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The FTC Won't Let Non-Competes Be

Client Alert

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Last July, early in his administration, President Biden issued an executive order encouraging the Federal Trade Commission to exercise its statutory rulemaking authority under the Federal Trade Commission Act to stop what the administration and its supporters see as the prevalent use of non-compete or other such agreements to unfairly limit worker mobility.^[1] This was just yet another recent step the federal government has made in a long line of actions to involve itself in such non-compete agreements. As written about here, however, this argument may overstate the FTC's authority to involve itself in such agreements and may also misstate the perceived disadvantages of such agreements, as well as their untold benefits.

In a recent *Wall Street Journal* report, Lina Khan, the Chair of the FTC, stated that she feels urgency to take action on curtailing the use of non-compete clauses or other such agreements and that this type of issue is "squarely" in the FTC's "wheelhouse."^[2] This is in addition to Chairwoman Khan's recent anti non-compete sentiment issued in a formal statement as part of the FTC's settlement of an administrative complaint. The administrative complaint challenged an acquisition in the oil and gas industry on the basis that the asset purchase agreement contained non-compete clauses.^[3]

Citing the non-delegation doctrine, however, FTC commissioner Noah Phillips has publicly stated that he does not think the FTC has the authority to regulate such agreements.^[4] The non-delegation doctrine dictates that Congress is not allowed to assign its legislative authority to other administrative bodies such as the FTC. On the other hand, the major questions doctrine examines whether Congress has previously retained the authority to conduct administrative action in that area, or whether the scope of Congress's delegation is as wide as the executive branch and an administrative agency, as the FTC is

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claiming. In other words, it is not clear—even to the FTC commissioners themselves—that the FTC has authority to intervene in this area when discussing private contracts.

In a recent June ruling in *West Virginia v. EPA*, the Supreme Court of the United States held that the major questions doctrine requires “clear congressional authorization” when agencies want to regulate on areas of great “economic and political significance.”^[5] After the *West Virginia* decision, it seems that a new potential open question may arise as to whether the FTC’s regulation of non-competes through its rulemaking powers is a matter of great “economic” and “political” significance. By Chairwoman Khan’s own admission in her recent WSJ interview, the regulation of non-compete agreements is of such significance, meaning that the FTC does not have the authority she believes it does unless Congress gave “clear congressional authorization” to set rulemaking for non-competes—which Congress has not. Under the Supreme Court’s holding in the *West Virginia* case, the regulation of non-competes may be a major question that may require Congress to provide the FTC with clear authority to regulate such agreements before it may do so.

While these points continue to be debated, Butzel will continue to monitor the situation. Employers, for their part, should continue to audit their current non-compete agreements and other agreements, make sure that they are reasonable, and enforce them when appropriate. Butzel is happy to assist you with any questions you may have. As more information comes out regarding potential changes to the law that may affect Michigan and nationwide business in this legal area, Butzel will keep you up-to-date and informed.

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[1] Exec. Order No. 14036, 86 C.F.R. 36987 (July 9, 2021).

[2] <https://www.wsj.com/articles/ftc-considers-restricting-the-use-of-noncompete-clauses-by-companies-11654747203> (June 9, 2022).

[3] https://www.ftc.gov/system/files/ftc_gov/pdf/2110187GPMExpressKhanStatement.pdf (June 10, 2022).

[4] https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf (January 9, 2020).

[5] *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2608-2609 (2022).