State Call to Action on Non-Compete Agreements

Earlier this year, the President launched an initiative to stoke competition across our economy – giving a fair shot to workers, start-ups and small businesses across the country. The President called on departments and agencies to take actions that will empower and inform consumers, workers and entrepreneurs, and ultimately boost the economy.

As a part of these efforts, the White House and Treasury issued reports on one institutional factor that has the potential to hold back wages and entrepreneurship: non-compete agreements, which ban workers from starting a company or going to work for a competitor for a certain period after leaving a job. As these reports highlighted, non-competes impact approximately 30 million – nearly one in five – US workers, including roughly one in six workers without a college degree. Recent media coverage has raised awareness of the usage and enforcement of non-compete agreements for workers from fast-food employees and warehouse workers to camp counselors and seasonal staff.

Most workers should not be covered by a non-compete agreement. Though each state faces different circumstances, we believe that employers have more targeted means to protect their interests, that non-compete agreements should be the exception rather than the rule, and that there is gross overuse of non-compete clauses today.

While the primary rationale of non-competes is to prevent workers from transferring trade secrets to rival companies, a considerable proportion come at the expense of workers, entrepreneurship, and the broader economy. Researchers have found that states that strictly enforce non-compete agreements have lower wage growth and lower mobility than states that do not enforce them.

State legislators across the country have drafted legislation and passed laws to curtail abusive and unfair agreements, and in three states – California, Oklahoma, and North Dakota – non-compete agreements signed by employees are generally void and unenforceable. In the past year alone, at least a dozen states (including Illinois, Utah, and Washington) considered reform, approximately half of which passed legislation that required changes to how non-compete agreements are regulated and two of which considered outright bans.

In order to reduce the misuse of non-compete agreements in states that choose to enforce them, the White House is calling on state policymakers to join in pursuing best-practice policy objectives, including one or more of the following:

1. Ban non-compete clauses for categories of workers, such as workers under a certain wage threshold; workers in certain occupations that promote public health and safety; workers who are unlikely to possess trade secrets; or those who may suffer undue adverse impacts from non-competes, such as workers laid off or terminated without cause.

2. Improve transparency and fairness of non-compete agreements by, for example, disallowing non-competes unless they are proposed before a job offer or significant promotion has been accepted (because an applicant who has accepted an offer and declined other positions may have less bargaining power); providing consideration over and above continued employment for workers who sign non-compete agreements; or

encouraging employers to better inform workers about the law in their state and the existence of non-competes in contracts and how they work.

3. Incentivize employers to write enforceable contracts, and encourage the elimination of unenforceable provisions by, for example, promoting the use of the "red pencil doctrine," which renders contracts with unenforceable provisions void in their entirety.

Even in states that do not enforce non-competes for some or all workers, employees may be adversely affected by a non-compete clause in a contract. To promote compliance and enforcement, states should assign appropriate remedies or penalties for employers that do not comply with state non-compete statutes.

In adopting these strategies, states can help ensure that workers can move freely from job to job, without fear of being sued. Even in states that choose to enforce non-competes, we have heard from experts that only in rare cases is a non-compete the best option for an employer to use, over and above the host of other legal frameworks – including trade secrets protections, non-solicitation agreements, and non-disclosure agreements. As states move to ensure free labor market competition, non-compete reform should be considered as one important tool.