WHAT DOES PRESIDENT BIDEN'S EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY MEAN FOR EMPLOYER NONCOMPETE CLAUSES?

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EXECUTIVE ORDER ON PROMOTING COMPETITION IN THE AMERICAN ECONOMY

On 9 June 2021, President Biden signed the Executive Order on Promoting Competition in the American Economy (the Order). The White House also issued a Fact Sheet detailing key aspects of the Order. The Order expounds on several ideas articulated by President Biden during his 2020 presidential campaign pertaining to the U.S. economy and labor market. Among other things, the Order contains key provisions directed at limiting employers' use of noncompetition agreements in an effort to encourage competition in the United States labor market. This alert focuses on those provisions.

The Order states that industries' increasing consolidation over the last several decades has weakened competition in many markets, which has contributed to "denying Americans the benefits of an open economy and widening racial, income, and wealth inequality." The Order also emphasizes that almost 50 percent of private-sector businesses use noncompetes. The Order calls all branches of federal government, including administrative agencies, to take action to address these restrictions on competition through a "whole-of-government-competition policy." To combat anticompetitive forces, the Order urges agencies to issue rules and regulations to carry out the Order, specifically encouraging the Federal Trade Commission (FTC) to limit or ban the use of noncompetes as "[r]obust competition is critical to preserving America's role as the world's leading economy."

The Order states in part:

> [T]o 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.

Therefore, while the Order does not ban or limit the use of noncompetes, it indicates the Biden administration's commitment to (i) limiting employers' ability to impose postemployment restrictions on their workforce, and (ii)

increasing employee mobility. It remains to be seen if the FTC and other federal agencies will take up President Biden's call to action and promulgate rules consistent with the Order and, if they do, how sweeping those rules will be and whether they will be challenged.

INCREASING STATE HOSTILITY TOWARD NONCOMPETE AGREEMENTS

The Order indicates the current administration's view on noncompetes. However, noncompetes are currently governed by state law. As a result, it is important to assess state-law trends regarding these postemployment restrictions.

Noncompetes are governed by common law in most states, though an increasing number of states have enacted statutes dictating the parameters of such provisions. In certain jurisdictions, recent legislation significantly limits or prohibits the use of employment-related noncompete clauses, regardless of the impact that competition may have on an employer's business. For example, three states[1] have banned employment-related noncompete agreements, and the District of Columbia recently passed its sweeping “Ban on Non-Compete Agreements Amendment Act,”[2] which is set to become effective later this year. D.C. legislation will prohibit an employer from placing any restrictions on a D.C. employee's ability to engage in outside employment or other work-related activities *during or after* the employee's employment—*even if such outside employment or activities would be competitive with the employer's business*. Accordingly, while employees will remain bound by their fiduciary duty of loyalty and other obligations to their current employers, employers will not be able to include language in their policies, offer letters, or employment agreements with D.C. employees that would prohibit employees from moonlighting or other otherwise engaging in any outside work during or after employment. Massachusetts,[3] Washington,[4] and Maryland[5] also recently enacted legislation that significantly limits the use of employment-related noncompetes, and multiple states have passed laws that restrict the use of noncompete agreements for low-wage workers.[6]

Therefore, the Order follows the broader trend among various states to limit the ways in which employers can restrict employees following termination of employment.

PRACTICE GUIDANCE

In light of this Order and state-law developments, employers should evaluate any policies and agreements that contain postemployment restrictions, especially those that restrict low-wage employees from seeking employment with a competitor. For employers who regularly require employees to execute noncompete agreements, they should ensure these agreements comply with applicable state law and should consider strengthening workplace policies that address confidentiality, nonsolicitation, and noninterference to protect trade secrets and proprietary information in the event the use of noncompete agreements is limited in whole or in part by the FTC.

While the Order indicates that the role of noncompetition provisions will continue to be limited, it is not an outright ban on noncompetition agreements. Narrowly tailored noncompete provisions can still be used to protect a company's confidential information and legitimate business interests in customer relationships or employee training when reasonably implemented and compliant with state law.

FOOTNOTES

[1] The three states with current noncompete bans are California, Cal. Bus. & Prof. Code §§ 16600–16602.5; North Dakota, N.D.C.C. § 9-08-06; and Oklahoma, Okla. Stat. tit. 15, § 21.

[2] Though the act does not mention nonsolicitation provisions, a D.C. councilmember described noncompete and nonsolicitation provisions as different concepts in a Report on the Act issued in November 2020, which suggests that the act's provisions would not apply to nonsolicitation provisions.

[3] M.G.L. ch. 149, § 24L(b)(iv).

[4] RCW § 49.62.020.

[5] Md. Code Ann., Lab. & Empl. § 3-716.

[6] These states include Illinois, 820 ILCS 90/1; Maine, 26 M.S.R.A. §§ 599-A, 599-B; Maryland, Md. Code Ann., Lab. & Empl. § 3-716; Massachusetts, M.G.L. ch. 149, § 24L(c); New Hampshire, N.H. RSA 275:70-a; Oregon, ORS § 653.295; Rhode Island, R.I. Gen. Laws §§ 28-58-1–28-58-3; Virginia, Code of Virginia § 40.1-28.7:8; and Washington, RCW § 49.62.020.

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