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The FTC Intensifies Its Examination of Non-Competes

11.10.2021

As you may recall, in March 2020, Butzel signed a letter in which over twenty law firms from across the United States urged the Federal Trade Commission (FTC) that the federal government should not meddle in state non-compete laws. In essence, Butzel and its co-signors sought to provide practical insight to the FTC as to why the federal government should not ban “non-competes”—restrictive covenants prohibiting former employees from competing against their former employer—and why such matters are best left to the authority of state governments. That letter can be found [here](#).

More recently, Butzel signed a similar letter to the FTC (and this time, to the White House, too) following President Biden’s July 9, 2021 Executive Order on Promoting Competition in the American Economy, which dialed in more sharply on the use of non-competes. Specifically, the Executive Order “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.” Out of concern that the FTC may proceed with promulgating such rules, the second letter addressed several common misconceptions about the purpose, use, enforcement, and impact of non-competes, and further examined the regulation of such agreements already taking place across the country. Lastly, this letter included recommendations for a fair and reasonable approach that the FTC could take with respect to non-competes that would further the objectives of the Executive Order. The second letter can be found [here](#).

Now, it appears that the FTC is at it again, announcing on October 27, 2021, that on December 6 and 7, it will be hosting a two-day workshop “to discuss efforts to promote competitive labor markets and worker mobility,” consisting of panels,

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presentations, and Q&A addressing “issues affecting labor markets and the welfare of workers, including: labor monopsony; the increased use of restrictive contractual clauses in labor agreements, including non-competes and non-disclosure agreements [and] the role of other federal agencies in ensuring fair competition in labor markets” Find the FTC’s press release on the workshop [here](#).

Butzel’s Non-Compete/Trade Secret team is closely analyzing this situation and whether it should join with other non-compete lawyers across the country once again in making the case to the FTC that the federal government should not interfere with state non-compete laws. As we’ve opined previously, there are commonsense regulations or laws that could be passed with regard to non-competes, but there are many that have been proposed that would not be beneficial. Misconceptions on non-competes and their utility continue to exist. But perhaps most importantly, any reforms, regulations, or laws addressing such restrictive covenants are best promulgated by the states, and not a one-size-fits-all approach from the federal government.

We will, as always, continue to assess the situation and report on any new developments.

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