

Breaking News on Restrictive Covenants: What Does President Biden's Executive Order on Non-Competes Mean for Employers?

Many businesses rely on non-compete agreements and other restrictive covenants to protect their proprietary information or business strategies. Recently, President Biden issued a lengthy Executive Order on Promoting Competition in the American Economy which directs the Federal Trade Commission, along with other agencies, to ban or limit “non-compete agreements and other clauses ... that may unfairly limit worker mobility” through rulemaking.

The Biden administration's Order takes aim at agreements that “unduly limit workers' ability to change jobs” and make it harder for workers to bargain for higher wages and better working conditions. The Executive Order does not immediately limit non-compete provisions or other clauses that limit worker mobility. The “other clauses” language could take aim at non-solicitation clauses, no-hire provisions and other types of restrictive covenants.

As we explained in our recent webinar, over the last several years, non-compete agreements have been used in employment contracts not only for high level executives but also for some entry level workers and courts have scrutinized the legitimacy of such clauses.

Non-compete agreements are traditionally creatures of state law and, as it stands, their enforceability across the country varies widely. Several states like California, Oklahoma, and North Dakota prohibit most non-compete clauses. Other states have recently passed laws limiting the scope of permissible non-competes including banning the use of them for low-wage workers. Those jurisdictions include Washington D.C., which recently passed a broad ban on the use of non-competes. Oregon decreased the maximum permissible duration of a non-compete from eighteen to twelve months. Illinois banned their use for anyone earning less than \$75,000 and banned the use of non-solicitation clauses for anyone earning less than \$45,000 and Nevada has banned all non-competes for hourly employees.

From the perspective of federal law, nothing has changed yet, and it will take months for the agencies to formulate rules. Moreover, those rules will almost certainly be subject to legal challenges. Stay tuned...

Top Three Takeaways:

- Review contracts containing non-compete agreements or other restrictive covenants to ensure they comply with the current legal requirements in your jurisdiction.
- When doing so, consider whether the agreements are necessary to protect your business taking into account the duration, the geographical area and the types of information that the worker may have acquired.
- Consider the use of other provisions, such as confidentiality agreements, that can protect legitimate employer interests.

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