

EMPLOYMENT LAW ALERT

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Biden Issues Executive Order Seeking Non-Compete Reform

On July 9, 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy which, among other things, seeks to curtail the use of non-compete agreements on the federal level. The Order advocates for a fair, open and competitive marketplace and highlights the Biden Administration's focus on the ability of Americans to maintain the economic freedom to switch jobs and negotiate higher wages. The Order also expresses an aversion towards "unfair" non-compete agreements. Although the Order has no direct impact on companies in this regard, it puts pressure on the Commissioner of the FTC to take action to curtail the "unfair use" of non-compete agreements.

Notably, the laws and enforceability surrounding non-compete agreements vary greatly from state-to-state. Some states, such as California, have all but prohibited the use of non-compete agreements with some limited exceptions. Certain other states have prohibited non-compete agreements for low-wage hourly workers. In New York, non-compete agreements are generally disfavored and carefully scrutinized by the courts; however, they may be upheld to the extent they serve a legitimate business interest and are narrowly tailored to address those interests. While it is currently unclear how aggressively the Commissioner may proceed in response to the Order, it may prompt changes to current state laws on non-compete provisions, along with other commonplace restrictive covenants imposed by employers.

While we await action by the Commissioner in response to the Order's directive, it would behoove employers to look closely at their current policies and practices concerning restrictive covenants to assess whether and/or to what extent they are necessary for their business needs. Furthermore, employers should continue to monitor this fluid situation, as new guidance regarding restrictive covenant enforceability and validity may soon emerge.

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