What Happens Next – July 25, 2021
Critical Race Theory, Golf Strategy, and Enforcing Non-Compete Agreements
Michael Wexler QA

Larry Bernstein:

Thanks, Michael. I'm going to go with a chronological order of your arguments and start with the Biden executive orders on July 9th. Is there any meat on that bone? Because this is predominantly a state law issue, and it's a state matter, if the federal government comes up with some bland executive order, is it basically meaningless? Or will it affect policy?

Michael Wexler:

I think it's a little more aspirational. When you look at his executive order in context, there are a number of items in his executive order, which are meant in different ways to lessen... I'll say to create more opportunities for people or to lessen restrictions on competition, because the general feeling of the Biden administration, at least in this executive order, is that competition is good. And how do we create competition while we remove barriers?

And if we remove certain barriers, then folks can compete more, and if folks compete more, that means that prices are lower for consumers. That also means that there's more opportunities for people to get better paying jobs and to switch positions. I think a lot of it is aspirational. I suspect that states will ultimately decide what they want to do. And most states will probably continue to do what they've always done. Some states may make some changes, especially the 20 or so states that have had some legislation with regard to low-wage workers.

I don't suspect we're going to see huge changes, but of course, we need to watch this. And obviously, folks who run businesses need to be aware of this and need to adjust accordingly if new legislation comes out, new laws, new case law, all those sorts of things. It's always a continuing process. I always tell clients that when you look at your agreements, and you look at how you're protecting things, it's a good thing to look at those things at least once a year, maybe twice a year, and just take stock of what's happened in the courts, what has happened in the legislatures, what's happening in the executive branch on these issues. And you want to stay ahead of that curve, and obviously address changes.

Larry Bernstein:

The second thing we talked about was how it affects low-wage workers. And this is what really has gotten into the public press, limitations for the guy who works at Taco Bell, who is preparing their meal, who wants to go over to McDonald's to serve fast food and being outraged when he finds out that he can't just do what he wants. Is your expectation that that's the sort of stuff that will end up being not enforceable?

Michael Wexler:

That trend will continue with low-wage workers, because close to half the states already have some form of legislation that says you can't or shouldn't have non-competition agreements for low-wage workers. And so, I suspect that trend will continue, because it seems to be very

popular now, and in the current administration, and their view of competition and what the effects of competition are. I suspect that we'll have more states that do things. And unfortunately I say this, it could be a red-blue issue, and it shouldn't be. It should just be a worker issue, but it could be a red-blue issue. And you may see states fall along those lines.

Larry Bernstein:

And how will that fit? That red states will allow for enforcement and blue won't? Is that what you're saying?

Michael Wexler:

Democrats would tend to favor competition and would just take the executive order from the White House. You would say that the Democrats, and you assume Biden's the head of the party, right? You would say that Democrats are favoring competition and favoring ways to increase competition. And you would say Republicans, they would potentially favor business, and favoring business and favoring capitalism would mean we want more protections in place, so that we take businesses and make sure that the investment they're making in products and services and in workforce, that those things are protected. And so, that would potentially lend itself towards having more... Keeping things the same, as far as non-competition agreements.

Larry Bernstein:

Previously, when I spoke to you on this topic, you mentioned to me that making your non-competition extremely narrow increases likelihood of enforcement. How would you recommend constructing a non-compete to make it enforceable? How would you make it narrow, so that the employee could work almost everywhere, but exactly where you don't want them to?

Michael Wexler:

That's a great question. There's such a range with regard to how people put these non-competition agreements together. There's the obvious one that says, "You will not go work for one year for any competitor." The law technically says you need to have geographic and time restrictions on this thing.

So, you might say, "You can't go to any competitor in the United States, and you can't do that for a year." Query whether that's enforceable or not. It may be enforceable for the CEO of a big company, from going to their main competition and being a CEO there. That might make sense in that situation, but not for someone lower down in the chain. You may have agreements that say you can't work and compete within 100 miles of your current territory or your current office, that sort of thing.

Well, obviously, what we've just gone through and continue to go through with pandemics and with technology, we know that you can work from almost anywhere in many situations. And we know that technology means that you can certainly compete beyond 100 miles through technology.

The best approach is to tailor these things to specific activities, to tailor these things in an appropriate time period, and to tailor things to an activity. So, for example, we'll take research and development. If you research and development widget A, and you work for someone, and they have a non-compete that says you will not develop widget A for someone else for one year, that's very specific, because you worked on widget A for the last 12 years at your current employer. That's very specific.

If you have a sales person, a regional manager or someone who's in charge of customers, and you say, "Okay, you will not go to and solicit those specific customers that you did working for me, you're not going to go to a competitor for the next year and work with those customers, but you're free to work in your industry. You're free to sell product and services, but just to other customers."

And then, I should preface all this by saying that you always have a confidentiality agreement that says that someone who works for you shall not share your confidential information with competitors. And that, frankly, can be a lifetime commitment if information that they learn at your shop is something that's never in the public domain, and in fact remains secret. Then, they should not be permitted to share that information elsewhere. And that's kind of a basic restriction that most businesses have with regard to their employees.

Larry Bernstein:

Arbitration. It seems that there's going to be disputes about what's enforceable, what's not. Will this end up in court? Will this end up in arbitration? How would you feel if you were representing the employee versus the employer? Is speed of the essence? How do you think about this problem?

Michael Wexler:

Arbitration is an interesting thing, and there's a lot of different views on this. One view with arbitration is, is that some folks feel that it's faster, because you're not stuck in the courts, where it takes a lot more time, potentially, to resolve disputes. Some people will say arbitration's more expensive, because you have to actually pay for your judge, your arbitrator, and you pay for their time to hold hearings and their time to research and their time to write opinions.

Other folks will say arbitration is a good thing, because it's done confidentially. And whatever the result is, it's confidential, and it doesn't go into the public domain. And so, you always have that tension, which is better? And different views on why one is better or the other.

There's no wrong or right answer with regard to this. The answer really depends upon what's important to the business, what's important to the employee. If the employee wants a fast result, arbitration may be faster. If they want a result that doesn't cost them a lot of money with regard to the arbitration, then they potentially would rather be in court, because in court, you don't have to pay for the judge. In either forums, you pay for your attorney, so that doesn't necessarily make a huge difference that way.

It really depends on the motivation for the resolution process. I think a lot of folks, a lot of businesses, prefer arbitration in certain circumstances, where they want confidentiality of what

happens. Whether they win or whether they lose, they prefer confidentiality. And they also prefer the speed with which arbitration can take place. And so, businesses may, if that's their motivation, that's their priority, they're going to go for an arbitration.

If a business says, "You know what? Whatever the result is, whether it's good or bad, we do this in a public forum, and the industry and our employees are going to know what happened, and that's fine with us. And so, we're just going to do this in court. And we'll do it in a forum that is not confidential and private."

And that makes perfect sense for some businesses. There's no wrong or right answer here. We have this discussion all the time with clients. When we write agreements, how do you want things resolved? And we have this issue all the time when we get into disputes, which is better? And again, it's based on the priorities of the individual. It's based on the priorities of the business.

Larry Bernstein:

It didn't always be the case that blue versus red states had different views on non-competition agreements. This is sort of a new thing. Will that affect how judges think about this problem or the arbitrators, in terms of what they think is the right answer? Or are they more contractually bound?

Michael Wexler:

Certainly in the ideal, fair world that we'd like to work in, in the judicial system, judges, arbitrators are supposed to follow the law. So, legislation, the rules on the books. And they're supposed to file case law. And the case law is made by judges making decisions and writing opinions. And so, we expect that judges and arbitrators will follow those rules and those opinions.

If you had a legislature that was controlled by one party or the other, and that legislature passes certain laws, and then the judges are bound to follow those laws, so they write opinions consistent with those laws. And then, we have a case, and judges and arbitrators have to follow, typically precedent.

And so, it certainly can have an effect, but it's not an overnight process. If you had dispute today, you would expect that the law on the books, and you would expect that the judges who interpret those laws and the judges who look at past opinions will follow that law and will follow those past opinions.

Larry Bernstein:

If you now have a chance to end your talk on a note of optimism, what would you be optimistic about as it relates to these non-competition agreements?

Michael Wexler:

There will always be non-competition agreements, because businesses aren't going to invest time and money in coming up with a product or a service to offer if they can't protect that product or service.

Everyone should note is that non-competition agreements protect workers, because if you have 100 workers at any level, and one worker leaves and takes something with them from that business, or goes and competes unfairly, right? And they don't follow a non-compete, that actually hurts the other 99 workers who are still in that business. I think when you put this in the context of what does non-competition protect?

It protects and entrepreneurs. It protects ingenuity, and it protects existing workers at a business so that someone doesn't take their job right out from under them, or they take the secret sauce that they produce and take it right out from under them.

Nnn-competition agreements, they will always be in existence in one form or another. And it's just smart to look and update agreements and look at changes in the law, and just make sure that your business is in tune with these things and takes the proper steps to protect what you have, and see what the law allows you to do.

I don't think it's a terrible thing. I think it's just a period of time where folks are looking at these issues and seeing, well, what's the best that we can do for the American worker? What's the best we can do for entrepreneurs? What's the best we can do for ingenuity? I think these agreements do help folks in the right circumstances.