

Memorandum

Biden Administration Announces Action Aimed at Reducing Use of Non-Compete Agreements

July 14, 2021

On July 9, 2021, President Biden signed an Executive Order on Promoting Competition in the American Economy (the “Executive Order”),¹ which calls upon the Federal Trade Commission (“FTC”) to take action which could result in the diminished ability for employers to enter into non-competition agreements with employees. Taking a “whole-of-government” approach, the Executive Order announces numerous initiatives with the stated goal of promoting competition. With respect to non-competes, the Executive Order aims to address the perception that “[p]owerful companies require workers to sign non-competes that restrict their ability to change jobs.”

The Executive Order, in and of itself, does not require employers to make any changes to existing agreements. Rather, it is a call to action for certain federal agencies. Specifically, President Biden:

- encourages the Chair of the FTC “to consider working with the rest of the [FTC] to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-competes clauses and other clauses or agreements that may unfairly limit worker mobility;” and
- orders the Secretary of the Treasury to “direct the Office of Economic Policy, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC, to submit a report to the Chair of the White House Competition Council, not later than January 2022, on the effects of lack of competition on labor markets.”

Notably, a Fact Sheet published by the White House on July 9, 2021² states that President Biden’s Executive Order encourages the FTC to “**ban or limit**” non-competes. The Executive Order itself does not actually go that far, instead encouraging the FTC “to consider . . . curtail[ing]” the unfair use of non-competes. There is an open question among commentators as to whether a standalone, broad-based rule-making effort targeting non-competes would survive the FTC’s rigorous rulemaking process. Moreover, as a general matter, there are often strong justifications for certain non-competes (e.g., for the purpose of protecting trade secrets or other sensitive information), which are generally supported by antitrust policy and

¹ Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² “Fact Sheet: Executive Order on Promoting Competition in the American Economy,” available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

current antitrust law. If the Executive Order does result in a federal restriction on non-competes, we would expect any such restrictions to focus mainly on lower-wage workers, consistent with some state-level non-compete restrictions enacted in recent years. However, we will need to wait to see if the federal government will take a more aggressive approach similar to the more restrictive laws enacted in states such as Massachusetts (among other things, requiring “garden leave pay” and banning non-competes with employees who are terminated without cause) and Washington State (among other things, barring non-competes with employees earning less than \$100,000), and in the District of Columbia (which totally outlaws non-compete restrictions).

Finally, we note that the Executive Order is reminiscent of non-compete-focused activities of the White House and Treasury Department in the final months of the Obama administration. In March 2016, the White House and the Treasury each published reports critical of non-competes (particularly with respect to lower paid and junior employees), discussing their adverse economic impact on the workforce. (For our prior alert discussing these reports, see [here](#).) In October 2016, the White House published a “call to action” encouraging state policymakers to pursue certain “best-practice policy objectives” to curb the perceived over-use of non-compete agreements.³ A key difference between President Biden’s Executive Order and the Obama administration’s 2016 efforts is that the Obama White House aimed to prompt state-level legislative and executive action, while the Executive Order relies on existing federal antitrust laws to prompt action from the federal regulatory agencies responsible for oversight of competition. Nevertheless, the policy objectives of the Obama White House as reflected in the 2016 publications may provide guidance about what to expect to follow from the Executive Order. The 2016 policy objectives included:

- banning non-compete clauses for certain categories of workers (such as low-wage workers and/or workers within certain occupations, workers who do not have access to trade secrets, and/or workers who are terminated without cause);
- improving transparency and fairness of non-compete agreements (for example, by disallowing non-competes unless they are proposed before a job offer or a significant promotion has been accepted or by requiring additional consideration beyond continued at-will employment); and
- incentivizing employers to write enforceable contracts (for example, by promoting the use of the “red pencil doctrine,” which renders contracts with unenforceable provisions void in their entirety).

³ A copy of the “Call to Action” is available at <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>.

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