OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 25-01 **October 7, 2024**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Remedying the Harmful Effects of Non-Compete and "Stay-or-Pay" Provisions that Violate the National Labor Relations Act

In May 2023, I issued a GC Memorandum taking the position that, except in limited circumstances, the proffer, maintenance, or enforcement of non-compete provisions violates the National Labor Relations Act (NLRA or Act).[1] Part I of this memo provides additional information about my intent to urge the Board not only to find certain non-compete provisions unlawful but also, as fully as possible, to remedy the harmful effects on employees when employers use and apply them. In addition, I believe that certain "stay-or-pay" provisions, under which an employee must pay their employer if they separate from employment, infringe on employees' Section 7 rights in many of the same ways that non-compete agreements do and that such provisions therefore also violate Section 8(a)(1) of the Act unless narrowly tailored to minimize that infringement. Part II of this memo sets forth my proposed framework for assessing the lawfulness of such provisions, the remedies I intend to seek before the Board, and the circumstances under which I will decline to issue complaint against preexisting stay-or-pay arrangements.

I. Remedying the Effects of Unlawful Non-Compete Provisions

While the financial harms caused by unlawful workplace rules or contract terms usually relate to enforcement actions, such as discipline or legal enforcement taken pursuant to such provisions, in the case of non-compete provisions there are also more pernicious harms. Such provisions are, in fact, often "self-enforcing" in that employees may forgo certain opportunities out of fear of breaching their contractual obligations.[2] Accordingly, non-compete provisions can restrict the ability to change jobs or leverage one's outside options to obtain a raise, which are common ways employees improve their income and employment terms.[3] In other words, unlawful non-compete provisions may have a harmful financial impact on employee wages and benefits by explicitly

[1] Memorandum GC 23-08, Non-Compete Agreements that Violate the National Labor Relations Act, dated May 30, 2023.

[2] *See, e.g.,* FTC Non-Compete Clause Rule, 89 Fed. Reg. 38,342, 38,378-81 (May 7, 2024) (codified at 16 C.F.R. pt. 910) (determining that most non-compete agreements constitute unfair methods of competition by limiting employee mobility, even absent enforcement), *set aside by Ryan, LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).

[3] NAJAH A. FARLEY, NAT'L EMPLOYMENT LAW PROJECT, FAQ ON NON-COMPETE AGREEMENTS (2022), https://www.nelp.org/publication/faq-on-non-compete-agreements (noting that "[c]hanging a job is one of the most common ways workers receive higher pay" and that non-competes limit employees' "opportunity to bargain for a higher wage and demand a better workplace").

restricting employees' job opportunities. And for those employees who separate from employment, these provisions often create additional financial burdens. For example, to avoid violating a non-compete, former employees may need to relocate, take a lower-paying job rather than one in their field, or pay for training to qualify for a position not covered by the provision.[4]

Accordingly, where the Board finds an employer has maintained an unlawful non-compete provision, rescission alone will fail to remedy all the harms caused by the provision, and make-whole remedies to unwind discipline or legal enforcement actions, while also necessary, will not be sufficient.[5] Whether or not an employer has attempted to enforce its unlawful non-compete provision against any employees, the additional, pernicious financial harms it has caused must also be remedied as fully as possible to make employees whole. As the Supreme Court has made clear, "[t]he task of the Board in applying [Section] 10(c) is to take measures designed to recreate the conditions and relations that would have been had there been no unfair labor practice."[6] Simply put, the goal is to place employees in the same position, as nearly as possible, in which they would have been had the employer not maintained the unlawful provision. Thus, where an employer has maintained an unlawful non-compete provision, the harmful financial effects caused by current employees' and former employees' attempts to comply with the provision must be remedied.

Make-whole relief for an overbroad rule's harmful effects on employees is consistent with case law awarding monetary relief for other types of Section 8(a)(1) violations. To start, any discipline violative of Section 8(a)(1) warrants a make-whole remedy.[7] More broadly, the Board regularly orders employers to remedy economic harms caused by non-disciplinary acts that violate Section 8(a)(1). For example, the Board has ordered employers to reimburse employees for damage to their personal property and for costs associated with retrieving it.[8] Similarly, it has ordered

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[4] *See, e.g.,* EVAN STARR ET AL., THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS 8 (Econ. Innovation Group, 2019), *available at* https://eig.org/non-compete-brief/ (noting that non-competes influence "*where* and *in which industry* individuals work").

[5] I am urging the Board to grant make-whole relief to all employees disciplined or subject to legal enforcement actions pursuant to an unlawful rule or contract term (e.g., overbroad provisions in an employment or noncompete agreement) where the conduct targeted at least touches the concerns animating Section 7, regardless of whether enforcement was alleged as an independent violation in the complaint. *See* Memorandum GC 24-04, Securing Full Remedies for All Victims of Unlawful Conduct, dated April 8, 2024. Due to the nature of non-compete clauses, any enforcement against mere employment—as opposed to establishment of a business—necessarily targets conduct that touches the concerns animating Section 7 inasmuch as securing a new job is one means of improving terms and conditions of employment. Thus, in addition to the remedies for mere maintenance discussed herein, an employer who brings a breach of contract or similar claim pursuant to an unlawful non-compete provision must also retract the legal action and make any employees whole, including by reimbursing employees for legal fees and costs expended in defending against such actions.

[6] *Franks v. Bowman Transp. Co.*, 424 US. 747, 769 (1976); *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263 (1969) (the purpose of a make-whole remedy is to "restor[e] the economic status quo that would have obtained but for" the unfair labor practice).

[7] *See, e.g., Butler Medical Transport, LLC*, 365 NLRB No. 112, slip op. at 4, 9 (2017).

[8] *See, e.g., Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 4 (2018) (employer ordered to compensate employees for expenses incurred related to their toolboxes,

compensation for individuals who cannot work as a result of injury caused by an employer.[9] Thus, extending make-whole relief to cases involving unlawful non-compete provisions would be consistent with the Board's remedies for other unlawful conduct that harms employees financially.

Accordingly, in order to compensate employees for the ill effects of unlawful non-compete provisions since the start of the Section 10(b) period, the Region should seek make-whole relief in the following manner. First, employees[10] should be permitted to come forward during the notice-posting period and demonstrate that they were deprived of a better job opportunity as a result of the non-compete provision. In particular, an employee must demonstrate that: (1) there was a vacancy available for a job with a better compensation package; (2) they were qualified for the job; and (3) they were discouraged from applying for or accepting the job because of the non-compete provision.[11] Where a Region determines, in compliance, that these criteria are satisfied, the employer must compensate the employee for the difference (in terms of pay or benefits) between what they would have received and what they did receive during the same period.[12]

Second, individuals who separated from the employer since the start of the Section 10(b) period may also be entitled to make-whole relief for additional harms or costs associated with complying with the unlawful non-compete provision during the post-employment period, until those restrictions expired. For example, a former employee may be able to demonstrate that they were out of work for a longer period than they would otherwise have been as a result of the non-compete, thereby entitling them to payment for those lost wages. They could do so by satisfying similar criteria as that discussed above, i.e., that there was a position available during their job search for which they were qualified but that they were discouraged from applying or accepting the position as a result of the non-compete provision. Further, where an individual accepted a job providing lesser compensation (in terms of pay or benefits) outside of their industry (but within the geographic scope of the non-compete provision), they should be entitled to the difference between what they would have received and what they did receive because they were foreclosed from pursuing other job opportunities due to the non-

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which were removed from employer's facility during strike in violation of Section 8(a)(1)), *enforced*, 976 F.3d 30 (D.C. Cir. 2020).

[9] *See, e.g., Freeman Decorating Co.*, 288 NLRB 1235, 1241 (1988) (employer required to compensate steward wrongfully evicted from employer's premises for loss suffered due to injuries if shown in compliance); *Graves Trucking*, 246 NLRB 344, 345 (1979) (ordering employer to pay employee for time he could not work as a result of disability caused by supervisory assault), *enforced as modified*, 692 F.2d 470 (7th Cir. 1982).

[10] Although typically it will be current employees coming forward with such evidence, former employees may be able to make the same showing for the period in which they were employed by the charged-party employer since the start of the Section 10(b) period.

[11] Any uncertainty about whether the employee would have been hired by the other company, the salary they would have earned, or their exact start date should be resolved in favor of the employee under longstanding principles. *See, e.g., State Distributing Co.*, 282 NLRB 1048, 1049 (1987) ("it is proper to resolve uncertainties against the one whose unlawful acts have created those uncertainties" where the employer's unfair labor practice has left the Board with "less-than-perfect remedial choices").

[12] Similar relief is also warranted where maintenance of an anti-moonlighting provision discourages employees from pursuing or accepting a second job.

compete provision's restriction for the duration that restriction was effective.[13] Conversely, if an individual had to move outside of the geographic region to obtain employment within the industry, they should be compensated for moving-related costs. Finally, employees should be compensated for the costs of any retraining efforts undertaken to be eligible for a position in a different industry not covered by the provision. While these harms would be accounted for already in calculating backpay and other foreseeable harms for unlawfully discharged or constructively discharged employees, those who voluntarily resigned or were lawfully terminated should also be compensated for facing these added difficulties in securing new employment, which are incurred as a direct result of the non-compete provision.

To assist the Regional offices with ensuring employees are fully compensated for these types of harms, I am recommending that the Board amend its standard notice posting to solicit relevant information from employees.[14] In this regard, the notice should: (1) alert employees that they may be entitled to a differential (in terms of wages or benefits) if they were discouraged from pursuing, or were unable to accept, other job opportunities due to the non-compete provision; (2) notify employees that they may be entitled to other compensation if they separated from employment and had difficulty securing comparable employment due to the non-compete provision, such as by being unemployed longer, accepting a job with a lower compensation package, moving outside the provision's geographic scope, or incurring retraining costs to become qualified for jobs in a different industry; and (3) include language directing individuals to contact the Regional office during the notice-posting period if they have evidence related to (1) or (2). Furthermore, in every case, the Board should order mailing of the notice to ensure that current employees, as well as former employees who were subject to the non-compete provision since the start of the Section 10(b) period, have an opportunity to read the notice and take steps during the notice-posting period to obtain relief, if appropriate.

By allowing employees to come forward with evidence showing such financial harms, the Board can reasonably approximate the damages caused by an employer's wrongful maintenance of an overbroad non-compete provision.[15]

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[13] If the individual cannot point to specific comparator job opportunities within the industry because they were not pursuing them as a result of the non-compete, the Region may use other evidence to provide a within-industry earnings estimate. Where no such evidence is available, the Region could base the calculation on the compensation the former employee would have received during that period at the employer. If, however, the employee was discouraged from pursuing a better job opportunity while employed by the charged party-employer, they would be entitled to the difference between their new job and that earlier opportunity.

[14] This aligns with the similar procedure I recommended in *United Wholesale Mortgage*, Case 07-CA-297897, brief to the Board filed March 18, 2024, regarding discipline or enforcement of unlawful rules or contract terms. Regions should pursue changes to the notice posting consistent with that guidance with respect to all the unlawful rules (including language alerting employees that they may be entitled to a remedy if they were disciplined or subject to legal enforcement under an unlawful provision) as well as the modifications discussed above that are specific to a non-compete rule.

[15] *See Bagel Bakers Council of Greater N.Y. v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977) ("A back pay award is only an approximation, necessitated by the employer's wrongful conduct."); *see also Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943) ("[t]he fact that the Board may only have approximated its efforts to make employees whole, because of asserted benefits of [a] dubious and unascertainable nature," does not render the remedy impermissible under Section 10(c)).

II. Stay-or-Pay Provisions that Violate the Act

Like non-compete agreements, stay-or-pay provisions have become increasingly common in American workplaces in recent years.[16] These provisions take a variety of forms, including training repayment agreement provisions (sometimes referred to as TRAPs), educational repayment contracts, quit fees, damages clauses, sign-on bonuses or other types of cash payments tied to a mandatory stay period, and other contracts under which employees must pay their employer in the event that they voluntarily or involuntarily separate from employment.[17] Like non-compete agreements, stay-or-pay provisions both restrict employee mobility, by making resigning from employment financially difficult or untenable, and increase employee fear of termination for engaging in activity protected by the Act. Accordingly, I believe that such provisions violate Section 8(a)(1) of the Act unless they are narrowly tailored to minimize any interference with Section 7 rights.[18] Only provisions that serve to recoup the cost of optional benefits bestowed on employees, and meet other requirements described below, should be permissible under the Act.

The term "stay-or-pay" provision generally refers to any contract under which an employee must pay their employer if they separate from employment, whether

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[16] *See, e.g.,* Robin Kaiser-Schatzlein, *Pay Thousands to Quit Your Job? Some Employers Say So*, N.Y, TIMES (Nov. 20, 2023), *available at* https://www.nytimes.com/2023/11/20/magazine/stay-pay-employer-contract.html?smid=nytcore-ios-share&ref (estimating that millions of American workers may be subject to stay-or-pay provisions); Consumer Fin. Prot. Bureau, *Issue Spotlight: Consumer Risks Posted by Employer-Driven Debt* (Jul. 20, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report/ (noting that training repayment agreement provisions arose in the 1990's and predominantly applied to higher-skilled, high-wage positions, but they are now common in lower- and moderate-wage industries).

[17] I do not consider repayment agreements associated with Registered Apprenticeship Programs (RAPs) subject to regulation under the National Apprenticeship Act of 1937 to constitute "stay-or-pay provisions" subject to the proposed test set forth herein. Many RAP scholarship or education loan agreements do not indebt apprenticeships to one specific employer, but rather to a third-party entity, such as a jointly managed trust fund. *See, e.g.*, Frank Manzo IV & Erik Thorson, Ill. Econ. Policy Inst., Union Apprenticeships: The Bachelor's Degrees of the Construction Industry 3 (2021), *available at* https://blog.dol.gov/2021/11/19/apprenticeships-and-the-labor-movement ("Joint labor-management programs account for 97 percent of all active construction apprentices in Illinois, 94 percent in Indiana, 82 percent in Ohio, 82 percent in Wisconsin, 79 percent in Kentucky, 78 percent in Michigan, and 63 percent in Oregon."). Accordingly, many "stay" requirements associated with an RAP do not compel a worker to remain employed by a particular employer, but rather allow employment with a multitude of employers. *See, e.g., Milwaukee Area Joint Apprenticeship Training Comm. v. Howell*, 67 F.3d 1333, 1335 (7th Cir. 1995) (permitting repayment in the form of employment at any employer that contributes to the specific apprenticeship fund or to any "like apprenticeship training trust fund"). In any event, the Department of Labor already regulates such programs to "promote the furtherance of labor standards necessary to safeguard the welfare of apprentices . . . ." 29 U.S.C. § 50. *See also* 29 C.F.R. § 29.7 (requiring "good cause" to suspend or cancel apprenticeship agreement after apprentice's probationary period); National Apprenticeship System Enhancements, 89 Fed. Reg. 3118, 3122, 3270, 3279-80 (Jan. 17, 2024) (to be codified at 29 C.F.R. pts. 29 & 30) (proposing, among other things, prohibition on non-compete provisions in apprenticeship agreements, "enhanced protections against unreasonable participation costs for apprentices," and disclosure to apprentices of "all costs, expenses, or fees related to participation").

[18] *Cf. Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) ("Accommodation between employees' § 7 rights and employers' property rights . . . 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'" (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956))).

voluntarily or involuntarily, within a certain timeframe. For example, employers sometimes require employees to undergo specific training as a condition of employment, but contractually obligate employees to pay the employer back for that training, or to pay some prorated amount, in the event that they separate from employment within a given period of time.[19] The repayment amounts may be higher than the actual cost of the training provided to the employee, and the repayment obligation often applies even if the employer terminates the employee without cause.[20] Other times, an employer may provide an up-front monetary payment, such as a sign-on bonus or relocation stipend, but it is not offered free-and-clear to the employee. Rather, employees are required to pay the employer back if they separate from employment within a given period.[21] In other cases, stay-or-pay provisions are not linked to any ostensible benefit bestowed on an employee. In its harshest form, a stay-or-pay arrangement may simply impose a penalty for separation (sometimes referred to as a "quit fee" or "breach fee") or pass to the employee certain business costs or losses (e.g., costs of hiring and training a replacement, lost profits caused by the employment vacancy) by means of a liquidated or unspecified damages clause if the employee resigns within a given period of time.[22]

Stay-or-pay provisions have a tendency to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.[23] Typically, as experience has shown, employees are economically dependent on their employers to sustain their income and benefits and do not wish to jeopardize their jobs.[24] This is the reality of the employer-employee relationship, especially when employees are at will. Thus, deterrents against resigning or engaging in any conduct the employer might disapprove of, including union organizing or other concerted activity for employees' mutual aid or protection, are already intrinsic to our system of employment.[25] Retaliatory measures employers take against employees for their union or protected concerted activity are unfortunately not uncommon—and many employees are acutely aware of the prospect for retaliation.[26] Accordingly, where the impact of job separation is even

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[19] *See, e.g.,* Kate Gibson, *PetSmart's "Grooming Academy" Traps Workers in Debt, Lawsuit Claims*, CBS NEWS (Aug. 1, 2022), https://www.cbsnews.com/news/petsmart-groomers-debt-trap-for-workers-lawsuit-claims/.

[20] *See, e.g., id* (noting that the repayment amount greatly exceeded the value of the training, and that the employer required the obligation be paid if the employee was fired or laid off).

[21] *See, e.g.,* Sara Falcone, Nurse.org, *HCA Ends TRAPs Forcing Nurses to Repay Training Costs* (May 19, 2023), https://nurse.org/articles/HCA-ends-nurse-training-repayment-contracts/ (noting employee obtained a new credit card in order to repay over $10,000 in bonus and training costs when she resigned in her sixth month of pregnancy because employer would not switch her to the day shift).

[22] *See, e.g., Paguirigan v. Prompt Nursing Employment Agency LLC*, 286 F. Supp. 3d 430, 435 (E.D.N.Y. 2017) (employer subjected employees to $25,000 contract termination fee should they quit employment within three years); Josh Eidelson, *Paying to Quit or Four Months Notice Has Workers Feeling Trapped*, BLOOMBERG NEWS (Jan. 26, 2023), https://news.bloomberglaw.com/daily-labor-report/paying-to-quit-or-four-months-notice-has-workers-feeling-trapped (healthcare worker expressed desire to resign due to unsafe patient workloads in combination with limited break and lunch period but was required to provide four months' notice or pay "quit fee" equivalent to four months' salary).

[23] 29 U.S.C. § 158(a)(1).

[24] *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 8-9 (2023) (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

[25] *Id.*

[26] *See* Irene Tung & Paul Sonn, Nat'l Employment Law Project, *Fired with No Reason, No Warning, No*

greater than the attendant loss of income and benefits because a significant debt associated with a stay-or-pay provision hangs over an employee's head, that provision exacerbates the risk employees already face when contemplating engaging in Section 7 activity. As a result, employees are chilled from engaging in protected activity to try to better their working conditions in their current job—whether by organizing a union, collectively advocating for improvements, or concertedly threatening to quit if enhancements are not forthcoming—for fear that termination would trigger the payment obligation.[27] Likewise, such provisions reasonably tend to discourage employees from seeking to improve their lot through job mobility by erecting a financial barrier to quitting.[28]

Employers generally advance two distinct business interests for maintaining such provisions. The first, and more problematic, is to lock employees in their jobs by imposing a financial barrier to separation.[29] Certain forms of stay-or-pay provisions, including quit fees and damages clauses, are aimed solely at holding onto employees.[30] While employers may understandably wish to retain employees, they can do so by encouraging them to stay through longevity bonuses or offering improved terms and conditions of

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Severance 3-5 (Dec. 2022), *available at* https://www.nelp.org/insights-research/fired-with-no-reason-no-warning-no-severance-the-case-for-replacing-at-will-employment-with-a-just-cause-standard/ (finding that one in eight U.S. workers has been disciplined for speaking up about job concerns and that at-will system creates a "'chilling' environment" where employees refrain from doing so because of the threat of job loss).

[27] Eidelson, *supra* note 22 (former chief of staff for Occupational Safety and Health Administration noted that workers have difficulty addressing safety issues when they are not free to leave employment); Nat'l Nurses United, *Comment Letter on Request for Information Regarding Employer-Driven Debt* 35 (Sep. 23, 2022), *available at* https://www.regulations.gov/comment/CFPB-2022-0038-0048 (reporting that training repayment obligation had a "chilling effect" on employees and that many did not want to engage in discussion of unionization due to fear of losing their jobs, thereby triggering debt obligation); Student Borrower Prot. Ctr., *Trapped at Work: How Big Business Uses Student Debt to Restrict Worker Mobility* 19 (July 2022), *available at* https://protectborrowers.org/trapped-at-work-how-big-business-uses-student-debt-to-restrict-worker-mobility/ (noting that the "prospect of losing employment can be enough to prevent victims of harassment and assault from speaking out" but that, in the case referenced, "[t]he looming threat of financial instability created by the company enforcing a TRAP made speaking out even more dangerous"); Consumer Fin. Prot. Bureau, *supra* note 16 ("Many commenters reported that employers invoked their debt as a retort to concerns about work conditions and a strategy to induce them to continue working.").

[28] *See* GC 23-08 at 3-4 (arguing that the following are, or should be, protected by the Act: (1) concertedly threatening to resign to demand better working conditions; (2) carrying out concerted threats to resign or otherwise concertedly resigning to secure improved working conditions; (3) soliciting their co-workers to go work for a local competitor as part of a broader course of protected concerted activity; and (4) seeking employment, at least in part, to specifically engage in protected activity with other workers at an employer's workplace).

[29] *See, e.g., Heartland Sec. Corp. v. Gerstenblatt*, No. 99 Civ. 3694 WHP, 2000 WL 303274, at *7 (S.D.N.Y. Mar. 22, 2000) (federal judge compared a training repayment agreement's $200,000 repayment scheme to indentured servitude and found that the employer's "true purpose" in using the contract was to dissuade employees from quitting); Consumer Fin. Prot. Bureau, *supra* note 16 ("research suggests that the rise in prevalence [of TRAPs] is attributable to employers' search for alternative means of discouraging employee turnover as non-compete agreements come under regulation and legal scrutiny").

[30] *Cf.* Michael Sainato, *'I Feel Like a Criminal for Quitting': Nurses Fight 'Stay-or-Pay' Agreements*, GUARDIAN (Dec. 29, 2023), *available at* https://www.theguardian.com/us-news/2023/dec/29/nurse-contract-fees-stay-or-pay-communicare (employer sued nurse for $100,000 under contractual damages provision).

employment. Employers do not have a legitimate business interest in forcing employees to remain employed in a given workplace against their will through the use of coercive contractual arrangements. Indeed, courts have frowned upon the use of stay-or-pay provisions to advance the purported interest of employee retention given the Thirteenth Amendment's prohibition against indentured servitude, among other concerns.[31] For these reasons, I believe quit fees, damages clauses, and other stay-or-pay provisions whose sole purpose is to force employees to remain employed by imposing fees if they separate are unlawful under the Act.[32]

The second business interest cited by employers in maintaining stay-or-pay provisions is to recoup payments toward employee benefits where an employee does not remain employed long enough for the business to reap its anticipated returns. While this may reflect a legitimate business interest, given that all stay-or-pay provisions have the potential to interfere with employee rights, it is my position that recoupment terms must still be narrowly tailored to minimize any such interference.

I will therefore urge the Board to find that any provision under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain timeframe is presumptively unlawful. The employer may rebut that presumption by proving that the stay-or-pay provision advances a legitimate business interest[33] and is narrowly tailored to minimize any infringement on Section 7 rights, that is, the provision: (1) is voluntarily entered into in exchange for a benefit; (2) has a reasonable and specific repayment amount; (3) has a reasonable "stay" period;

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[31] *See, e.g., Heartland,* 2000 WL 303274, at *7; *Wilson v. Clarke*, 470 F.2d 1218, 1223 (1st Cir. 1972) (noting, in context of liquidated damages provision, that an employer "may not require its ex-employee to make payments to it unrelated to the employer's damage, *simply as a penalty to discourage a job change*" and stating, as a general rule of law, that an employee's "aptitudes, [their] skill, [their] dexterity, [their] manual or mental ability, . . . are not [their] master's property") (emphasis added; internal quotations omitted); *McAfee v. LifeStance Health Grp. Inc.*, No. CV-23-01144-PHX-DJH, 2024 WL 1115831, at *7 (D. Ariz. 2024) (denying motion to dismiss plaintiffs' claim that the "advance on compensation arrangement" in employment contract, which required employees to repay the advance if they left employment before the employer could recover the amount of the advance in the form of insurance billing, created "indentured servitude" relationship in violation of the Thirteenth Amendment); *Paguirigan*, 286 F. Supp. 3d at 435 (refusing to dismiss claim under Trafficking Victims Protection Act where $25,000 termination fee for resigning was allegedly "designed to coerce the nurses into continuing their employment"); *see also Pollock v. Williams*, 322 U.S. 4, 17-18 (1944) (explaining that the Thirteenth Amendment was meant to maintain a system of "completely free and voluntary labor" and that "the right to change employers" is the "defense against oppressive hours, pay, working conditions, or treatment"); *cf.* FTC Non-Compete Clause Rule, 89 Fed. Reg. at 38,378-81 (finding that non-compete clauses constitute an unfair method of competition in part due to their impact on employee mobility).

[32] Federal law may prohibit charging employees for recruitment fees or other fees that can lead to debt bondage, such as: payments for obtaining a visa; fees to cover the cost of soliciting, interviewing and placing workers; fees for medical exams, immunizations and background checks; and costs of recruiters, attorneys, notaries or other legal fees. Where a stay-or-pay arrangement involves such fees, the Region should contact the Agency's immigration team, who may also work with the Agency's antitrafficking coordinator, to assess whether the case is appropriate for referral to a government department or agency that investigates such violations.

[33] Where the repayment requirement appears to be for the purpose of recouping the cost of bestowed benefits based on the contract language, but the surrounding circumstances undercut that legitimate justification and demonstrate that the real purpose is to force employees to stay against their will, the provision is unlawful without further analysis. *Cf. Heartland,* 2000 WL 303274, at *7.

and (4) does not require repayment if the employee is terminated without cause. This allocation of burdens is "consistent with ordinary evidentiary principles that take into account which party has better access to the information that would prove or disprove an argument."[34]

***Voluntarily entered into in exchange for a benefit*:** In order to minimize any infringement on employee rights, entering into a stay-or-pay provision must be fully voluntary—meaning that employees must be permitted to freely choose whether to do so and may not suffer an undue financial loss or adverse employment consequence if they decline—and must be in exchange for a benefit conferred on the employee.[35] Ensuring that employees choose, of their own free will, to enter into such provisions is essential to minimizing any interference with Section 7 rights.[36] If a stay-or-pay arrangement is optional, employees who are worried about retaliation for engaging in protected activity may opt not to enter into such an arrangement, thereby allowing them to exercise their statutory rights as freely as any other employee. In contrast, if employment is conditioned on a stay-or-pay arrangement, employees have no ability to preserve their Section 7 rights in this manner.

Training repayment agreements with a stay-or-pay provision satisfy this proposed criterion so long as the training is optional. In many cases, an employer offers to pay for training or educational opportunities that an employee voluntarily elects to pursue with the understanding that the employee will "pay" costs back through continued employment for a given time period instead of paying for the program out of their own pocket (and repay the employer if the employee does not stay for the requisite period).[37] Where an

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[34] *Total Security Management Illinois 1, LLC*, 364 NLRB 1532, 1546 n.41 (2016), *overruled on other grounds by 800 River Road Operating Company, LLC d/b/a Care One at New Milford*, 369 NLRB No. 109 (2020), *enforced mem.*, 848 F. App'x 443 (D.C. Cir. 2021).

[35] Although benefits conferred in exchange for the stay requirement are typically listed in a stay-or-pay provision, in some cases it may be difficult to discern whether the repayment obligation is limited to such benefits, especially where foreign workers are concerned. Certain visa programs provide that recruitment fees are not to be borne by the employee. *See* U.S. Dep't of Labor, Recruitment, https://www.dol.gov/general/migrantworker/recruitment (migrant workers may not bear the cost of recruitment fees). On the other hand, some visa programs require the employer to provide items employees are normally responsible for, such as housing and transportation. *Id.* (under the H-2A visa program, employers are required to provide free housing and transportation to the job). Thus, where a stay-or-pay arrangement covers a foreign worker, it may be necessary to scrutinize the repayment requirement to ensure it is limited to conferred benefits, i.e., payment of expenses on behalf of the employee that are legitimately borne by the employee (or an advance to the employee to cover such expenses), and does not represent an attempt to shift a business expense to the employee as a penalty or fee for separating.

[36] *Cf. Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 104 (1985) (observing that employees' freedom to escape a union rule through resignation was "critical" to Court's finding that the rule did not restrain or coerce employees within the meaning of Section 8(b)(1)(A) in *Scofield v. NLRB*, 394 U.S. 423, 430 (1969)).

[37] While rare, there may be other examples of truly optional benefits besides training or education funding that employers offer in exchange for an employee agreeing to work for the employer for a set period of time. For example, the federal government provides employees with optional paid parental leave of 12 weeks in the event of a birth or adoption placement, with the understanding that the employee will return to employment for at least 12 weeks. *See* Sarah Donovan, Cong. Research Serv., *The Federal Employee Paid Parental Leave Benefit* (March 5, 2024), *available at*

employee can decline that opportunity without losing their job (or suffering other adverse consequences at work), the employee is not being forced to enter into a stay-or-pay arrangement. For example, if an employee needs a certain credential to be eligible for promotion, a stay-or-pay arrangement to finance that undertaking would be permissible. Likewise, subsidies covering the cost of classes or courses necessary to obtain or maintain a mandatory credential for an employee's current job, such as a degree, license, or certification ("credential"), may be conditioned on a stay-or-pay provision if the classes are selected at the employee's discretion from any third-party vendor, that is, the employee is not forced to take the classes through the employer. A stay-or-pay is voluntary in such situations because an employee could pay out of pocket in lieu of entering into a stay-or-pay arrangement. Doing so would amount to a justifiable financial burden since employees expect to bear such costs to gain and keep a credential that is portable to other jobs within the industry, and they can shop around based on price. Additionally, where educational degrees are concerned, employees typically have other financing options beyond becoming indebted to their employer and, thus, employees would not be compelled to accept a stay-or-pay to fund their educational pursuits. While not strictly required, it would be advisable to make the voluntary nature of the arrangement explicit in the contract, e.g., by stating that the training or credential is not mandatory or that the employee has the option of obtaining a mandatory credential from a third-party vendor instead of via the employer.

In contrast, a stay-or-pay arrangement that is tied to mandatory training—that is, orientation sessions, on-the-job training or other specific instruction that the employer requires an employee to attend—cannot satisfy this proposed criterion. In practice, employees are typically given no choice as to whether to enter into stay-or-pay agreements in exchange for training their employer mandates. The only way to inject "choice" into such an arrangement is to give employees the option of paying for the mandatory employer-specific, employer-provided or employer-arranged training upfront instead of entering a stay-or-pay—a choice that would be illusory. Employees would have no ability to "shop around" for more economical offerings and, even if they could, many would not be able to afford such payments because outside financing options for these trainings are considerably more limited, if they exist at all, as compared to more traditional educational opportunities. Thus, if given the choice of entering into a stay-or-pay provision or paying out of pocket, often the only financially viable course of action would be to sign up for the stay-or-pay. Moreover, even if the employee could afford to pay, they would suffer a significant financial loss and would be at a financial disadvantage compared to their coworkers if they declined the stay-or-pay. Virtually no employee would elect to be put in that position. And any who did would effectively be *paying their employer* for the privilege of remaining debt-free in order to more freely engage in union and protected concerted activity, an outcome that cannot be squared with the Act.[38] Accordingly, a stay-or-pay arrangement cannot be truly voluntary when

https://crsreports.congress.gov/product/details?prodcode=IF12420. If the employee does not return to employment for the given period, the agency may recoup the cost of insurance premiums paid on behalf of the employee during their parental leave—notably, a sum significantly less than the total cost of the paid leave itself. *Id.*

[38] In contrast, employees who have the option of obtaining credential-related training through third-party vendors, rather than through their employer, are not forced to pay their employer for the privilege of preserving their Section 7 rights since they could opt to pay a vendor instead.

tied to mandatory training provided by or arranged through the employer. Moreover, underwriting the cost of mandatory training cannot be said to be a true "benefit" to employees in the same way as financial assistance for optional training or portable credentials. Mandatory trainings predominantly benefit the *employer* rather than employees by ensuring the workforce has the necessary skills to perform their jobs. While some trainings might involve general skill development that could be portable to another job, that objective is often overshadowed by learning other competencies that are non-transferrable.[39] In these latter circumstances, the repayment requirement is effectively an attempt to recoup the employer's cost of doing business from employees' pockets, which is not a legitimate employer interest, rather than a true recovery of benefits conferred on an employee that are transferable. For all these reasons, stay-or-pay provisions tied to mandatory training fail this aspect of the proposed test.

With respect to cash payments, such as a relocation stipend or sign-on bonus, in my view a stay-or-pay provision can only be considered fully voluntary if employees are given the option between taking an up-front payment subject to a stay-or-pay or deferring receipt of the same bonus until the end of the same time period. Only in this way can employees who anticipate possibly engaging in protected concerted activity avoid becoming indebted to their employer without a significant financial downside. If the only alternative was to decline the cash payment outright, that "choice" would be illusory because no reasonable employee would do so, and if they did, it would amount to paying their employer in order to safeguard their Section 7 rights by foregoing money that will remain in the employer's account.

In short, it is my position that where a stay-or-pay arrangement is fully voluntary and tied to a conferred benefit in the ways discussed above, it does not unduly infringe on employees' Section 7 rights so long as it satisfies the additional criteria discussed below.

A reasonable and specific repayment amount: In order to be lawful, the repayment amount must be reasonable, that is, no more than the cost to the employer of the benefit bestowed, and the debt amount must be specified up front. Where the repayment amount is greater than the cost to the employer, the true purpose of the provision is no longer legitimate recoupment but rather coercive restriction of employee mobility, which, as noted above, is not a legitimate business interest. Further, where the employer sets the debt repayment amount above the benefit's cost, that can exacerbate the coercive effect of the provision by making it that much harder for an employee to repay the debt if they switch jobs or contemplate engaging in protected activities that

[39] *See, e.g.,* Kaiser-Schatzlein, *supra* note 16 ("if a company pays for a transferable credential, like an M.B.A. or a master's degree in computer programming, it might make sense to require the employee to stay for a set amount of time" but "too often the training is little more than orientation and provides no transferable credentials"); Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 724 (2021) (noting that TRAPs tied to on-the-job training "often constrain employee mobility without providing employees the portable skills needed for quality jobs"); Consumer Fin. Prot. Bureau, *supra* note 16 (in certain sectors, employees "who have already completed all training necessary to perform the job and required by licensing authorities" are often required to sign stay-or-pay provisions for mandatory training programs; "some firm-specific trainings may have greatly inflated valuations, with little to no actual value for the worker despite the high costs charged").

might jeopardize their job security. To satisfy the specificity requirement, the employee must be informed of the repayment amount before assuming the stay requirement. In the case of cash payments or advances, the amount must be stated in the stay-or-pay contract; where other types of benefits are concerned, the amount must at least be disclosed before the employee accepts the benefit subject to a stay requirement.[40] This ensures that employees enter into stay-or-pay arrangements with informed consent, knowing how much the debt will be if they separate from employment before the end of the stay period.[41] Without such specificity, employees cannot make an informed decision about whether to enter into the stay-or-pay arrangement. In addition, not knowing the exact amount of debt owed to the employer if an employee separates prematurely may heighten an employee's fear of retaliation for engaging in Section 7 activities because they may imagine it to be a larger sum than it actually is.

A reasonable "stay" period: In addition, the "stay" period associated with the stay-or-pay provision must be reasonable. Such a determination will be fact-specific based on factors such as the cost of the benefit bestowed, its value to the employee,[42] whether the repayment amount decreases over the course of the stay period,[43] and the employee's income. Where the cost of the benefit is greater, the stay period may be longer, whereas lower-cost benefits should be associated with shorter stay periods. In my view, ensuring that the stay period is reasonable under the circumstances reduces the coercive effect of the provision by ensuring that the period of time an employee must stay, and potentially be chilled from engaging in Section 7 activity, is not unduly long and is proportional to the benefit bestowed.

No repayment required if terminated without cause: Finally, the provision must effectively state that the debt will not come due if the employee is terminated without cause. A stay-or-pay provision that permits the employer to recoup a debt if it

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[40] For example, a stay-or-pay contract may specify that the employer will pay for voluntary training on the employee's behalf and the debt will be forgiven at certain percentages over time, without specifying exactly how much the total training cost will be. As long as the employee is aware of the cost of each training *before* they decide whether to enroll and are reminded that enrollment will subject them to a stay requirement, this is sufficient to provide the employee notice of the amount of their debt obligation to make an informed decision about whether they wish to become indebted to their employer subject to the stay-or-pay requirement. Likewise, a stay-or-pay contract may state that the employer will arrange and pay for their relocation, but an employee must be given an estimate of the relocation costs and be reminded that acceptance will trigger a stay requirement before they accept the employer's assistance.

[41] Consumer Fin. Prot. Bureau, *supra* note 16 ("there is a risk that employees may be rushed into signing agreements that hide the details of the debt workers are agreeing to"; "many workers [are] unsure of the exact amount they owe").

[42] *See* Harris, *supra* note 39 at 754 (arguing for applying the doctrine of unconscionability to training repayment agreements and urging courts to consider the value of the training provided, i.e., "whether the employee received any benefit from the training, such as portable skills," in conducting such analysis).

[43] While an employer is not required to prorate the amount the employee must repay on a monthly or quarterly basis over the course of the stay period, doing so will weigh in favor of the reasonableness of the stay period. Thus, for example, where a one-year stay period might otherwise seem somewhat unreasonable under the other factors listed, if the repayment amount declines by 25% every quarter, that could be enough to make the stay period reasonable under the Act. *Cf.* Harris, *supra* note 39 at 728 (arguing that "whether the TRA[P] repayment amount is amortized—that is, decreases over the time employed" should be one factor courts consider in applying the doctrine of unconscionability to such provisions).

terminates the employee for *any reason whatsoever*, which would include a basis prohibited by the Act, is unlawfully coercive. Indeed, an employee who knows they have a debt that will come due if they are fired without cause, which could include termination for an unlawful reason, will have an even greater fear of engaging in union activity and other concerted advocacy for improved working conditions. Given that termination for engaging in activity protected by the Act is, by law, termination without cause,[44] I believe this limitation is essential to ensure stay-or-pay provisions are narrowly tailored to minimize interference with Section 7 rights.

Remedying the Effects of Unlawful Stay-or-Pay Provisions

Where a stay-or-pay arrangement was voluntarily entered into, with informed consent, in exchange for a benefit, but the provision violates the Act because it is not otherwise narrowly tailored in one or more ways discussed above, the employer should be ordered only to rescind and replace it with a lawful provision, as well as undertake other remedies as further discussed herein.[45] For example, if the repayment amount and stay period are reasonable, but payment was required even if an employee was terminated without cause, the employer must modify that aspect of the agreement to remedy the chilling effect such a repayment requirement has on Section 7 activity. Likewise, if the repayment amount is greater than the cost of the benefit or the stay period is unreasonably long, the employer must modify those terms to make them reasonable.

The proffer or maintenance of non-voluntary stay-or-pay arrangements requires a more robust remedy and, as discussed in the next section, I will decline to issue complaint as to *certain preexisting* stay-or-pay arrangements, even if they were not voluntary. Otherwise, however, where an employer proffers or maintains a stay-or-pay provision that is not voluntary (or is offered without disclosing the debt amount), I will encourage the Board to remedy the provision's harmful effects by requiring that the employer rescind the provision and notify employees that the "stay" obligation has been eliminated and that any debt has been nullified and will not be enforced against them. Where an employee is indebted to their employer for mandatory training, the only way to put the employee back in the position they would have been in but for the unfair labor practice is to erase the debt.[46] Likewise, where an employee was not given a choice to defer payout of a bonus or relocation subsidy until the end of the stay period, the employer should be ordered to eliminate the repayment obligation, without unwinding the cash payment so that the employee is not harmed financially by the employer's misstep. Similarly, if an employee agreed to a stay-or-pay provision without any notice as to the amount of the repayment obligation, the stay-or-pay obligation must be rescinded because it cannot be said that the employee voluntarily accepted the stay-or-pay with informed consent. Only in this manner can the Board remedy the coercive

[44] *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401 n.6 (1983) (noting that, in drafting Section 10(c), Congress attempted to distinguish between those discharges that were "for cause" and those that were imposed "as punishment for protected activity").
[45] *See Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 7-8 (2019) (ordering employer to rescind arbitration agreement or else revise it "to make clear to employees that it does not bar or restrict their right to file charges with the Board").
[46] *See Franks*, 424 US. at 769; *J.H. Rutter-Rex,* 396 U.S. at 263.

nature of stay-or-pay arrangements that are entered into involuntarily and ensure that employees can opt out of such arrangements if they so choose.

Where an employer has attempted to enforce an unlawful stay-or-pay agreement, except in extenuating circumstances, the employer should be required to retract the enforcement action and make employees whole for any financial harms resulting from its attempted enforcement.[47] Thus, for example, where an employer has demanded payment in reliance on the terms of an unlawful stay-or-pay provision, and the employee complied, the employer must compensate the employee for any repayments made. Where an employer attempts to collect the purported debt, either through legal action or by sending it to a collections agency, in addition to retracting the action and notifying all necessary parties that the debt has been nullified, the employer must also compensate the employee for any legal or other fees associated with defending against the employer's action. Where an employee can show that they experienced other financial harm as a direct or foreseeable result of the stay-or-pay provision, such as where their credit rating was impacted by any attempted enforcement,[48] which adversely affected the employee's ability to secure new employment or the terms of a loan taken out by the employee, the employer should be required to take steps to correct the credit rating and compensate the employee for any pecuniary harms.[49]

Finally, as with non-compete provisions, employees must have the opportunity to come forward and demonstrate that they were deprived of better employment opportunities since the start of the Section 10(b) period as a result of the unlawful stay-or-pay provision. While non-compete provisions restrict employee mobility directly, stay-or-pay provisions do so indirectly by making resignation financially difficult or untenable. In either case, the effect is the same—employees who are discouraged from pursuing or accepting a better job as a result of an unlawful provision are worse off financially as a result of the employer's unfair labor practice. Accordingly, the employer must compensate employees subject to a stay-or-pay provision for that difference (in terms of pay or benefits) where an employee can show that: (1) there was a vacancy available for a job with a better compensation package; (2) they were qualified for the job; and (3) they were discouraged from applying for or accepting the job because of the stay-or-pay provision.

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[47] For cases involving unlawful employment rules or contract terms, I have argued that the Board should remedy enforcement actions where the employer targeted employee conduct that "touches the concerns animating Section 7." *See United Wholesale Mortgage*, Case 07-CA-297897, General Counsel's Brief in Support of Exceptions, filed March 18, 2024; Memorandum GC 24-04, Securing Full Remedies for All Victims of Unlawful Conduct, dated April 8, 2024. However, stay-or-pay provisions are debt arrangements and, thus, they are distinct from most other unlawful employer rules or contract terms in that their purpose is not to regulate employee conduct. Accordingly, a "touches the concerns" analysis is not necessary, and employers should be required to unwind any enforcement actions taken pursuant to any unlawful stay-or-pay provision.

[48] *See* Gibson, *supra* note 19 (noting employee's credit score fell as a result of employer's attempt to collect on a training repayment provision); Consumer Fin. Prot. Bureau, *supra* note 16 ("Employer-driven debts may have a derogatory effect on workers' credit reports and, in turn, impede their ability to obtain other financial products that require credit checks, or a new job with a company that requires a credit check as a precondition to employment.).

[49] *See Thryv, Inc.*, 372 NLRB No. 22, slip op. at 6 (2022), *enforcement denied in part on other grounds*, 102 F.4th 727 (5th Cir. 2024).

To assist the Regional offices with ensuring employees are fully compensated for these types of harms, as discussed in Part I, I recommend that the Board amend its standard notice posting to solicit relevant information from employees.[50] In this regard, the notice should: (1) alert employees that they may be entitled to a differential (in terms of wages or benefits) if they were discouraged from pursuing, or were unable to accept, other job opportunities due to the unlawful stay-or-pay provision; (2) notify employees that they may be entitled to other compensation if they separated from employment and had difficulty securing new employment due to the unlawful stay-or-pay provision, such as where a new employer declined to hire them due to a lowered credit score tied to unpaid debt to the employer; and (3) include language directing individuals to contact the Regional office during the notice-posting period if they have evidence related to (1) or (2). Furthermore, in every case, the Board should order mailing of the notice to ensure that current employees, as well as former employees who were subject to a stay-or-pay provision since the start of the Section 10(b) period, have an opportunity to read the notice and take steps during the notice-posting period to obtain relief, if appropriate.

Exercise of Prosecutorial Discretion

In recognition of the fact that this proposed framework contains new, specific requirements, I will exercise my prosecutorial discretion to decline to issue complaint, absent settlement, in certain circumstances. Thus, I will grant employers a sixty-day window from the date of issuance of this memorandum to cure any preexisting stay-or-pay provisions that advance a legitimate business interest. For example, if a stay-or-pay arrangement includes a repayment amount that is more than the cost of the benefit bestowed, the employer should reduce it to a level that is no higher than that cost and notify affected employees of the new repayment amount. Likewise, if a stay period is unreasonably long, the employer should shorten it to a reasonable length and notify impacted employees of the new stay period. And if the stay-or-pay provision requires repayment in the event an employee is terminated without cause, the employer should amend the provision to make clear that it does not cover no-cause termination and so notify employees. If an employer cures any such defects in this manner prior to the sixty-day deadline, such that any remaining debt satisfies the test set forth above, I will decline to issue complaint, absent settlement. Likewise, if a debt collection enforcement action (e.g. through a collections agency, lawsuit, or arbitral proceeding) is still pending when this memorandum issues, the employer should modify its demand for repayment within sixty days so as to comply with this test, for example, by: reducing the repayment demand so that it is no higher than the cost of the benefits; seeking dismissal of a claim if the stay period was unreasonably long and the employee stayed for a reasonable period of time; or seeking dismissal if the provision did not have a carve out for discharges without cause and the employee was, in fact, terminated without cause.

[50] This aligns with the similar procedure I recommended in *United Wholesale Mortgage*, Case 07-CA-297897, brief to the Board filed March 18, 2024, regarding discipline or enforcement of unlawful rules or contract terms. Regions should pursue changes to the notice posting consistent with that guidance with respect to all the unlawful rules (including language alerting employees that they may be entitled to a remedy if they were subject to legal enforcement under an unlawful provision) as well as the modifications discussed above that are specific to a stay-or-pay provision.

In some circumstances, it will not be possible for an employer to unwind an unlawful stay-or-pay provision to conform to the proposed test. Such a problem is presented where the stay-or-pay provision was not entered into voluntarily (or with informed consent as to the amount) as well as where the enforcement action has already closed. Since the inequities flowing from cancelling a debt are greater where employees received a tangible, transferrable benefit, I will also exercise my prosecutorial discretion by declining to pursue cases where the preexisting stay-or-pay arrangement involved such benefits—e.g., an upfront cash payment such as a bonus or relocation stipend, financial assistance towards optional training, or payment for classes to obtain or maintain a credential—so long as the other three requirements discussed above are cured by the end of the sixty day window. Thus, even though a cash payment or credential-conferring training may not have been fully voluntary as defined above, I will not issue complaint as to a preexisting arrangement if any issues relating to the stay period, repayment amount, or repayment trigger, are cured. Likewise, and again assuming all other issues are cured, where an employee was not informed of the exact amount of the debt for optional training or credential-related classes, I will not pursue a complaint against such a preexisting arrangement so long as the employer discloses the debt amount to the employee within sixty days. Where an employer has already enforced a stay-or-pay agreement entered into prior to this memorandum that was in exchange for the types of benefits contemplated here (cash payments, payments toward optional training or any credentialing), I will not litigate the unlawfulness of such enforcement so long as the amount being sought is reasonable, in accordance with the above analysis. Finally, I will decline to prosecute *any* preexisting stay-or-pay arrangement if the employer cancels the debt, notifies employees that they no longer have a repayment obligation, retracts any debt collection enforcement action and, if appropriate, returns any repayments collected from employees within sixty days of this memorandum.

In all other respects, I intend to prosecute preexisting stay-or-pay arrangements that fail the test set forth herein and seek retroactive application, absent extenuating circumstances.[51] I also intend to issue complaint, absent settlement, over the proffer, maintenance, or enforcement of any unlawful stay-or-pay arrangement that is entered into after issuance of this memorandum, without a sixty-day reprieve.[52]

I recognize that both employers and employees can benefit from certain training repayment provisions and other stay-or-pay arrangements. However, given the serious

[51] *See, e.g., SNE Enterprises,* 344 NLRB 673, 673 (2005) (stating that the Board's usual practice is to apply new policies and standards retroactively "to all pending cases in whatever stage" so long as doing so "would not result in "manifest injustice"); *see also Williams Natural Gas Co. v. F.E.R.C.*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (explaining that retroactivity is "natural, normal, and necessary" where agency ruling concerns a matter of first impression and observing that the D.C. Circuit has "repeatedly held that retroactivity is appropriate when the agency's ruling represents a 'new policy for a new situation,' rather than being 'a departure from a clear prior policy'" (quoting *Aliceville Hydro Assocs. v. F.E.R.C.*, 800 F.2d 1147, 1152 (D.C. Cir. 1986), and *New England Tel. & Tel. Co. v. F.C.C.*, 826 F.2d 1101, 1110 (D.C. Cir. 1987))).

[52] Of course, where an employee was unlawfully discharged under the Act and was thereafter subject to the repayment requirements of a stay-or-pay provision, I will encourage the Board to fully remedy any related financial harms. Regardless of the legality of the stay-or-pay provision or the date it was entered, the employee should not have been terminated and accordingly should not have been subject to the stay-or-pay provision's repayment requirement.

potential for suppressing union organizing and other concerted activity for mutual aid or protection, including by impairing job mobility, I believe such provisions must be narrowly tailored to minimize that infringement on Section 7 rights in order to respect the rebalance of "economic power between labor and management" Congress sought in passing the Act.[53]

Should Regions have questions about the application of this framework to a particular case or encounter a case involving enforcement of a stay-or-pay arrangement, they should contact the Division of Advice.

/s/
J.A.A.

[53] *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965).