CLIENT ALERTS & INSIGHTS

Biden Administration Encourages Federal Agency to Clear the Muddy Waters of Non-Compete Agreements

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Citing concerns about worker mobility and advocating for increased market competition, President Biden signed Executive Order No. 14036: Promoting Competition in the American Economy, on July 9, 2021. The Order, published in the Federal Register on July 14, 2021, encourages the Federal Trade Commission to use its statutory authority to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

Although the Order itself has no weight of enforcement behind it, it invites a federal response to an issue that is today governed by state law-that is, whether non-compete agreements are enforceable and, if so, to what extent. Generally, non-compete agreements are entered between an employer and employee and preclude the employee from working in a competing business both during and after the employee's employment period or during some other period of time specified in the agreement.

Presently, there is wide variance amongst the states as to whether such agreements are enforceable. In California, for example, such agreements are unenforceable in nearly all circumstances. In some states, (including, but not limited to Washington, New Hampshire, and Maine) non-compete agreements are only enforceable against employees who meet a statutory compensation threshold. Other states provide that these agreements are enforceable so long as they are supported by sufficient consideration-i.e., what is given to the employee in exchange for being bound by the agreement. Moreover, states differ regarding what is considered sufficient consideration. Some, like Ohio, find that new or continued employment constitutes consideration, while others require something more. States also look to whether the scope of a non-compete agreement's limitations is reasonable from geographic and temporal perspectives. Accordingly, it is critical that employers determine and evaluate the law applicable to these agreements on a state-by-state basis to ensure compliance.

Potential Impact on Employers

The Order is not legislation and does not bind employers. However, the Order may indicate how non-compete agreements are currently being viewed from a federal perspective, which may result in subsequent legislation. Notably, however, if legislation or attempted executive action does flow from this Order, it appears likely to concentrate on eradicating "unfair" non-compete agreements as opposed to all non-compete agreements, leaving in place those that Congress and the courts deem to be "fair."

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