CLIENT ALERTS & INSIGHTS

Just like 2021, the DOJ and FTC will likely remain active in the Restrictive Covenant Space in 2022

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2021 saw significant activity by both the Department of Justice ("DOJ") and Federal Trade Commission ("FTC"). The DOJ, for example, finally followed through on its 2016 warning/threat to investigate and criminally prosecute no-poach arrangements/agreements between competitors. And, as previously commented on by Benesch, the FTC is currently following through on President Biden's executive order to examine the impact restrictive covenants have on the marketplace. This article looks at the role the DOJ and FTC played in the restrictive covenant space in 2021 and will likely continue to play in 2022.

A. DOJ Goes Criminal On No Poach Agreements

Several years ago the DOJ investigated allegations of certain Silicon Valley companies having a secret pact to not poach each other's employees. The investigation found the allegations to be true and a civil settlement was ultimately reached whereby Apple, Google, Intuit, Adobe, and Intel agreed to abandon their secret no poach pact. The DOJ continued investigating allegations of competitors in other industries having secret no poach agreements and, in 2016, warned that criminal charges, instead of civil penalties and fines, could be in the offing.

Five years later, on January 7, 2021, the DOJ followed through on this warning by indicting Surgical Care Affiliates LLC ("SCA"), a unit of UnitedHealth Group, for allegedly violating criminal anti-trust laws by secretly conspiring with a Texas-based company from May 2010 through October 2017, and a Colorado company from February 2012 through July 2017, to not solicit each other's senior-level employees. The secret no poach pact was allegedly enforced by the CEOs of the companies. Notably, the Texas and Colorado companies that were allegedly part of the no poach pact were not named in the indictment and have not been publicly identified. The case was filed in the United States District Court for the Northern District of Texas and is currently pending.

The DOJ ended 2021 with another no-poach indictment, this time in the aerospace industry. Specifically, on December 16, 2021, a federal grand jury in Connecticut returned an indictment that charged a former manager of Raytheon Unit Pratt & Whitney with engaging in a secret no poach agreement with five executives of an outsource engineering supplier. The DOJ alleges in the indictment that the conspiracy was "long-running" and affected thousands of engineers in the aerospace industry who performed services in the design, manufacturing, and servicing of aircraft components for both commercial and military purposes. In its press release announcing the indictment, the DOJ noted that its investigation into the practices of the aerospace industry is "ongoing." Not surprisingly, the DOJ's comments about an ongoing investigation have led both

lawyers and industry experts to speculate as to whether additional indictments will be coming in the first quarter of 2022.

It should also be pointed out that multiple state attorney generals have been active in this space for several years and, as a result, have induced national chains in the fast food and retail industry to stop including no poach provisions in their franchise agreements. The state attorney generals have also been successful in having these industries abandon attempts to enforce no poach agreements that affect low-wage workers. Most recently, the New York Attorney General entered into an agreement with Old Republic National Title Insurance Company that required Old Republic to stop no poach agreements with independent insurance agencies.

At her press conference touting the agreement with Old Republic and Old Republic's payment of a $1,000,000 fine for "engaging in anti-competitive activity," New York Attorney General Laticia James stated that her office "will continue to investigate no poach agreements that potentially harm New York workers and [will] fight to end these anti-competitive practices once and for all." Given these statements and the activity discussed above, we can expect state attorney generals and the DOJ to continue investigating and prosecuting companies that enter into no poach agreements that the attorney generals/DOJ consider "anti-competitive."

B. FTC Continues to Examine Non-Competes

As reported in prior articles, President Biden issued an executive order on July 9, 2021, that encouraged the FTC to analyze restrictive covenants and decide whether the FTC's statutory rulemaking authority under the Federal Trade Commission Act allowed the FTC to curtail "the unfair use of non-compete clauses or agreements that may unfairly limit workforce mobility." Members of Benesch's Trade Secret, Restrictive Covenant and Unfair Competition Group, along with 50 other nationwide restrictive covenant attorneys, responded to President Biden's executive order and the FTC on July 14, 2021. (A copy of the July 14, 2021 letter can be viewed here.) The letter recommended that restrictive covenant law be left to the states, as it has been for over 200 years. Nevertheless, if the FTC were to regulate non-competition agreements (and there is considerable debate whether the FTC has the constitutional authority to do so), then the letter pointed out that any regulation should be limited to addressing abuses of non-competition agreements and should not be a broad prohibition of non-competition agreements.

The DOJ and FTC held a "Workshop on Competition" on December 6th and 7th of this year. Although the workshop covered a wide range of "competitive topics," there was significant attention directed at restrictive covenants and, in particular, non-competition agreements. The discussion surrounding non-competition agreements largely centered on whether the FTC should create regulatory guidelines with respect to non-competition agreements and, potentially, no poach agreements, non-disclosure agreements, and training repayment agreements. During these discussions, several panel members described non-competition agreements as "harmful" to competition and, in particular, low-wage employees. These same panel members also argued that non-competition agreements were typically "take it or leave it" agreements that created an unfair advantage in the employee-employer relationship. Not surprisingly, these panel members argued for an outright ban on non-competition agreements and supported their position with studies and scholarly articles that decry the use of non-competition agreements.

There was, however, a counterview that maintained non-competition agreements actually help competition and increase workers' wages. To support this position, several members noted a recent study by the Federal Reserve Bank of Philadelphia that found "little support for the widely held view that enforcement of non-compete agreements negatively affects the entry rate of new firms or the rate of jobs created by new firms." More specifically, the Bank's study found "that increased enforcement of non-competes had no effect on the entry rate of start-ups" and "a positive effect on job creation." Appearing to support the Bank's study, panelists also noted two no poach cases, one in Florida involving McDonald's and another in Washington involving Jimmy Johns, where "wages were higher before the elimination of no poach agreements, and lower after." Lastly, and although not mentioned during the workshop (likely because it was issued during the workshop), the U.S. Chamber of Commerce published a study finding that reasonable non-competition agreements do not stifle competition and "when used transparently can benefit employees and employers."

With so much conflicting information about the effect of non-competition agreements in the marketplace, it should come as no surprise that no consensus was reached, or decision made, regarding what, if any, action the FTC should take with respect to non-competition or other restrictive covenant agreements. The FTC and DOJ encouraged additional commentary from outside sources following the workshop, so, on December 20th, Benesch attorneys joined 50 other restrictive covenant lawyers in supplementing the July 9, 2020, letter to the FTC and DOJ. (A copy of the December 20th letter can be viewed here.) The December 20th letter once again recommended that restrictive covenant law be left to the states. It also provided the DOJ and FTC with additional studies and analysis regarding the impact non-competition agreements may or may not have on competition, and reminded the DOJ and FTC that several of the initial studies on non-competition agreements failed to assess all of the variables that impact competitive activities. Accordingly, the December 20th letter recommends that "lawyers, scholars, and regulators refrain from making any strong causal claims" from the existing research.

It is unclear what steps the FTC will take regarding non-competition agreements but we will continue to monitor the FTC and will provide relevant updates.

C. Takeaways for 2022

Based upon the activities of the DOJ and state attorney generals, companies should be leery of entering into any type of no poach agreement with an outside party (competitor, vendor, supplier, etc.) unless the agreement involves the sale of a business or a similar transaction. Restrictive covenants involving low-wage employees should also be carefully scrutinized and only entered into or enforced in extremely limited circumstances.

The DOJ and state attorney generals, so far, have not focused on restrictive covenants, including employee non-solicitation clauses, between companies and their non-low-wage employees. In addition, the FTC is still in its "investigative" stage regarding restrictive covenants and any action taken by the FTC is likely to face political and legal challenges. Thus, for 2022, companies should continue to focus on their restrictive covenants complying with the state laws that will govern and control the enforceability of the covenants.

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