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U.S. Senator Reignites Federal Non-Compete Reform Efforts With Bill Aimed At Protecting Low-Wage Employees

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Last year, Democrats in the United States Senate and House of Representatives introduced bills — S.2782 and H.R.5631 — banning non-compete agreements in the vast majority of workplaces across the country. Although those bills failed to gain traction, the authors of this Blog anticipated a renewed effort at federal non-compete reform in 2019, with Democrats taking control of the House in the November 2018 elections. Sure enough, the Federal Freedom to Compete Act (the "Act") was introduced on January 15, 2019, but in a twist, the Act's author is not a Democrat but rather Marco Rubio, Republican Senator from the State of Florida.

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As explained on Senator Rubio's website, the Act is focused on "entry-level, low-wage workers" and is designed to "empower these workers by preventing employers from using non-compete agreements in employment contracts." Below, we take a closer look at the Act, including the types of agreements covered by the Act, as well as the scope of employees who would be subject to its protections.

Introduction

Drafted within the framework of the Fair Labor Standards Act ("FLSA"), the Act prohibits employers from entering into, extending, renewing, enforcing, or threatening to enforce "non-compete agreements" with respect to all employees except for FLSA-exempt executive, administrative, professional, or outside sales employees. Notably, this prohibition would apply retroactively to any agreements entered into prior to the Act's enactment. Employers who violate such provisions "shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of such section."

What is a "non-compete agreement"?

As defined in the Act, a "non-compete agreement" means an agreement between an employer and employee "that restricts such employee from performing, after the employment relationship […] terminates …: (1) Any work for another employer for a specified period of time[;] (2) Any work in a specified geographical area[; or] (3) Any work for another employer that is similar to such employee's work for the employer that is a party to such agreement." In addition to this general definition, the Act expressly states that it does not preclude agreements that prohibit the disclosure of trade secrets.

We see three primary issues with this definition:

First, while it is true that most non-competes are limited to a specified duration, geographic range, and type of work, that is not always the case. Interpreted in its most literal sense, the Act does not account for restraints on competition that, intentionally or not, fail to include such specifications. For instance, an agreement that simply prohibits an employee from subsequently working for a competing business, while potentially overbroad and unenforceable on other grounds, would fall outside of the above-referenced definition and, therefore, would theoretically avoid coverage under the Act. The creation of this loophole was presumably unintentional.

Second, by defining "non-compete agreements" to include agreements that restrict work "for another employer"

for a specified duration or in a specified capacity, the Act seemingly fails to cover agreements that prevent an employee from competing in a capacity other than as an employee (e.g., where an employee forms a competing business or works for a competitor as an independent contractor). Again, this distinction was presumably unintentional.

Third, while the Act expressly disclaims coverage over agreements that prohibit the misappropriation of trade secrets, it is unclear whether it applies to the use of limited restraints on competition, such as covenants that prohibit the solicitation of employees, the solicitation of customers, or the disclosure of confidential information that does not qualify as a trade secret.

Who does the Act protect?

As mentioned above, the primary intent of the Act is to increase the economic freedom of "entry-level, low-wage workers." In order to meet that goal, the Act initially imposes a broad prohibition on non-compete agreements for all employees. The Act then adds the caveat that the prohibition "shall not apply with respect to any employee described in [FLSA] section 13(a)(1)[,]" which includes exempt executive, administrative, professional, and outside sales employees who meet heightened wage requirements.

By allowing non-compete agreements only for exempt executive, administrative, professional, and outside sales employees, one could safely argue that the Act's non-compete ban extends to employees who are neither "entry-level" nor "low-wage." At the same time, the Act would prohibit the use of non-compete agreements with anyone who is paid on an hourly basis. Consequently, as the Act gets increased attention, there will likely be efforts from pro-business forces to narrow the scope of the ban.

Conclusion

In light of last year's Democrat-led efforts to regulate non-compete agreements at the federal level, Senator Rubio's submission of the Federal Freedom to Compete Act suggests a level of bipartisan support that was not previously apparent.