

Overview of Biden Executive Order Addressing Non-Competes

July 15, 2021

On July 9, 2021, President Biden signed an Executive Order on Promoting Competition in the American Economy which the administration said included 72 initiatives aimed at lowering prices, increasing wages, and promoting innovation and economic growth. One of those initiatives asks the Federal Trade Commission ("FTC") to consider curtailing non-competes and other agreements that "unfairly" limit worker mobility. Section 5(g) of the Executive Order provides:

To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

Non-competes and other post-employment restrictions are currently generally regulated at the state level. The Executive Order does not trigger any immediate changes to the law or to the viability of post-employment restrictions, but it signals a greater emphasis on — and likelihood of — eventual federal regulation of non-competes and other similar restrictions.

It is not clear what, if any, action the FTC will take in response to the Executive Order. Although it is possible that the FTC could try to ban the use of all non-compete agreements that impact interstate commerce, the Executive Order does not call for an outright ban on non-competes. Instead, it refers to agreements that "unduly" or "unfairly" limit the ability of workers to change jobs and to the "unfair" use of non-competes and similar clauses. This could lead the FTC to adopt an approach similar to that taken recently by a number of states that have banned non-competes for employees whose compensation is under a specified threshold and required non-competes to be in writing and provided to employees sufficiently in advance so that they can review them and consult with counsel if desired prior to signing the agreement. It is also possible that the FTC will focus on specific industries (technology has been mentioned as one potential area of focus) or on larger employers.

If the FTC uses its statutory rulemaking authority to try to limit non-competes and other similar provisions as suggested by the Executive Order, that process will take some time. Under Section 5(a) of the Federal Trade Commission Act ("FTC Act"), the FTC is empowered to investigate and prevent (1) unfair methods of competition, and (2) unfair or deceptive acts or practices affecting commerce. The FTC Act gives the FTC the authority to issue rules with respect to unfair methods of competition or unfair or deceptive acts or practices as defined under the FTC Act. The public process begins when the FTC publishes a Notice in the Federal Register that provides a summary of the anticipated rule, additional information, a burden statement, and requests for public comments. The initial comment period is usually 30 days, though it is not uncommon for the FTC to extend the deadline. The FTC recently voted to update its rulemaking procedures to make it easier for stakeholders to participate in the rulemaking proceedings and include more opportunities for public comment, so there is likely to be significant input from employers and other stakeholders if the FTC moves forward under its rulemaking authority. The FTC can issue a final rule after reviewing the public comments.

There is a reasonable likelihood that any broad action taken by the FTC to ban or significantly limit non-competes will be met with legal opposition from interested stakeholders. This could further delay or prevent the implementation of federal regulation of non-competes and similar agreements.

While the current focus is on the recent Executive Order, bills regulating non-competes and similar agreements are routinely introduced in Congress. While prior bills have faltered relatively quickly, a bipartisan group recently introduced the Federal Workforce Mobility Act (FWMA), which would ban most non-compete agreements. It is unclear if the FWMA will advance where prior similar bills have failed.

There are a number of steps employers can take in the wake of the Executive Order. Employers can take preliminary steps to organize and confer with trade groups and industry associations in advance of any action by the FTC. If and when the FTC rulemaking process begins, employers should consider the extent to which they want to comment (or to ask trade groups or industry associations to comment) on proposed FTC rules addressing non-competes. Employers also should review their existing post-employment restrictions to ensure they are well-positioned if the FTC does attempt to limit the use of non-competes or similar agreements, including by ensuring that non-competes are narrowly tailored and well drafted and that employers make appropriate use of other post-employment restrictions that are less likely to come within federal regulation such as confidentiality agreements, paid garden leaves, and non-solicitation provisions.

* * *

Carter Ledyard & Milburn LLP uses Client Advisories to inform clients and other interested parties of noteworthy issues, decisions and legislation which may affect them or their businesses. A Client Advisory does not constitute legal advice or an opinion. This document was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. © 2021 Carter Ledyard & Milburn LLP.

related professionals

Jeffrey S. Boxer / Partner

D 212-238-8626

boxer@clm.com

Meredith B. Spelman / Associate

D 212-238-8657

spelman@clm.com