Recent Interest in "PROMOTION OF COMPETITION" *Signals Change on the Horizon for Use of Non-Compete Agreements*

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Non-compete agreements are generally used as part of employment agreements or business sale agreements to restrict an individual's ability to work for or start a competing business. Proponents of such clauses argue they solve an "incentive" problem for employers, meaning employers will be encouraged to invest in developing specialized knowledge and training for employees if they know that such value will not be transferred to a competitor. Proponents likewise suggest employees have leverage to receive additional compensation for their agreement, in the form of either upfront incentives or future compensation and wage growth, reflecting a future return on investment by the employer in the employee.

In recent years, however, the use of these agreements has come under heightened scrutiny, with opponents arguing there is little support that the "incentive" exchange described above is benefiting employees, and that use of such agreements (even in jurisdictions where they are unenforceable) is negatively influencing the larger economic system by unnecessarily chilling employee mobility.

Historically, the enforceability of non-compete agreements has been controlled by state common law. With slight variation, these agreements have generally been held enforceable in the vast majority of states as long as there is a limitation on the duration and geographical scope of the agreement, noting public policy demands that the limitations be only as restrictive as necessary to protect the employer's "legitimate business interests." Most states have now also passed legislation further limiting the use of such agreements, with a small minority banning their use outright.

In July 2021, President Biden issued his "Executive Order on Promoting Competition in the American Economy," which included vast aims on combatting a "lack of competition" in the American economy. The Order suggests corporate consolidation and lack of competition have driven up prices for consumers, driven down wages for workers, and inhibited economic growth and innovation. Within the Order, President Biden encouraged the Federal Trade Commission (FTC) to use its rule-making authority to "curtail the unfair use of

non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." The accompanying fact sheet for the Order states the FTC is directed to "ban or limit non-compete agreements." Notably, the Executive Order has no immediate impact on employers, as the FTC will have to first engage in the regulatory rule-making process. Based on the vague direction of the Order, the scope of future regulatory action is still unknown and will be subject to hotly contested debate.

The FTC has recently held an informal workshop on December 6-7, 2021, entitled "Making Competition Work: Promoting Competition in Labor Markets." The "increased use of restrictive contractual clauses in labor agreements, including non-competes" was just one of the topics upon which the workshop focused. Thirty-seven public comments were submitted at or shortly after the workshop for consideration. Additionally, the FTC recently released its draft Strategic Plan for Fiscal Years 2022-2026 for public comment in November 2021. One of the strategies listed included:

> "Improve compliance: . . . Increase use of provisions to improve worker mobility including restricting the use of non-compete provisions."

These actions indicate the FTC is laying the foundation for eventual rule-making on non-compete agreements.

A study by the Economic Policy Institute released in 2019 suggests that somewhere between 27.8% and 46.5% of American public-sector workers (translating to 36 to 60 million employees) are subject to non-compete agreements. A survey based on 2014 data from American workers by the University of Michigan reported that 18.1% of workers were then covered by non-competes, but that 38.1% of workers had agreed to one at some point in their lives. That same study found that while non-competes were more routine amongst workers with higher levels of education and higher earnings, they were still prevalent amongst less-educated and lower-wage employees. For example, 34.7% of employees without a bachelor's degree responded that they had entered into a non-compete agreement at some point and 14.3% were currently working under one. For those workers earning less than $40,000 a year, 13.3% were currently working under a non-compete, and 33% had agreed to one at some point. FTC Commissioner Rebecca Slaughter focused heavily on the impact of non-compete agreements on lower-wage workers in a speech during a prior FTC workshop specifically addressing non-compete agreements in January of 2020. The focus on the prevalence of non-competes amongst lower-wage earners suggests that future regulation or legislation will most likely focus on this category of workers, at a minimum.

Several states have also recently amended or enacted legislation further limiting or restricting non-compete agreements.

- **Washington, D.C.** passed a law in 2020, with a delayed effective date of April 1, 2022, completely banning non-compete agreements in the district, similar to prior prohibitions in **California, North Dakota** and **Oklahoma**. The law also includes non-retaliation provisions and requires all employers to provide written notice to employees of the prohibition under the law.
- **Oregon** passed an amendment to its existing non-compete legislation, effective as of January 1, 2022, prohibiting non-compete agreements (with limited exception) unless certain conditions are met, including: the employee makes at least $100,533 a year (later adjusted for inflation); advance written notice is provided by the employer; the employee falls within certain categories (administrative, executive, or professional, salaried, and exercises intellectual, managerial, or creative independent judgment); the employer has a "protectable interest" (i.e., trade secrets or competitive business or professional information); and a copy of the non-compete is provided again following separation. The amendment also shortened the permissible duration of the agreements from 18 months to 12 months.
- **Nevada** passed legislation effective on October 1, 2021, making non-compete agreements unenforceable if the employee is paid on an hourly basis. The law also provides recovery of attorney's fees for an employee who successfully challenges an unenforceable agreement.
- **Illinois** passed legislation in May 2021, which became effective January 1, 2022, placing several limitations on the enforceability of non-compete agreements, including: a minimum earning threshold of $75,000 a year (with specified future increases); limitations for non-competes when an employee was the subject of a COVID-related layoff or termination; voiding non-compete agreements for certain collective bargaining employees and construction employees; implementing notice and writing requirements; and providing for recovery of attorney's fees and costs to employees who successfully challenge an unenforceable agreement.

These recently enacted laws also suggest a common thread of limiting the impact on lower-wage and hourly workers.

There have also been renewed attempts to pass federal legislation in the past year. The Workforce Mobility Act, a federal bipartisan bill introduced by Sens. Chris Murphy (D-CT) and Todd Young (R-IN), which would eliminate the use of non-compete clauses in employment agreements, with limited exceptions for partnership dissolutions and sales of businesses, is currently working its way through Senate committees. The Freedom to Compete Act was also introduced last summer by Sen. Marco Rubio (R-FL). The Act was also a bi-partisan bill that would void all non-compete agreements entered before the Act and prohibit them going forward, with limited exceptions for certain types of workers. Similar efforts in Congress have historically failed.

If federal legislation or an FTC proposed rule gain steam this year, push back from employers can be expected during the initial drafting and enacting processes, and through legal challenge thereafter. Questions have already been raised regarding whether the FTC has legal authority to enact substantive rules to prohibit "unfair methods of competition," or if only Congress has the power to do so through specific legislation. FTC Commissioner Noah J. Phillips raised such separation of powers concerns during the January 2020 FTC non-compete workshop, also noting that the FTC had only issued a competition rule once in its history. That rule was never enforced and was later withdrawn. Likewise, any federal legislation may raise questions regarding whether the law completely preempts existing state law limitations.

By all indications, the already choppy landscape of restrictions on the enforcement of non-compete agreements is subject to further change. Employers should take heed to closely monitor and carefully re-evaluate their use of non-compete agreements against the same, considering the common law and legislation of each state in which their non-compete agreements may be enforced, as well as the effect of any future federal regulation or legislation.

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