Via Executive Order, the Biden Administration Takes Aim at Non-Compete Agreement

BY ROCKY ROGERS

On July 9, 2021, President Biden issued a sweeping executive order addressing several different topics aimed at promoting "competition in the American economy."[1] Notably, the Executive Order builds upon the Obama Administration's prior efforts[2] to curtail the use of non-competition agreements (aka "non-competes") in private-sector American employment agreements. Several states already ban non-competes, but the Order seeks to address the practice at the federal level, which would then be uniform across all states.

Citing data from CBS News and the Economic Policy Institute that indicates roughly half of private-sector business require at least some employees to enter non-competes, which cumulatively impacts between 36 and 60 million workers, the Order encourages the Federal Trade Commission ("FTC") to utilize its statutory rulemaking authority to ban or limit non-competes.[3] While the focus is upon non-competes, the specific language of the Order seemingly is actually broader. It calls upon the FTC "to curtail the unfair use of non-compete clauses or agreements that may unfairly limit worker mobility." Based upon this language, the Executive Order arguably embraces other clauses or provisions common in employment agreements that may "limit worker mobility."

As is common with such Orders, its language paints broad strokes but leaves many questions unanswered. For example, it does not mandate that the FTC issue any rules. Further, it leaves to the discretion of the FTC to limit or outright ban non-competes, should the FTC even take up the issue. Additionally, are only non-competes that "unfairly limit worker mobility" affected, and who makes that decision? Moreover, who decides if other clauses common to employment agreements, such as non-solicitation provisions or provisions requiring repayment of signing bonuses, costs of training, or other incentives to be refunded if the employee swaps jobs, unfairly limit worker mobility and therefore are subject to regulation? Simply put, there is still a lot of gray area.

According to data from the Economic Policy Institute, albeit based upon a small sample size, 21% of companies in the "transportation" sector require all employees to sign non-competes whereas 37% require at least some employees to sign non-competes.[4] This is not necessarily surprising given the high rate of turnover in the industry and that profits are often driven by advantages gained through proprietary information and practices, particularly in the 3PL sub-sector. Therefore, arguably those in the transportation industry do have legitimate interests they seek to protect via non-competes.

You may ask, where does this new Order leave us? For now, nothing has changed (yet). The Executive Order does not have the effect of law. The enforcement of non-competes for now will still be resolved by state law. As noted,

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[1] July 9, 2021 White House Briefing Room Fact Sheet: Executive Order on Promoting Competition in the American Economy.
[2] *See* April 15, 2016 Executive Order: Steps to Increase Competition and Better Inform Workers to Support Continued Growth of the American Economy; May 2016 Executive Order: Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses.
[3] *See* Fact Sheet, supra n.l.
[4] https://www.epi.org/publication/noncompete-agreements/

some states already ban non-competes. Many states that do not outright ban non-competes have placed limitations such as duration, geographic reach, and what "tiers" of employees are subject to non-competes. Accordingly, it's important to know what state choice of law is provided for in any employment agreements and what that state's law says about the availability of non-competes. This is an area where careful contract drafting can create a strategic advantage under existing law.

It will be interesting to see whether the FTC does, in fact, take up the call from the Biden Administration and utilize its rulemaking authority to address non-competes and other similar restrictive employment clauses. If it does, what will be the final rule that emerges? Will the FTC's rule be challenged? For now, the Executive Order raises more questions than it answers, but it does serve as a good reminder to review your current employment agreements for compliance with existing law. As the law on non-competes continues to change, your agreements should keep pace or run the risk of being deemed unenforceable. Additionally, those in the transportation field should begin to consider other mechanisms by which to protect their proprietary and other interests through means other than non-competes.