Non-Competes 2020: U.S. Senators and Presidential Candidates Seek to Outright Ban Non-Competes

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Another day, another push to outright ban non-competes.

As discussed in previous client alerts (May 30, 2019, August 2, 2019, and September 5, 2019), the efforts to outright ban and/or severely limit the use of non-compete agreements have gained steam nationwide with several states having already passed sweeping legislation. This effort has continued with certain U.S. Senators and even Presidential Candidates seeking to outright ban non-competes.

On October 3, 2019, U.S. Senator and Presidential Candidate Elizabeth Warren (D-Mass) released a comprehensive plan to completely reform the labor laws in the United States (here). Among other things, Senator Warren seeks to completely ban non-compete clauses from employment contracts, as well as "no poach" agreements (typically agreements between employers and/or franchisees whereby they agree not to poach/hire each other's employees). Warren argues that banning such clauses would help boost wages by 2-3%. This position is consistent with Senator Warren's previous efforts to outright ban non-competes, including her introduction of the "Workforce Mobility Act" in April 2018 (along with Senators Chris Murphy (D-CT) and Ron Wyden (D-OR), which proposed to ban the use of employee non-competes (and potentially non-solicitation agreements)).

Just this week, on October 17, 2019, Senator Murphy introduced (or reintroduced) the "Workforce Mobility Act" with Senator Todd Young (R-IN) seeking to limit the use of non-competes. According to their press release and Twitter feed, the bill would:

- Limit the use of non-competes to the sale of business context and/or dissolution of a partnership.

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- Provide a private cause of action for employees, as well as place enforcement responsibility on the FTC and the Department of Labor.
- Require employers to notify employees of the limitation on non-competes.
- Require the FTC and Department of Labor to submit a report to Congress on any enforcement actions taken.

A link to the full text of the bill is available here.

This recent legislation and other efforts to outright ban and/or limit non-competes have received considerable pushback. Indeed, in their zest to help the American worker, these bills and positions often go too far and actually serve to thwart innovation and harm businesses, employers, AND employees. So long as non-competes are drafted in a reasonable and narrowly tailored way (as required by existing law in any event), they serve as an extremely effective tool in protecting companies' trade secrets – the lifeblood of most businesses that employ hundreds and/or thousands of employees. Most of the pro-ban movements stem from the "Be Like California" argument, believing that companies and employees are successful in California because it outright bans non-competes. The author of this client alert has repeatedly pointed out the flaws of the "Be Like California" argument. *See here*. In fact, California was ranked dead last yet again on the 2019 Best & Worst States for Business by Chief Executive Magazine. This argument also ignores the success of cities in states where non-compete agreements are permissible and enforceable, including Detroit (historical success of the auto industry), Boston (historical success of the pharmaceutical industry before the new Massachusetts law), and Austin (wildly successful population and employment growth).

IN LIGHT OF THE CONTINUED MOVEMENT TO BAN NON-COMPETES, WHAT SHOULD EMPLOYERS AND BUSINESSES DO?

1. Continue to monitor this legislation and the potential impact on your business. It is unlikely that this bill will become law anytime soon (or even receive a vote), but with 2020 around the corner, anything could happen.
2. Proactively review your existing non-compete agreements and analyze whether they comply with new state laws, potential federal legislation, and/or could withhold scrutiny from state and federal agencies.
3. Tailor your non-compete and/or no-poach agreements for the jurisdiction in which they are used. For example, a reasonable non-compete agreement that would be enforceable in Michigan would likely not be enforceable if the employee lives or works in California.
4. Audit your non-compete agreements on at least a yearly basis to ensure that they are compliant with any changes to state and/or federal laws. As noted above, the laws are constantly evolving and/or changing.

In the end, the message should be loud and clear. Proactively take steps to ensure that your restrictive covenant agreements will likely be held enforceable by carefully crafting to protect your legitimate business interest and narrowly tailoring the restrictions (all the while staying in compliance with the

constantly evolving laws).

Please contact the author of this alert or any of Butzel Long's Trade Secret and Non-Compete Specialty Team attorneys regarding the latest changes in the law and/or to help implement the recommended steps above.

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