Butzel Long Attorneys Sign Letter to the White House and FTC Regarding Non-Competes

7.23.2021

On July 9, 2021, President Biden signed an Executive Order on Promoting Competition in the American Economy. The Executive Order addresses or discusses many aspects of the economy, from labor and employment matters to regulatory licensing and even agricultural concerns. But one of the key parts of the order takes aim at restrictive covenants prohibiting former employees from competing against their former employer, commonly known as "non-competes."

President Biden has asked the Federal Trade Commission to limit —if not outright ban—non-competes. This is yet another step in a long line of actions by the federal government to involve itself in these state contracts, as written about here. Just in the past couple years the FTC has looked at non-competes and examined whether special rules should be passed to ban or limit them. At that time, Butzel Long signed on to a letter to the FTC in an attempt to educate the Commission as to why non-competes should not be banned and why such matters should be left to states. That previous letter can be found here.

Now, President Biden is asking the FTC to look at non-competes again. The Executive Order recently passed suggests that "[p]owerful companies require workers to sign non-compete agreements that restrict their ability to change jobs." Therefore, President Biden has directed the FTC to "address agreements that may unduly limit workers' ability to change jobs." Therefore, he has "encouraged" the Chair of the FTC to "consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

It is important to note that the Executive Order did ***not*** change any current laws. It did not ban or limit non-competes. It did not stop any companies today from enforcing their non-competes,

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or from asking future employees to sign them. What it did, again, was to "encourage" federal agencies and commissioners to work together to potentially pass rules to curtail *unfair* non-competes. In theory, the FTC may do nothing. Or it may do a lot. Even then, it is unknown how it or anyone else may define what non-competes are "unfair" and which are not. But unless and until the FTC acts, nothing has changed.

It is also important to note that federal administrative agencies rarely act rapidly. The rulemaking process mentioned in the Executive Order takes time. Proposed rules would have to be publicized, the FTC would have to take questions and comments on them, and then they'd have to be publicly voted up or down. No change has happened yet and none will happen tomorrow.

But it is still worth asking the question of whether the FTC should take any actions at all, or if any are needed. For this reason, several Butzel Long attorneys recently signed onto a letter to the White House and to the FTC, signed by nearly five dozen recognized national non-compete/trade secret lawyers from across the country, attempting to educate the FTC and the White House on the facts and data behind non-competes and urging restraint in any future rulemaking. That letter can be found here.

The entirety of the letter is worth reading and is extremely thorough. But a summary of the letter is as follows:

1. The letter walks through the purpose and practicalities of non-competes;
2. It addresses several common misconceptions about the use, enforcement, and impact of non-competes;
3. Next, it examines regulatory efforts going on across the country already; and
4. Lastly, it lays out our recommendations for a fair approach that could be taken by the FTC.

"In sum," we wrote, "although sometimes abused, when used properly (as all of the signatories to this letter recommend) noncompetition agreements serve legitimate purposes that are important to the economy, and necessarily require a nuanced approach reflective of variations in jobs, industries, and state economies." Importantly, nobody who signed this letter advocated that nothing could or should ever be done. Rather, we noted that "some changes in the law would unquestionably benefit workers, without harming companies or the economy."

Ultimately, the letter recommends the following:

- Permit states to regulate and legislate how these contracts—traditionally governed by state law—are treated. This has been ongoing at a rapid pace, with different states fashioning rules that they believe work best for them. We should allow them to keep doing so, rather than passing a one-size-fits-all rule at the federal level.
- If the FTC believes it should or must promulgate a rule, we urged the Commission to be judicious and to tailor any regulation to the specific abuses noted by those who wish to regulate the use of non-competes. This could include:

  - A ban on non-competes for low-wage workers; and
  - A requirement that employers provide advance notice that a non-compete will be required prior to the employment starting.
- We also recommend that any federal rule—should there be one—permit for judges to reform or rewrite unreasonable agreements, and to potentially provide for "springing non-competes" that only come into effect if the employee breaches an otherwise enforceable non-disclosure or confidentiality agreement.

Such reforms would advance attempts to help employees but would not harm businesses or the economy. We are proud to be signatories to this letter along with our peers. We hope the FTC takes our ideas into account.

In the meantime, continue to audit your current non-compete agreements and other agreements, make sure that they are reasonable, and enforce them when appropriate. We are happy to assist you with any questions you may have. And as more information comes out as to potential changes in the law, Butzel Long will keep you up to date and informed on any such potential changes.

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