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Here We Go Again: The Debate Over Federal Regulation of Non-Competes Rises Again

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As this firm has repeatedly advised (here, here, and here), many states have been seeking to change their non-compete laws over the past several years. The same has also been true at the federal level. Certain members of Congress have been attempting to enact federal non-compete legislation for some time. And while there are debates on both sides of the issue as to whether such regulation is needed, the efforts at the federal level have been—at least periodically—bipartisan. But when Congress was unable to pass the legislation that some wanted, those involved turned to federal regulatory authority in an attempt to bypass the legislative process in order to achieve their goals.

In 2019, Congress asked the Federal Trade Commission (the “FTC”) to use its rulemaking powers to either eliminate or restrict the use of non-competes. Shortly thereafter, 18 State Attorneys General also urged the FTC to take similar action. While some have questioned whether the FTC properly has such power, the FTC began reviewing the issue and earlier this year held a workshop titled “Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues.”

At that point in time, this firm—along with 21 other lawyers and law firms from across the country—signed a letter to the FTC in response to that workshop. That letter analyzed and described the business justifications for non-compete clauses; the sufficiency of state laws to address non-compete clauses; whether employers enforce non-compete agreements and how routinely they do so; whether the FTC should consider using its rulemaking authority to address non-compete agreements; and what additional economic research should be undertaken to evaluate the true net effect of non-compete agreements. That letter was sent to the FTC in March, 2020. Since that time, the FTC has not acted to regulate non-competes.

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But now, perhaps acting on the adage that you never want a serious crisis to go to waste, Senators Elizabeth Warren (D-Mass.) and Chris Murphy (D-Conn.) are again asking the FTC to use its rulemaking authority to regulate or reign in non-competes. Citing the COVID-19 crisis, Senators Warren and Murphy have asserted that the “pandemic has exacerbated the problems created by non-compete agreements.” Neither senator explained or substantiated how or why the pandemic has done so, or what new regulatory rules might fix the asserted issue.

Leaving no doubt as to where they stand on the issue, the senators refer to non-compete agreements as “poisonous,” allege that they leave “millions of workers who have lost jobs due to the pandemic unable to seek employment elsewhere,” and assert that they will stop people from starting their own company after the crisis subsides. The senators also asserted that non-competes lead to employers cutting wages, decreasing benefits, and even subjecting workers to “inhospitable environments without fear of the employees leaving for a competitor.”

Leaving all hyperbole aside, those who have studied these issues assert that the data does not bear the senators’ positions out. As was addressed by the letter to the FTC noted above, the data is at best mixed on the subject. This firm has also recently written on the effect that the COVID-19 crisis may have on the likelihood that judges will enforce non-competes. As we wrote at the time, only time will tell whether courts will become more circumspect than usual about non-competes in the wake of this recent crisis, but it is very possible that the evils cited by the senators will not come to pass. Regardless, state courts will and should continue to implement their own laws on the evaluation and enforcement of restrictive agreements.

Critics of the senators’ views assert that while this economic and health crisis will eventually subside, once enacted, any FTC regulations will be unlikely to be undone. It would seem prudent to them, then, for any rulemaking or legislating to be conducted cautiously, if done at all. Those opposing the senators’ views counter that there is no reason to use the current crisis to pass rules or laws that neither the legislature nor administrative agencies have seen fit to pass over the past five or more years.

Moreover, as noted at the outset, states have been increasingly and frequently tweaking, revising, amending, and outright changing their own laws on non-competes at the state level. Those who advocate for states to regulate non-competes argue that if the issues that Senators Warren and Murphy fear are true, then state legislatures would be best situated to address such issues, and that this is precisely how such change should be effected, in our laboratories of democracy.

Both sides of the debate bring heavyweight advocates to their position. As always, the Butzel Long Non-Compete/Trade Secret team will continue to monitor this situation. If there are any developments, we will keep our clients informed. And as always, if you need any assistance in drafting non-competes, advice as to how to implement them, or assistance in enforcing them, we are here to help.

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