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President Biden Takes Aim at Enforceability of Noncompete Agreements via Federal Agency Call to Arms

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On July 9, 2021, President Joseph Biden issued the Executive Order on Promoting Competition in the American Economy. The Order is a broad call to action to federal agencies to create a more "open and competitive" economy by decreasing industry and market consolidation. Among many other initiatives, the Order asks the Federal Trade Commission to adopt regulations that curtail noncompete clauses to increase worker mobility. With respect to noncompete agreements, the Order itself does nothing more than encourage the FTC to take action, but we expect the newly emboldened FTC to respond with noncompete regulations in the coming months. Such regulations will likely incite legal challenges, as have other agency rulemaking efforts in recent years.

State regulation of noncompete agreements

Biden's position on noncompete agreements reflects a growing national trend to restrict and regulate the legality and enforceability of noncompete agreements. Currently, more than half of US states have enacted laws restricting the use of noncompete agreements among employers. Three states have outright banned the use of noncompete agreements, and Washington, DC, has passed similar legislation that remains pending until budget and financial planning is finalized. Seven states restrict employers from entering noncompete agreements with low-wage workers.

The Order's scope

The Order is broad in scope and aims to encourage competition across industries, including by targeting specific sectors, such as the tech sector, and specific issues, such as excessive banking market power, data collection and surveillance, and consumer privacy. The Order establishes a White House Competition Council – which will include the attorney general, the secretary of labor and the chair of the FTC, among others – to coordinate and advance agency efforts to address overconcentration, monopolization and unfair competition.

With respect to noncompete agreements, the Order encourages the FTC, the federal agency with antitrust enforcement powers, to "curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility." We expect that the FTC will propose noncompete regulations in the coming months, which will take time to proceed through the administrative rulemaking process. Given the recent trend in state legislation aimed at banning application of noncompete agreements to low-wage workers or those workers for whom the employer can't claim a legitimate "protectable interest" – a common area of existing challenge in noncompete litigation – we expect the FTC to do the same. White House communications after the Order have fallen short of recommending a full ban, suggesting instead that restrictions will apply to "construction workers, hotel workers [and] many blue-collar jobs," and implying that some noncompetition agreements remain necessary and won't be targeted.

The Order also encourages the attorney general and the chair of the FTC to update the existing Antitrust Guidance for Human Resources Professionals to better protect workers from wage collusion. To that end, we expect the FTC and the Department of Justice to update enforcement guidance on the sharing of wage information and agreements between competitors not to poach or fix wages. All agency participants on the White House Competition Council are tasked with evaluating any licensing regulations restricting competition in the industries under their jurisdiction.

Legal challenges are likely

The Order presumes that the FTC has authority to regulate employers' use of noncompetes through the antitrust law framework. However, the FTC's authority to adopt regulations prohibiting noncompetes is unclear, and any regulations adopted by the FTC will likely incite legal challenges, even if the FTC adopts narrow regulations protecting only low-wage workers. In addition, the FTC's rulemaking on the enforceability of noncompete agreements will likely seek to preempt state law on the same, which will further stoke legal challenges from those advocating for states' rights to balance the interests of workers and those businesses seeking to protect their goodwill and confidential information.

We will continue to monitor for rulemaking adopted by the FTC and the DOJ. If you have any questions, please reach out to a member of the Cooley employment team.

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