

Biden Targets Non-Compete Agreements

July 13, 2021

During his presidential campaign last fall, Joe Biden vowed to “work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets.” Little time was wasted in trying to fulfill that promise. On July 9, 2021, President Biden signed an executive order urging the Federal Trade Commission (the “FTC”) to ban or limit non-compete agreements. The proposed crack down on non-competes is one of many initiatives covered by the executive order, and it remains unclear how sweeping any action by the FTC in this area may be. One potentially “positive” aspect of the executive order is its focus on “unfair” non-compete agreements, which may steer the FTC away from more aggressive approaches such as an outright ban and towards more rational limitations. Regardless, many states have been actively limiting non-compete agreements, and non-competes are likely to face increased scrutiny going forward, whether at the federal or state levels.

Contemplated Congressional Action. Congress has also signaled an appetite to regulate non-competes. In February, a bipartisan group of legislators introduced the Federal Workforce Mobility Act in both the House and Senate, which would be the first legislation of its kind at the federal level. The proposed bill would prohibit the enforcement of non-compete agreements entered into after the legislation is enacted, with the exception of those necessary to protect trade secrets or that relate to the sale of goodwill or ownership interests or to partnership dissolution or disassociation. Although the Senate has yet to take action on its bill, the House has sent its version to its Committee on Energy and Commerce and its Committee on Education and Labor. Unlike non-compete legislation enacted at the state level, the Federal Workforce Mobility Act is written broadly: it is not limited to low-wage workers, it applies to employees who were fired for cause, and it does not carve out non-solicit or garden-leave agreements from the definition of a non-compete agreement. It is unclear whether Congress is likely to pass the bill in its current state, and in light of President Biden’s July 9 executive order, it seems more likely that the Federal Trade Commission will attempt to regulate non-compete agreements under its current authority.

Continued State Efforts to Limit Non-Competes. Whatever the limitations of federal-level legislation or rulemaking may be, however, there continue to be important

developments at the state level. At least 15 states and the District of Columbia have adopted legislation aimed at curtailing the use of non-compete agreements since Barack Obama issued an executive order in 2016 urging them to do so. At the end of May, for example, the Illinois legislature passed a comprehensive bipartisan bill amending the Illinois Freedom to Work Act that limits the use of both non-compete and non-solicit agreements with employees currently earning less than \$75,000 and \$45,000 per year, respectively. Other states, including New York, New Jersey, Iowa and Connecticut are currently considering bills that would narrow the use of non-competes in those jurisdictions. Decisional law in various states has further limited the enforceability of non-competes. For example, recent New York decisions hold that non-competes are unenforceable against employees who were terminated without cause.

Recommendations for Employers. Given the increased scrutiny and skepticism of non-competes, employers should:

- Remain alert to legislative developments in this area, particularly by the FTC and in those states where their employees work.
- Resist the urge to overreach and instead ensure that non-competes are narrowly tailored and utilized only where there is a legitimate basis.
- Avoid entering into non-compete agreements with low-wage earners, unless there is a compelling legitimate business reason for doing so (e.g., direct access to trade secrets).
- Consider putting other forms of trade secret protection in place that can be relied on where non-compete agreements cannot be enforced, including non-disclosure agreements, confidentiality agreements and invention assignment agreements.

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Please do not hesitate to contact us with any questions.



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