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The Proposed Workforce Mobility Act is Back Again, This Time with Gusto

The legislative assault on non-competes that we have been reporting on continues. In a bipartisan federal bill introduced days ago, US Senator Chris Murphy (D-Conn.) and US Senator Todd Young (R-Ind.) have once again reintroduced the Workforce Mobility Act (Senate Bill 200 S200). While this bill was introduced last year, this year's legislation would ban the use of non-compete agreements, with some limited exceptions. However, this proposed legislation not only reoccurs, but gets worse and goes further each year. This year, S200 goes even further than the FTC's proposed ban introduced January 5 of this year.

According to Senator Murphy's statement, the Workforce Mobility Act would:

- Only permit the use of non-compete agreements to
- include instances of a dissolution of a partnership
- or the sale of a business;
- Charge the Federal Trade Commission and the
- Department of Labor with enforcement, and
- providing a private right of action in federal court;
- Require employers to make their employees aware of the limitation on non-competes, and the Department of Labor would also be given the authority to make the public aware of the limitation; and
- Require the Federal Trade Commission and the
- Department of Labor to submit a report to Congress on any enforcement actions taken.

A non-compete agreement is defined under the proposed Act as an agreement between a person and an individual performing work for the person, that restricts such individual, after the working relationship between the person and individual terminates, from performing:

- any work for another person for a specified period of time;
- any work in a specified geographical area; or
- any work for another person that is similar to such individual's work for the person that is a party to
- such agreement.

The Act provides exceptions for the seller of business entities, executives who enter into severance agreements in connection with the sale of a business limited in geographic scope and duration of one year, and partners who dissolve or disassociate from the partnership. Employers would be required to post notice of the Act to its employees.

S200 also includes other provisions the FTC proposed Rule does not include, such as authorizing the DOL to investigate and prosecute employers that attempt to enforce non-competes under the proposed Act, with a statute of limitations of four years. A violation of the Act would be treated as an unfair or deceptive act or practice prescribed under section 22 18(a)(1)(B) of the Federal Trade Commission Act.

S200 also goes further by providing a private civil federal right of action and permitting recovery of "any actual damages sustained by the individual as a result of the violation; and in the case of any successful action, the costs of the action and reasonable attorney's fees, as determined by the court." State AGs would also be permitted to pursue violations of the Act.

It is unclear what impact this proposed legislation will have on the FTC's proposed new rule banning non-competes, which is currently in the comment period until March 20, 2023. The FTC has received, so far, over 9,828 comments on Regulations.gov regarding that proposed Rule, as well as contact from 100 business groups requesting a 60-day extension which, if granted, will extend the comment period to May 19, 2023. What is clear is that employers and businesses that utilize restrictive covenants can expect to endure repeated political, regulatory and legislative attempts to curtail the use of these covenants.

Archer's Trade Secret Protection & Noncompete Group will continue to monitor and update these developments. If you have any questions, please contact Thomas Muccifori, Chair of Archer's Trade Secret Protection & Non-Compete Group, at 856-354-3056 or tmuccifori@archerlaw.com.