

Obama goes after labour monopsony power

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The White House (Credit: Wikimedia/AgnosticPreachersKid)

The White House is urging states and Congress to combat reports of declining competition in the US labour market by addressing monopsony power and non-compete agreements.

The call to action comes on the heels of the Department of Justice antitrust division and Federal Trade Commission's announcement last week that the DOJ would criminally pursue companies for agreeing not to compete for each other's employees.

In the white paper released this week, the Council of Economic Advisers reported on the impact of monopsony power on wages, employment and inequality, citing a recent speech by DOJ antitrust head Renata Hesse in which she said antitrust enforcement must focus on "harm to the competitive process wherever it occurs."

The council acknowledged the antitrust enforcers' decision to criminally pursue no-poaching agreements, and said that whistleblower protections for those employees who report antitrust violations like wage-fixing may be appropriate.

The council's report and the White House's release also focused on non-compete agreements, which they say have an adverse effect on wage equality across various industries. The White House noted that employers bind one in five workers to non-compete agreements, and that such contracts affect 14% of workers making \$40,000 or less.

Citing a survey finding that states that strictly enforce non-compete agreements have lower average wages for middle-aged workers, President Barack Obama called on Congress "to consider this critical issue and the potential economic consequences of inaction." He urged Congress to look at past bills addressing the issue and pass federal legislation.

Further, the administration is reaching out to individual states, asking them to consider a variety of possible policy stances. These include banning non-competes for workers who are under a certain wage threshold, in specific occupations, unlikely to possess trade secrets or who otherwise suffer from the clauses.

Utah, Hawaii, Illinois, Connecticut and New York have already signed on to support the president's call to action.

New York attorney general Eric Schneiderman said on Tuesday that he will propose a bill next year to "curb the rampant misuse of non-compete agreements, which depress wages and limit economic mobility," fully supporting Obama's "initiative to increase economic competition."

Hughes Hubbard & Reed partner Elizabeth Prewitt noted the remarkable nature of such a collaboration among the antitrust agencies, the White House and various states, especially the New York AG's office.

"It is extraordinary to have what appears to be a coordinated attack on agreements that could have the effect of limiting employee mobility," Prewitt said.

Wilson Sonsini Goodrich & Rosati antitrust partner Jonathan Jacobson said the DOJ's and FTC's announcement – which he said was supplemented by the White House's call to curb collusion among companies trying to suppress wages – will likely achieve its goal, noting that potential prison time is a powerful deterrent to collusive agreements.

Regarding the non-compete contracts, however, Jacobson said he was surprised that the White House would try to federalise the issue. The enforceability of such clauses historically has been determined by state law.

"This could encourage more action at the state level," he said, adding that although this should not be a partisan issue, he does not see the dysfunctional Congress passing anything.

Jacobson also said that it is important to consider that sometimes companies must have a non-compete clause; he used the example of a high-paid, highly skilled talent asset that a company would not want to quit and join a competitor days later.

"A covenant not to compete, ancillary to the sale of a business, has always been upheld provided it does not last too long and provided it is not too broad," Jacobson added.

In April, President Obama issued an executive order trying to foster greater competition, pointing to increased consolidation in the set-top box industry and others; and directing executive branch agencies to develop pro-competitive policies for consumers and workers. The White House said Tuesday's call to action was a response – a set of "next steps".