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The Biden Administration Takes Aim at Noncompete Clauses

Employers – in light of recent action by the Biden administration, it is time to review and evaluate restrictive covenants being used with your workforce. Courts, state legislatures, and the president are increasingly scrutinizing such covenants, including noncompete agreements.

President Joe Biden campaigned on a platform to eliminate and reduce barriers for employees seeking higher wages and better benefits. As part of this commitment, he promised to prohibit all noncompete agreements, except those essential to protecting a narrowly defined category of trade secrets. President Biden took a concrete step towards making good on this promise on July 9, 2021, by signing a sweeping executive order.

Noncompete provisions have become commonplace. According to data the Biden administration cites, approximately one-half of private-sector businesses require at least some segment of their workforce to execute noncompete agreements, affecting between 36 to 60 million workers in the United States. The Biden administration claims these agreements limit wage growth and hamper employee mobility.

In its wide-ranging executive order, the Biden administration signaled an aggressive approach to curtailing the use of noncompete agreements. The executive order declares "that a whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy." Of particular interest to many employers is the executive order's directive to the Federal Trade Commission (FTC), which encourages the FTC to use its rulemaking authority to restrict

and reduce — and even ban — certain types of non-compete agreements. Specifically, it provides that "the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the FTC Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

The executive order, which builds upon an executive order issued during President Obama's final year in office, represents a potential sea change to enforcement of noncompete agreements because it adds a layer of federal considerations to an already complex and ever-evolving array of state requirements.

To be clear, the July 9 executive order does not immediately change anything. The FTC must exercise its rulemaking authority under the FTC Act to accomplish its mission. It could be months or years before the FTC announces any specific rules. And challenges to the FTC's authority will likely follow whatever rules the Commission ultimately promulgates.

The executive order also directs a newly created White House Competition Council to identify any potential legislative changes necessary to advance the policies outlined in the executive order. This may spur Congress to pass federal legislation in addition to anticipated agency rules. Beyond that, the Biden administration's aggressive and prominent action on this front may inspire state legislatures across the country to evaluate their laws and potentially pass additional measures regulating enforceability of noncompete agreements. At bottom, this executive order represents an inflection point as the Biden administration aims to increase competition and wages by eliminating what it views as hindrances to achieving those goals.

While awaiting action by the FTC, employers should to take the time to scrutinize and evaluate the terms of restrictive covenants they use to ensure the restrictions are narrowly tailored. Such diligence may increase the likelihood of enforceability. In addition, employers should explicitly state the reasons for the restrictive covenants (e.g., protection of trade secrets, company goodwill, etc.). And, as always, employers need to also keep abreast of any state-law developments.

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