Use of Non-Compete Agreements – Too Much of a Good Thing?

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Use of Non-Compete Agreements – Too Much of a Good Thing?

In case you missed the trend, several recent actions by the Obama administration have been aimed at enhancing employee rights. This pattern continued last week, when the White House issued a "Call to Action" and a report on *Non-Compete Reform: A Policymaker's Guide to State Policies*, expressing concern about overuse of non-compete agreements. Unlike recent reforms that the administration has accomplished through Executive Orders (such as mandating paid sick leave for government contractors), there was no attempt to impose any immediate change in the law. For the most part, the use of non-competes has been controlled by state law (and so changes would generally require state action, unless antitrust concerns could be established under federal law). Accordingly, the report seems intended to help facilitate a dialogue about concerns and possible reform and is not a clear signal of impending change.

The report highlights concerns about the growing use and potential misuse of non-competes, especially with regards to "low-wage, low-skilled" professions, and summarizes recent reform efforts, including:

- Limiting the scope of such clauses – either based on time (current restrictions are usually one to two years) or geography
- Carving out specific professions (lawyers are almost always carved out, but another common exception would be for doctors)
- Prohibiting use of non-competes except for individuals earning at or above a specified threshold (currently used by Oregon and effective in Illinois starting January 1, 2017, for new agreements)

- Assessing enforcement options (commonly either the ability to reform as needed, ability to strike the offending portion, or requirement to strike entire agreement if overbroad)
- Enhancing transparency for employees, such as by requiring prior notice that a job offer or promotion includes a non-compete requirement (intended to help individuals maximize their own bargaining power with negotiating over terms of employment and avoid the choice of signing or losing their job)

Other reform options include use of potential "garden leave" as well, ensuring whether continued employment is adequate consideration for a non-compete. The majority of states allow continued employment to be sufficient consideration for a non-compete agreement (although some will take a closer look if the employment is only for a short period). Garden leave provides continued compensation ***after job termination*** in exchange for the agreement to not work for a competitor. Both of these are intended to help create a mutual incentive — encouraging employers to only seek non-compete restrictions in circumstances where there is also a cost to or investment by the employer.

The use and enforcement of non-competes has potential drawbacks for both employees and employers, which are not explored by the report. For instance, using non-competes for all positions, instead of just positions likely to be involved with protectable interests (typically confidential information and certain customer relationships), may signal that the enforcement is unlikely — contributing to uncertainty and frustration for both employees and employers. On the other hand, even lower earners or positions sometimes viewed as fungible, may be exposed to valuable information and relationships. For example, consider a receptionist who is especially adept at

chatting with visitors — the position can potentially learn a lot of valuable information about business relationships, including potential strategies, based on who is visiting. Similarly, an entry-level production employee may be exposed to manufacturing processes that might be confidential.
The report also focuses on protection of confidential information or trade secrets, essentially ignoring the need to protect customer relationships or an employer's investment in good will — identifying sandwich makers, temporary warehouse staff, and hairstylists as positions "unlikely to possess sensitive information or have access to trade secrets." Just speaking as the author of this article, hairstylists may or may not have access to trade secrets, but they do tend to engender a good deal of customer loyalty – which a business might reasonably want to protect.

Finally, the report mentions concerns about "worker morale, wage growth, job mobility and career development, labor turnover, and economic development" — all legitimate topics of governmental concern. The report is correct in stating the use and misuse of non-competes is getting more scrutiny from state legislatures. It could easily be the next example of the state of local reform — consider the trend of changes to "ban the box" and mandate sick leave.

Where does this leave you? On the lookout for further developments in this continually evolving area of law.