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Legislation Seeking to Ban Non-Competes Reintroduced in Congress

Law and the Workplace on **February 10, 2023**

On February 1, 2023, a coalition of U.S. Senators and Members of the House of Representatives reintroduced a bill titled the Workforce Mobility Act (the "Act"), seeking to prohibit the use and enforcement of post-employment non-competition agreements. The bill had been previously introduced in 2018, 2019, and 2021, but it was stalled each time and did not make it to a committee vote. If enacted, the Act would empower the Federal Trade Commission ("FTC"), the U.S. Department of Labor, and state Attorneys General to investigate and enforce a sweeping ban on non-compete agreements. The Act would also provide aggrieved individuals with a private right of action in which they could recover actual damages and attorneys' fees. Additionally, it would require employers to make their employees aware of the limitations on non-compete agreements by posting a notice in the workplace.

The Act defines "noncompete agreement" as:

an agreement … between a person and an individual performing work for the person, that restricts such individual from performing, after the working relationship between the person and individual terminates, any of the following: (A) [a]ny work for another person for a specified period of time; (B) [a]ny work in a specified geographical area; (C) [a]ny work for another person that is similar to such individual's work for the person that is a party to such agreement.

Workforce Mobility Act, S. ___, 118th Cong. § 8 (2023).

The Act provides for limited exceptions, including certain non-compete agreements executed in the sale of a business or the dissolution of a partnership. While non-compete agreements would remain permissible for owners and senior executives of businesses in these limited contexts, the Act would impose limitations on these agreements, including a maximum duration of one year.

The Act also clarifies that it does not preclude confidentiality agreements protecting trade secrets:

[n]othing in this Act shall preclude a person from entering into an agreement with an individual working for the person to not share any information (including after the individual is no longer working for the person) regarding the person, or the work performed by the individual for the person, that is a trade secret.

Id. at § 4. Notably, the Act is silent on non-solicitation clauses.

The proposal of the Act follows on the heels of the FTC's proposed rule seeking a similar prohibition on non-compete agreements, which is currently pending comment and which we discuss here. The timing of the proposed legislation is notable in view of the likelihood that the FTC will face significant challenges to its authority to implement its proposed rule. And the above-referenced rights of action in the Act make it more daunting than the FTC's proposed rule.

Notably, the Act has received bipartisan support. The legislation was introduced in the Senate by Senators Chris Murphy (D-Conn.) and Todd Young (R- Ind.), and co-sponsored by Senators Tim Kaine (D-Va.) and Kevin Cramer (R-N.D.) and in the House of Representatives by U.S. Representatives Scott Peters (D-Cal.-52) and Mike Gallagher (R-Wis.-08).

We will continue monitoring and providing updates on the Act and the FTC's proposed rule.

View original.

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