

Does President Biden's Executive Order Signal a Future Full or Partial Ban on Non-Competition Agreements? Employers Need to Stay Tuned!

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Last week President Biden issued an executive order aimed at “promoting competition in the American economy.” Prior to the issuance of the order, the White House released a Fact Sheet which listed a stated goal of the forthcoming order as banning or limiting non-compete agreements. A press release issued with the Fact Sheet stated the White House’s desired to “[m]ake it easier to change jobs and help raise wages” by removing barriers that “impede economic mobility.” While this should not have come as a surprise to anyone—Joe Biden tweeted as a presidential candidate in 2019 that “[w]e should get rid of non-compete clauses”—it still left many employers wondering if employment agreements containing restrictions on competition would now be considered unlawful.

The actual executive order revealed that this was not the case, at least not yet. Section 5(g) of the order commands the Federal Trade Commission (“FTC”), in conjunction with other federal agencies, to “address agreements that may unduly limit workers’ ability to change jobs.” The section further encouraged the FTC Chairperson to “consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete and other clauses or agreements.” While the Biden Administration’s order is for now aspirational, it carries potentially massive ramifications for employers. The White House estimates that non-compete agreements are used by roughly half of private-sector businesses for at least some of their employees, and a ban on such agreements would affect anywhere between 36 and 60 million workers. However, until the FTC begins to propose rules there is no way to predict whether the ultimate result will be a complete ban on non-compete agreements, in line with the administration’s highly critical campaign rhetoric, or a more muted approach such as a prohibition on non-competes for low wage workers.

Even if the FTC proposes a complete ban on non-competition agreements, the FTC’s authority to implement such a ban will surely be called into question. There will be significant debate about whether action by the FTC in this manner constitutes executive overreach, usurps lawmaking powers traditionally reserved for Congress, or unconstitutionally infringes on the rights of individual states to make laws concerning the ability to contract. Regardless, employers should take note of the changing national tides surrounding non-compete agreements and work in conjunction with their legal counsel to stay abreast of changing laws effecting the drafting and enforcement of such agreements.