

# CLIENT ALERTS

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## What Developments to Expect for Non-Compete Agreements in the New Year: A Renewed Effort to Rein in or Outright Ban Their Use, This Time at the Federal Level

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2019 brought with it numerous efforts to limit, restrict or outright ban the use of non-compete agreements. Those efforts occurred at both the state and federal level and some state actions were successful. But 2019 also brought with it a renewed effort at the federal level for change in the non-compete arena. In July 2019, Michigan's Attorney General, Dana Nessel, signed on to a letter, along with eighteen other state attorneys general, to the Federal Trade Commission ("FTC") in an effort to get the FTC to act on non-competes. Butzel Long's Bernard Fuhs issued an alert on this action. Attorney General Nessel signed on again to that effort in a November 15, 2019 follow-up letter asking the FTC to restrict or ban non-compete agreements.

The state attorneys general urged the FTC to take rule-making action to rein in non-compete agreements because the FTC "offers the quickest, most comprehensive regulatory path to protecting all workers from these exploitive contracts," apparently ignoring any benefits such agreements might provide. The signers of that letter believe that this path was a better path forward even though they continued to support state and federal legislative reforms on non-competes.

Shortly after the submission of that November letter, business media reported on the uses and purported abuses of non-compete agreements. Campbell, B., "36 Million Workers Bound By Noncompetes, Survey Says," *Law360.com* (December 10, 2019): Sahadi, J., "What to do if you're asked to sign a non-compete agreement," *CNN.com* (December 10, 2019).

These recent actions portend of a continued effort to limit or outright ban the use of non-compete agreements. Indeed, the FTC, in an apparent attempt to at least consider some of the concerns raised by the attorneys general held an "FTC Workshop

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on Non-Competes,” on January 9, 2020. *“FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts,” FTC.gov (December 5, 2019)*. It has been reported that the FTC is considering rules related to the use of non-compete agreements for certain workers. *“U.S. agency considering rule reining in non-compete agreements for workers,” Reuters.com (January 9, 2020)*.

So what does all this mean and what can you do, if anything, about it? Well, it certainly appears that a renewed effort to limit, restrict or flat out ban non-compete agreements will continue to gain momentum in 2020. While such efforts have been somewhat fruitful at the state level, resulting in state legislative changes limiting or banning non-compete agreements, this year’s effort will be more focused, at least in part, at the federal level in urging the FTC to take rule making action on non-compete agreements.

Regardless of your view on non-compete agreements, whether you see non-compete agreements as effective tools in protecting a company’s business, its intellectual property and other intangible asset values, or that poorly drafted, overly restrictive agreements unfairly restrict employees from finding new work, it certainly appears that there may be some federal level attention to those types of agreements. Apart from whether any statistical research actually supports that latter negative view of non-compete agreements (this author believes none exists), if you are at all concerned about a process that may affect your right to contract, you should actively engage in discussing the use of non-compete agreements with your state and federal representatives.

Furthermore, our team at Butzel Long has been and will endeavor to be involved at both state and federal levels to be heard on the fair use and appropriate restrictions on non-compete agreements. Our specialty team has extensive experience in drafting, counseling and litigating non-compete agreements and has decades of expertise. We are well versed in not only the ins-and-outs of such a practice but the practical effect of restrictive covenants and what they do for business and to departing employees.

In the end, 2020 can be a pivotal year in the development of the legal framework and foundation for the use and enforcement of non-compete agreements. Contact our team if you have any questions about this alert and any efforts in connection with the use or enforcement of non-competes and other restrictive covenants.

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