PAUL HASTINGS

Bloomberg

Employers Take Note — Noncompete Times, They Are a-Changin'

By Carson H. Sullivan, Jennifer S. Baldocchi, and Jessica E. Mendelson July 29, 2021, 1:01 AM

President Biden's executive order barring noncompete agreements has led to much speculation regarding what will happen next and what the FTC will propose, Paul Hastings attorneys say. They find possible clues in the language of the order and say employers should identify agreements containing restrictive covenants and take stock of which employees have agreements.

President Biden's July 9 executive order on promoting competition in the American economy marks the first step towards delivering on his broad campaign promise to eliminate noncompete and no-poach agreements that hinder the ability of employees to seek higher wages, better benefits, and improved working conditions.

The order directs several federal departments and agencies to take action or provide input on 72 items that target various industries, including advertising, air travel, farming, financial services, journalism, shipping, telecommunications, and technology. It aims to increase competition in the labor market by encouraging the Federal Trade Commission to ban or limit noncompete agreements, stating:

To address agreements that may unduly limit workers' ability to change jobs, 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 Federal Trade Commission Act to curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility....

The order does not detail how or when the FTC should take action. Indeed, it mentions noncompetes only twice, the provision quoted above and the additional statement: "Powerful companies require workers to sign noncompete agreements that restrict their ability to change jobs."

The language of the order has led to much speculation regarding what will happen next and what the FTC will propose. Coupled with the already ever-changing patchwork of state laws restricting non-competition agreements and proposed (and re-proposed) federal legislation, the EO leaves open many questions in the already murky legal landscape relating to restrictive covenants.

Finding Clues for What Will Come Next

Some possible clues can be found in the order's language. The inclusion of the word "unfair" in describing the types of noncompetes that the FTC should curtail is significant. During his campaign for the presidency, Biden did not previously use that modifier, instead stating his intent was to ban all non-competes, "except those very few that are absolutely necessary to protect a narrowly defined category of trade secrets."

The narrower language in the order suggests that Biden no longer aims to impose a blanket ban on noncompete clauses. Many speculate that the FTC may follow the lead of at least 10 states, which have banned non-compete agreements that restrict mobility for low- wage workers.

Also at issue again and something to watch is the Freedom to Compete Act, which has just been reintroduced by Sens. Marco Rubio (R-Fla.) and Maggie Hassan (D-N.H.). The bill proposes to amend the Fair Labor Standards Act of 1938 (FLSA) to ban noncompetes for most nonexempt workers. With timing unclear as to FTC action in response to the EO, action taken on the now bipartisan-proposed Freedom to Compete Act may impact the FTC response.

In addition to the swirling debate regarding noncompete restrictions that will be proposed in response to the order, employers should also note its inclusion of the phrase "other clauses or agreements." The order encourages the attorney general and FTC to consider revising the antitrust guidance for human resource professionals, which noted the anti-competitive risks associated with wage fixing and no-poach agreements.

It is thus likely that no-poach agreements will be included as part of these "other clauses or agreements." There is also an open question regarding whether the FTC may address the use of other types of restrictive covenants, such as non-solicitation agreements.

Next Steps for Employers

The order has little immediate impact on noncompete contracts employers may have, because it does not indicate when or how the FTC will take definitive action to limit non-competes.

However, employers should be on the lookout for the FTC's response in the coming months, particularly as the order reaffirms federal scrutiny now facing restrictive covenants—a trend that we have seen at the state level over the past few years. It appears that an outright ban on restrictive covenants is unlikely given the order's reference to the "unfair use of non-compete clauses."

However, employers should consider preparing as follows:

Identify Existing Agreements, Policies, and Practices

Employers should identify agreements containing restrictive covenants and take stock of which employees have agreements. This includes a review of employee handbooks and other policy documents, as well as offer letters, on-boarding agreements, and severance terms that contain clauses that may be construed as limiting employee mobility.

Though timing is uncertain, we recommend taking inventory now so employers are ready to re-evaluate the use of such documents in the event the FTC takes action warranting revision.

Additionally, and though the timing of any vote on the Freedom to Compete Act is also unclear, we recommend that employers specifically review now whether they have non-exempt employees who are subject to noncompetes.

Consider Alternatives to Protect Business Interests

Know your state: In many states, noncompetes may be unenforceable or highly scrutinized by courts and strictly construed against employers, even when permitted by statute. Employers may consider which restrictive covenants, both current and future, are effective and necessary to protect legitimate business interests.

Though the end result is still unclear, the order and the proposed legislation make clear that change is coming. Employers should take the time now to consider how they will protect their confidential information and trade secrets when their ability to do so through the use of noncompete agreements may be further curtailed.

Non-disclosure agreements, which have less of an impact on employee mobility, will become even more important, as will increased employee and manager training and strong exit interview procedures.

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Author Information

Carson H. Sullivan *is a partner in the Employment Law practice of Paul Hastings and is the chair of the Washington, D.C., Employment Law Department. She represents employers in all aspects of employment law, with an emphasis on the defense of class and collective action suits. She also has a particular focus on litigation involving trade secrets and restrictive covenants.*

Jennifer S. Baldocchi *is co-vice chair of the Paul Hastings Employment Department and the chair of the International Employee Mobility and Trade Secrets practice. Her practice focuses on employee mobility and intellectual property, including trade secrets, covenants not to compete, unfair competition, and fiduciary duties.*

Jessica E. Mendelson *is an associate in the Employment Law Department of Paul Hastings. Her practice focuses on litigation and counseling on a wide range of labor and employment issues.*