Bipartisan Legislation Introduced in United States Senate to Limit Use of Noncompete Agreements

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In early January, the Federal Trade Commission (FTC) proposed a new rule that would ban employers from entering into noncompete agreements with workers and require employers to rescind existing noncompete agreements. Fast forward one month, and a bipartisan group of United States Senators has introduced legislation that would limit the use of noncompete agreements.

On February 1, 2023, U.S. Senators Chris Murphy (D-Conn.) and Todd Young (R-Ind.) reintroduced the Workforce Mobility Act (the "Act"), which is co-sponsored by U.S. Senators Tim Kaine (D-Va.) and Kevin Cramer (R-N.D.).

If passed, the Act would render noncompete agreements as unfair trade practices under federal law. The Act provides that, with limited exceptions, noncompete agreements will have no force or effect and that "no person shall enter into, enforce, or attempt to enforce a noncompete agreement with any individual who is employed by, or performs work under contract with, such person with respect to activities of such person in or affecting commerce."

Under the Act, a "noncompete agreement" is defined as an agreement, entered into after the date of enactment of this Act between a person and an individual performing work for the person, which restricts such individual, after the working relationship between the person and individual terminates, from performing: (A) any work for another person for a specified period of time; (B) any work in a specified geographical area; or (C) 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 does, however, contain limited exceptions. For instance, noncompete agreements could be permitted in connection with the sale of certain interests in a business or the dissolution of, or disassociation from, partnerships. In addition, an exception may exist for executives who enter into severance agreements in connection with the sale of a business, but would be required to be limited in geographic scope and to one year in duration.

Notably, the Act would authorize the FTC, Department of Labor (DOL), state attorneys general, and individual employees to bring actions against employers who violate the Act to seek penalties, damages, injunctions, and other relief. The FTC and DOL would be required to submit a report to Congress on any enforcement actions taken. In addition, claims under the Act would also be exempt from arbitration and joint-action waivers, including waivers of joint, class, and collective actions.

The Act would require all employers with employees in or affecting commerce to post notice of the provisions of the Act in a conspicuous place. For instance, the notices could be posted where other notices to employees and applicants for employment (e.g., policies against discrimination) are customarily posted physically or electronically.

The Act states that it does not affect trade secret non-disclosure obligations that may exist. It remains to

be seen what impact the Act will have on the FTC's proposed rule banning noncompete agreements, which is currently in the comment period.

Please contact the authors with any questions about this Act or the FTC's proposed rule, including if you need assistance preparing any comments to submit to the FTC concerning its proposed rule. We will continue to monitor further developments related to the Act and the FTC's proposed rule.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors, Curry Sexton (CSexton@sb-kc.com), Brenda Hamilton (BHamilton@sb-kc.com), Mark Opara (mopara@sb-kc.com), or any other shareholders in Seigfreid Bingham's Employment Law Group, including John Vering, John Neyens, Shannon Cohorst Johnson, or your regular contact at Seigfreid Bingham.