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U.S. Federal Trade Commission Considers Rulemaking on Non-Compete Clauses in Employment Contracts

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On January 9, 2020, the U.S. Federal Trade Commission held a workshop to examine whether there is a sufficient legal and empirical basis to promulgate a Commission Rule restricting the use of non-compete clauses in employment contracts. This follows a workshop hosted by the U.S. Department of Justice's Antitrust Division in September 2019 on the role of antitrust in labor markets. Together these workshops signal the agencies' continued focus on labor competition and potential competitive harm from employment contracts.

For more analysis on these issues, Gibson Dunn will be hosting a webcast on Thursday, February 27th at 12:00pm EST to discuss these developments, as well as antitrust enforcement by State Attorneys General against no-poach and non-compete agreements and recent guidelines issued by regulators in Hong Kong and Japan (to register, please CLICK HERE).

FTC Workshop

In March 2019, a group of labor and public interest organizations, advocates, and scholars, led by the Open Markets Institute, petitioned the FTC to initiate rulemaking to prohibit employers from including non-compete clauses in agreements with employees and independent contractors and from enforcing or threatening to enforce existing non-compete clauses. The petition argues that non-compete clauses reduce labor mobility and depress wages even in states where they are not enforceable under state law. This petition comes at a time of increased scrutiny of non-competes by the states, with seven states—Maine, Maryland, New Hampshire, Oregon, Rhode Island, Utah, and Washington—enacting or amending statutes limiting their use and enforcement.

The FTC convened the recent workshop to examine whether there was sufficient legal basis and empirical support to initiate rulemaking. Economists reviewed literature showing that non-compete clauses are wide-spread, including in employment contracts with low-wage workers and in states where they are unenforceable under state law. While acknowledging that further study is necessary to understand the practical effects of non-compete clauses, several economists concluded that, on average, non-compete agreements are associated with lower wages and decreased job mobility. In one study of non-compete clauses in CEO agreements, however, the data showed that CEOs are usually compensated for agreeing to the non-compete clause. That study also found that CEOs are more likely to be fired for poor performance when a non-compete is in place.

Antitrust practitioners, including Gibson Dunn partner Kristen Limarzi, and administrative law scholars discussed legal challenges to regulating non-competes either as unfair methods of competition or unfair and deceptive practices under the FTC Act. Courts have held that the FTC has authority to adopt rules defining unfair methods of competition, although the last time the FTC used that authority was 1968. FTC rules defining unfair or deceptive practices are subject to a much more extensive administrative process. Several

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presenters expressed skepticism regarding a rule banning all non-compete clauses, explaining that it would be vulnerable to legal challenge.

Commissioner Rebecca Slaughter applauded the workshop as a valuable mechanism to gather information, but urged the Commission to go beyond information gathering and initiate a rulemaking process. She credited FTC Commissioner Rohit Chopra for previously calling for such rulemaking. FTC Commissioner Noah Phillips also expressed concern that non-compete clauses are so prevalent, including in low-wage workers' employment contracts where at least one of the traditional justifications for non-competes—preservation of trade secrets—is not obvious. But Commissioner Phillips questioned the legal basis for rulemaking and expressed concern that the FTC's claimed authority to regulate "unfair methods of competition" may be so unbounded, that it would violate the non-delegation doctrine that requires Congress to provide an intelligible principle to guide an agency in rulemaking.

There is no deadline for the FTC to act on the petition for rulemaking. The FTC is accepting public comments on this issue through March 11, 2020. Partners in Gibson Dunn's Administrative Law and Regulatory Practice regularly work with companies and trade associations throughout the agency rulemaking process. Working closely with subject-matter experts in the firm's Antitrust and Labor & Employment Practice Groups, our Administrative Law attorneys are available to assist in submitting comments.

DOJ Workshop

In September 2019, the Antitrust Division of the Department of Justice held its own workshop on the role of antitrust in labor markets. Assistant Attorney General Makan Delrahim opened the workshop by stating that the Antitrust Division's goal for the workshop was to obtain a more nuanced understanding of the marketplace for workers within the United States and the role for antitrust enforcement within that marketplace.

Economists discussed the results of their respective research regarding the impacts of elasticity and concentration of labor markets on wages. All agreed that higher market concentration can affect wages, although data indicate that the effects vary based on industry-specific factors, geographical differences, and the skills required for specific job positions, among other considerations.

Gibson Dunn partner Rachel S. Brass and other antitrust practitioners, economists, and government enforcers discussed labor market definitions, civil litigation and government enforcement concerning labor restraints such as no-poaching agreements in complex business arrangements, as well as issues regarding labor organizations' exemptions from antitrust laws.

In October 2016 the Antitrust Division and Federal Trade Commission issued their Guidance for Human Resource Professionals announcing DOJ's intent to proceed criminally against naked no-poaching and wage-fixing agreements. Although no criminal enforcement proceedings have been announced publicly, state investigations and civil litigation have proliferated, and Assistant Attorney General Delrahim stated that criminal prosecution of naked wage-fixing and no-poaching agreements remains a "high priority" for the Antitrust Division.

Takeaways

The FTC and DOJ continue to look for ways in which the antitrust laws can be used to improve mobility and competition in the labor markets. Now more than ever companies should ensure that their hiring, employment, and compensation policies and practices conform with antitrust laws.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the

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