



President Biden Takes Aim at Employment Non-Compete Agreements

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07.12.2021

As anticipated, President Biden has continued to carry through on his presidential campaign promise to overhaul federal labor and employment laws. With the aim of protecting workers and encouraging competition, on July 9, 2021, President Biden issued the Administration's latest salvo – a sweeping Executive Order on Promoting Competition in the American Economy, along with a coordinating Fact Sheet explaining the basis for the President's Order.

The Order is part of a larger push from the Administration to make it easier for workers to have free mobility within their respective industries. While the Order does not provide specific directives as to the scope of any restrictions the Biden Administration would ultimately like its agencies to implement, the President encourages the Chair of the Federal Trade Commission (FTC) and other federal agencies to develop regulations that would ban or limit non-compete agreements and ban occupational licensing restrictions that impede employee mobility.

In order to do so, the Order first seeks to establish a White House Competition Council led by the Assistant to the President for Economic Policy and the Director of the National Economic Council. The Competition Council is directed to meet on a semi-annual basis to advance policies that, among other things, promote a competitive marketplace, higher-paying jobs, and the ability for employees to switch jobs and negotiate higher wages and better working conditions.

The Order next encourages the heads of all federal agencies, including the Secretary of Labor and the Secretary of the Treasury, to implement regulations to further these free-competition and employee-mobility efforts. Specifically, the Order directs the heads of these agencies to “consider using their authorities” to address agreements that may unduly limit workers’ ability to change jobs. See Order, Section 5(g). The Order encourages the FTC to use its statutory rulemaking authority under the Federal Trade Commission Act to address non-compete clauses and similar restrictive covenants “to curtail the unfair use of” clauses or agreements that may unfairly limit worker mobility. *Id.* The Executive Order also directs the FTC and the Department of Justice to strengthen antitrust rules to prevent employers from collaborating to suppress wages or reduce benefits in their industries.

Significantly, the Order does not change the law – but rather, again, it merely directs federal agencies such as the FTC to engage in the rulemaking process, including a period of notice and public comment. And, of course, it is safe to assume that businesses will have a lot of comments on those proposed regulations! Indeed, the U.S. Chamber of Commerce immediately raised concerns about the Executive Order as evidencing too much government involvement in private industry. But, if the FTC successfully implements regulations in keeping with President Biden’s Order, the federal government will follow the lead of many states, including recent developments in Virginia and the District of Columbia – jurisdictions that also have moved to ban or limit non-compete agreements. For example:

- As previously reported by Williams Mullen in our January 22, 2021 alert, the District of Columbia has banned virtually all non-compete agreements, and D.C. employers are prohibited from restricting employees even from moonlighting or operating their own businesses while they are employed by their current employer.
- For Virginia employers, the 2020 Virginia General Assembly enacted a ban on all future non-competition agreements between employers and so called “low-wage employees” – defined as employees who earn less than the average weekly wage of the Commonwealth, (See Williams Mullen’s April 13, 2020 alert for more information), which is currently approximately \$65,000/year. Employers can access current Virginia wage data through the U.S. Bureau of Labor Statistics.

Although the July 9 Executive Order does not immediately change the law, it does send a message to employers that the Biden Administration intends to use the tools available to it to crack down on actual or perceived unfair competition. Employers that use non-compete agreements with employees also must carefully monitor changes to state laws in which they do business – whether through that state’s legislature or case law from state courts – as many states’ laws are trending toward limiting or eliminating employment restrictive covenant agreements.

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