provisions "do so ***indirectly*** by making resignation financially difficult or untenable" for NLRA-covered employees. As such, Abruzzo urges the NLRB to adopt a new standard and find that any provision where "an employee must pay their employer if they separate from employment," either voluntarily or involuntarily, is "presumptively unlawful." GC Abruzzo's proposed new framework would allow employers to rebut this presumption by showing—***via a four-factor test***—that stay-or-pay provisions advance a "legitimate business interest and is narrowly tailored to minimize any infringement on Section 7 rights."

According to the memo, GC Abruzzo plans to prosecute employers for using non-competes and stay-or-pay provisions and, as she put it, "as fully as possible remedy the harmful effects" of these agreements. In outlining her remedial approach, GC Abruzzo notes that the fact a stay-or-pay arrangement may have been entered into voluntarily in exchange for a benefit does change that it violates the NLRA, and the employer should be ordered to rescind and replace it with a lawful provision, in addition to providing other remedies. Where a stay-or-pay provision is "non-voluntary," and especially where an employer has attempted to enforce the provision, GC Abruzzo states that her office will seek "a more robust remedy," including requiring the employer "to retract the enforcement [] and make employees whole for any financial harms resulting from its attempted enforcement."

GC Abruzzo concludes her memo by stating she will "grant employers a sixty-day window from the date of issuance of th[e] memorandum to cure any preexisting stay-or-pay provisions" that are inconsistent with her new proposed framework. After that, she intends to prosecute employers "over the proffer, maintenance, or enforcement of any unlawful stay-or-pay arrangement."

Importantly, Section 7 of the NLRA applies only to non-managerial employees, and so GC Abruzzo's enforcement position does not affect companies' ability to use noncompete agreements and "stay-or-pay" rules with those who are considered part of management. However, to the extent employers are using either tool with lower-level employees, they should review that practice with counsel. Although GC Memo 25-01 (like all other GC memoranda) is not legally binding, the GC's reading of the law carries great weight. She is the NLRB's top prosecutor and therefore plays a significant role in shaping how federal labor laws are enforced.

Paul Hastings' Employment Law Department has deep expertise in both employee mobility and traditional labor law. Our attorneys are available to assist with questions arising from both the recent litigation over the FTC Rule, as well as the GC Abruzzo's recent memo.

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