Obama Administration Announces Effort to Address "Problematic Usage" of Non-Competes

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The Obama administration announced last week an effort to address what it perceives to be the anti-competitive effects of non-compete agreements on the labor market and the larger economy. This announcement is the latest in a series of federal governmental statements about the impact of non-competes.

First, in March of 2016, the U.S. Department of the Treasury issued a report entitled, "Non-Compete Contracts: Economic Effects and Policy Implications." This report decries perceived suppression of wage growth in, and brain drain of highly skilled workers away from, those states most strictly enforcing non-competes. Most interesting (and surprising) is the report's comments about information protection. It recognizes that [e]mployee departures . . . disseminate improvements in technologies" but sees a benefit in the "information sharing facilitated by worker mobility in some industrial clusters," because "[w]hile not always in the interest of a particular firm, this sharing can redound to the advantage of the larger economy…."

I note the apparent incongruity between this view and those driving the pending expansion of federal trade secrets protection addressed in previous posts and described here.

In any event, in response to the March 2016 Treasury Report, President Obama issued an Executive Order on April 15, 2016 confirming that "maintaining, encouraging, and supporting a fair, efficient, and competitive marketplace is a cornerstone of the American economy" and directing all executive branch departments and agencies to propose new ways of fostering competition and improving competitive markets. That Executive Order is available here.

Last week, in order to facilitate the creation of those agencies' reports, the White House announced that a consortium of experts will study the impact of non-competes and recommend to the states a set of "best practices" for the enforcement of such agreements. The White House announcement suggests that "competition for consumers and workers is declining, [and . . .] the number of new firms each year is experiencing a downward trend," and it bemoans that "there has been a decrease in 'business dynamism'—the so-called churn of firms and who is working for whom in the labor market—since the 1970s." It identifies a possible culprit to which at least some of the blame can be ascribed: non-compete agreements.

Noting that one in five US workers is restricted by a non-compete, the White House announcement calls non-competes “one institutional factor that has the potential to hold back wages” and calls for further investigation of the “problematic usage” of such contracts. Of particular concern to the Obama administration is the fact that “non-compete clauses are found not only in the contracts of senior executives or other highly compensated employees, but also for comparatively low-skill occupations. Approximately 15 percent of workers without a college degree are currently subject to non-compete agreements, and 14 percent of individuals earning less than $40,000 are subject to them.” The White House announcement also notes that, even in jurisdictions where non-competes are not enforced, employees are induced to sign them anyway and may be unaware of their unenforceability, “suggesting that even unenforced non-compete agreements may have deleterious effects.”

To address these issues, the Administration is convening “a group of experts in labor law, economics, government and business to facilitate discussion on non-compete agreements and their consequences” with the goal of creating a set of best practices that the states would be called upon to adopt. Employers and employees alike will want to watch for the results of the Administration’s efforts.

The White House announcement can be found here and more information can be found here.

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