CLIENT ALERTS

Stay or Pay

Client Alert
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Earlier this month, the National Labor Relations Board (NLRB) General Counsel issued an advice memorandum cautioning employers about the continued use of policies with "stay or pay" provisions. A "stay or pay" provision is typically found in a contract where the employee agrees to repay the employer for a benefit if the employee does not remain employed with the employer for a specified length of time. Typically, employers use stay or pay provisions in contracts for relocation stipends, tuition reimbursement, signing bonuses, Training Repayment Agreement Provisions ("TRAPs") and up-front retention bonuses.

The General Counsel's position is that stay or pay provisions tend to interfere with, restrain or coerce employees' exercise of their rights under Section 7 of the National Labor Relations Act ("NLRA"), because employees who have a repayment obligation hanging over their heads if they are terminated are less likely to engage in protected, concerted activity and risk retaliatory discharge by their employer. Similarly, employees with a repayment obligation are less likely to resign to take a new job with better terms and conditions of employment when they will be liable to repay a debt if they do.

Employers have cited two business interests furthered by stay or pay provisions: employee retention and recouping payment for a benefit that did not yield the intended result. The General Counsel does not find these interests compelling enough to outweigh the negative impact that stay or pay provisions have on an employee's Section 7 rights. For that reason, the General Counsel intends to urge the NLRB to find that a stay or pay provision is presumptively unlawful. An employer can overcome that presumption by demonstrating that the stay or pay provision is narrowly tailored to minimize its impact on an employee's Section 7 rights and that it advances a legitimate business interest. An employer can make that showing if the

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provision is: (1) voluntarily agreed to by the employee; (2) has a reasonable and specific repayment amount; (3) has a reasonable "stay" period and (4) the employee does not have to repay any amount if they are terminated without cause.

It is important to remember that even non-unionized employees have rights under Section 7 of the NLRA, so these issues can impact all employers. Additionally, many stay or pay programs may also violate the Michigan Wages and Fringe Benefits Act as unlawful wage kickbacks.

All employers should review stay or pay agreements with current and former employees to determine if they meet the four requirements to overcome the presumption that they are unlawful. If an employer has agreements that would not overcome the presumption, they should consider whether to preemptively modify the terms and/or relieve individuals of any debt obligations incurred under a presumptively unlawful agreement.

Please contact your Butzel attorney or the authors of this Client Alert if you have any questions.

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