

# CLIENT ALERTS

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## Here We Go Again. Again. Congress Seeks to Ban Non-Competes

3.3.2021

Here we go again. Again.

Congress is proposing a bill that would limit—if not outright ban—non-compete agreements. If it seems like this Alert sounds a little bit like a broken record, it may be because we have reported on this same topic or very similar topics numerous times, here, here, here, and here, among others. It seems that with each new year, we see new attempts by the federal government to regulate private contracts between employees and their employers. In the past weeks, we have seen it again.

On February 25, 2021, Senators Chris Murphy (D-Conn.) and Todd Young (R-Ind.) introduced what they are calling the *Workforce Mobility Act*. This bipartisan legislation would aim to limit the use of non-compete agreements that “negatively impact American Workers.” This action taken by these Senators was to be a counterpart to proposed legislation introduced in the House of Representatives earlier that same month.

The proposed legislation would do the following:

- Limit non-competes solely to instances of a dissolution of a partnership or the sale of a business;
- Place the enforcement responsibility on the Federal Trade Commission (the “FTC”) and the Department of Labor (the “DOL”), as well as provide for a private right to sue;
- Require employers to make their employees aware of the limitation on non-competes; and
- Require the FTC and the DOL to submit a report to Congress on any enforcement actions taken.

The first bullet point above would all but prohibit non-competes as we know them today in the employment setting. And the second point would give the federal government the power to investigate and, if it deems fit, fine or punish companies who it

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## CLIENT ALERTS

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deems to be offenders. Both of these provisions would be drastic changes to the status quo and would be an increase in federal power over companies of any size.

The Senators, in a press release found [here](#), use alarming language in setting forth what they argue is the need for this legislation. In fact, they literally state that the number of workers who have ever been party to a non-compete is, indeed, “alarming.” They also indicate that workers are “trapped” by them, are “less mobile,” and even that non-competes are the cause of young companies “dying” because they are not able to hire workers with the right set of skills.

But is it so that non-competes are such a scourge, both to employees and businesses alike? There is, it seems, little data to suggest such. And the Senators’ press release does not provide any evidence for their assertions. The evidence is, at the very least, mixed on these fronts.

This firm was a signatory to a joint letter to the FTC almost exactly a year ago. At that time, the FTC was considering agency rules that would regulate non-competes. (Giving credit where it is due, at least the current legislation is being proposed by actual legislators.) The letter to the FTC was signed by over twenty of the foremost Non-Compete attorneys and law firms in the country. At that time, we argued that the evidence and studies—as well as our own experiences—indicate that non-competes are not as harmful as many would suggest.

Among other things, non-competes permit employers to hire employees without fear that they will simply be training them to compete against them. Employees who sign them are also often able to demand a higher compensation or bonus for doing so. Moreover, when non-competes are outlawed, trade secret litigation tends to increase, actually increasing costs both to businesses and employees and potentially harming employees even more. Non-competes are also an effective way to protect trade secrets, which the federal government recognized not long ago as an important effort when it passed the Defend Trade Secrets Act of 2016. The allegedly harmful effects of non-competes are also often overblown or simply just not true.

And regardless of what one thinks of the benefits of non-competes, it has never been answered why federal action is necessary to govern and regulate these private contracts. In just the past few years, a vast majority of states plus the District of Columbia have passed laws pertaining to non-competes. Others have proposed legislation but were unable to or chose not to pass the ideas into laws. Some of these new laws and proposed laws sought to ban non-competes outright or drastically curtail them. Others, to the contrary, have actually strengthened non-competes. It is unclear why the federal government would need to pass a one-size-fits-all law pertaining to these private contracts, effectively wiping out these diverging actions taken by nearly every state.

Regardless of the propriety, wisdom, or likelihood of success of this newly proposed federal legislation, the Butzel Long Non-Compete/Trade Secret team will continue to monitor the situation. If appropriate and given the chance, we will gladly write to or testify to Congress as we did with the FTC and as we have in the past when similar legislation has been proposed at the state level. We will also, of course, keep our clients up to date on any new requirements or regulations. In the meantime, if you should have any questions pertaining to non-competes, trade secrets, confidentiality agreements, non-

## CLIENT ALERTS

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solicitation agreements, or any other restrictive covenants, contact a member of the Butzel Long Non-Compete/Trade Secret Specialty team.

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