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President Biden Signs Executive Order Seeking to Ban or Limit Non-Compete Agreements

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On July 9, 2021, President Biden signed an Executive Order on Promoting Competition in the American Economy (the "Order"),¹ which marks the first step towards delivering on his broad campaign promise to eliminate non-compete and no-poach agreements that hinder the ability of employees to seek higher wages, better benefits, and improved working conditions.² 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. This article focuses solely on the provisions most likely to affect non-compete agreements and employee mobility.

The Order aims to increase competition in the labor market by encouraging the Federal Trade Commission ("FTC") to ban or limit non-compete 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 non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.³

However, the Order does not detail how or when the FTC should take action. Indeed, the Order mentions non-competes only twice, the provision quoted above and the additional statement: "Powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs."

The inclusion of the word "unfair" in describing the types of non-competes that the FTC should curtail is significant. During his campaign for the presidency, President 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 President Biden no longer aims to impose a blanket ban on non-compete clauses. In addition, the use of the phrase "other clauses or agreements" suggests that the FTC may address the use of other types of restrictive covenants, such as non-solicitation agreements.

The Order also encourages the Attorney General and FTC to consider revising the Antitrust Guidance for Human Resource Professionals.⁴ This guidance noted the anticompetitive risks associated with wage fixing and no-poach agreements.⁵

Next Steps for Employers

The Order itself has little immediate impact on non-compete 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.⁶ Moreover, 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:

I. Identify Existing Agreements, Policies, and Practices

Employers should identify agreements containing restrictive covenants and take stock of which employees have such agreements. This includes a review of employee handbooks and other policy documents, as well as offer letters, onboarding 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 that employers are ready to re-evaluate the use of such documents in the event that the FTC takes action warranting revision.

II. Review and Analyze

Because the Order provides no concrete direction to the FTC regarding retrospective limitation of non-compete agreements that are already in place, employers should continue to ensure that their existing agreements comply with current state law and be aware that they may need to reassess practices after the FTC takes action.

III. Consider Alternatives to Protect Business Interests

Know your state: In many states, non-competes 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. Consider alternatives, such as non-disclosure provisions, which protect confidential information and trade secrets with less of an impact on employee mobility.



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¹ The Executive Order is not yet published in the Federal Register. See <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021>, listing the last order published as EO 14035, signed June 25, 2021. The Executive Order is currently published in full at Joseph R. Biden Jr., *Exec. Order on Promoting Competition in the American Economy*, THE WHITE HOUSE BRIEFING ROOM PRESIDENTIAL ACTIONS (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Antitrust Guidance for Human Resource Professionals*, Dep't of Justice Antitrust Division, Federal Trade Commission (Oct. 2016).

⁶ John Barry et al., *President Biden Signs Executive Order Targeting Noncompetition Agreements*, NAT'L. L. REV. Vol. XI, No. 193 (July 12, 2021).