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Will the New Biden Administration Attempt to Limit or Outright Ban the Use of Non-Compete Agreements?

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President-elect Joe Biden was quoted as recently as December 2019 saying that "[i]t's simple: companies should have to compete for workers just like they compete for customers We should get rid of noncompete clauses and no-poaching agreements that do nothing but suppress wages." History from politicians from both sides of the aisle attempting to do away with noncompetes, however, suggests that it is not so simple. Those two sentences are loaded with plenty of questions, issues, and assumptions, such as whether the data suggests that companies aren't competing for workers, or whether non-compete agreements actually suppress wages.

Even beyond these questions, it is worth asking why non-compete agreements are systematically and often categorically viewed as unfair or oppressive when there are legal requirements (hurdles) that must be met in each instance for enforcement. Often enough, that assumption is made without statistical support that shows the true impact (or lack thereof) of non-compete agreements. Indeed, Butzel Long's Non-Compete and Trade Secret Specialty Team has written on these types of efforts in the past. (*See [here](#), [here](#), and [here](#)*). If you hope to find the answers to any of these questions in this writing, then you will be disappointed. The goal of this publication is not to answer those questions, but simply to alert companies and individuals with an interest in the area of enforcement of non-compete agreements that the winds of change may be yet again picking up in 2021.

So if President-elect Biden does move ahead with an effort to restrict or ban non-compete agreements, how might his administration go about that from a legal perspective? There are two basic federal level paths to that goal: legislatively or through regulation. The former would involve federal legislation that seeks to limit or ban non-compete agreements at some

Related People

Phillip C. Korovesis
Of Counsel

Ivonne M. Soler
Senior Attorney

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level. That effort has occurred before, but it never really got that far. (*See March 28, 2019 Client Alert*). Perhaps that effort is complicated by the fact that contract law is the province of the individual states and not that of the federal government. That is, states make the rules for creation and enforcement of contracts. Non-compete agreements are nothing more than contracts and the rules that govern them should be left to the states. As a result, many will argue that they should continue to leave it to the states to determine whether they will allow non-compete agreements and to what extent.

As to the latter path to reigning in non-compete agreements, regulation might include Federal Trade Commission action. Under its authority to address unfair or deceptive acts or practices and unfair methods of competition, the FTC could attempt to issue rules to limit or ban non-compete agreements. A recent FTC public forum was convened to address and discuss this as an option to regulate non-compete agreements. (*See March 17, 2020 Client Alert*). One of the concerns with the use of the FTC regulatory approach is whether the FTC has the authority to even make such sweeping edicts and control what are state law contract issues. Butzel Long recently joined experienced and notable non-compete practitioners from across the country in a letter to the FTC, urging that it not intervene in this area of law in an attempt to set the record straight. (*See March 11, 2020 letter*).

Regardless of the path that might be taken, or whether the new administration will take both paths to instill non-compete law reform, we believe that there indeed will be a concerted and likely coordinated effort to make changes to the landscape of non-compete law at the federal level. Coupling the federal effort with the regularly on-going state legislative attempts to address non-compete enforcement issues, 2021 will likely be a very active year for change to non-compete agreement enforcement and the laws that govern that enforcement. Our team has been and will continue to be involved at all levels in that effort and can help you steer through these perhaps soon to be “re-charted” waters.

Phil Korovesis

313.983.7458
korovesis@butzel.com

Paul M. Mersino

313.225.7015
mersino@butzel.com

Bernie J. Fuhs

313.225.7044
fuhs@butzel.com