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Biden Order: Consider a Federal Rule on Non-Competes

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Don't be misled: President Biden's July 9 Executive Order does not bar non-compete agreements. Rather, it "encourages" the Chair of the Federal Trade Commission to use rule-making to limit their use.

In fact, the only text in the Order addressing non-competes reads, in its entirety: "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."

States have traditionally regulated non-competition agreements, and of late, they have been looked upon with increasing disfavor. Three states, California, Oklahoma, and North Dakota, have banned non-compete clauses altogether. Another dozen states prohibit the use of non-competition clauses and agreements with low wage workers.

Interpretation and enforcement varies by state. Even where an agreement has a clear clause setting forth which state's law will govern, a court may determine that the chosen law is against the public policy of the state in which the action is pending and decline to

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enforce it. As a result, an employer's contract might be enforceable in one state, but not in another. Nevertheless, businesses that invest time, money, and resources in developing confidential and proprietary information, customer relationships, their reputation, workforce stability, morale, and business goodwill need to protect those interests. For them, non-compete agreements are critical even if not uniformly enforced.

Use of rule-making to adopt a sweeping federal rule governing non-compete agreements would be an extraordinary departure from current practice. And it's not hard to see why Biden issued the directive to the newly confirmed Chair of the FTC, Lina Khan. Khan recently co-authored a law journal essay "The Case for 'Unfair Methods of Competition' Rulemaking" in which she argued that the FTC should do more to promote fair competition, including the use of federal rule-making authority specifically with respect to non-competes.

"Antitrust law today is developed exclusively through adjudication," she wrote, and that has resulted in "a regime that generates ambiguity, drains resources, and deprives individuals and firms of any real opportunity to participate in the process of creating substantive antitrust rules." She argues that rulemaking would "give market participants sufficient notice about what the law is, helping ensure that enforcement is predictable," and would provide "clarity and certainty about what types of conduct constitute—or do not constitute—an "unfair method of competition."

"These agreements prevent employees from working for rival firms for a period of time after they leave. As recent studies show, these agreements—which now cover roughly twenty-eight million Americans—deter workers from switching employers, weakening workers' credible threat of exit, and diminishing their bargaining power. By reducing the set of employment options available to workers, employers can suppress wages... A rule

could grant clarity as to when noncompete agreements are permissible or not," the essay said.

Boosting the diminished bargaining power of workers is consistent with other priorities of the Biden Administration, such as the President's call for Congress to pass the Protecting the Right to Organize Act (PRO Act). The PRO Act would amend previous labor laws such as the National Labor Relations Act and significantly expand various labor protections to employees' rights to organize and collectively bargain the workplace. Among other things, the PRO Act would increase penalties for unfair practice violations, limit employer lockouts, override state "right-to-work" laws (which prohibit unions from negotiating contracts with employers that require employees to pay union dues to remain employed), increase regulation of employer communications with employees during the unionization process, ban mandatory arbitration agreements (likely resulting in more class action lawsuits), and radically change the legal test for who is an independent contractor, ensuring that more workers would be classified as employees and could participate in the collective bargaining process.

The President's Executive Order itself does not address how any FTC rulemaking on non-competes would impact existing State laws, nor how it would relate to the proposed Workforce Mobility Act – a bipartisan bill that was re-introduced in the Senate in February of this year and, if passed, would drastically limit the use of non-compete agreements.

Whether or not the Executives Order and any subsequent FTC rulemaking will impact the future of non-competes is yet to be seen. So for now, employers seeking to protect their lawful business interests with non-compete agreements should continue to do so, and should keep an eye on the FTC's rulemaking agenda.

For help with non-compete agreements or other workplace issues, contact your Akerman attorney.