

President Biden Signs Executive Order Targeting Non-Competes

Article
Lowndes
07.15.2021

Related Attorneys
Melody B. Lynch

Last Friday, July 9, 2021, the White House issued a 20-page executive order on “Promoting Competition in the American Economy” aiming to create an “open and competitive economy” where workers have the “economic freedom to switch jobs or negotiate a higher wage.” The order seeks to spur a “whole-of-government approach” to increase competition in the labor market, doing so in part by targeting non-compete clauses and agreements, which the order states are used by “powerful companies” against workers to “restrict their ability to change jobs.”

Non-compete agreement clauses or agreements are contractual in nature and usually consist of an employee’s promise not to compete with the employee’s employer while employed as well as for a specific time after the employment ends. Non-competes are also usually limited to a certain geographic area and scope of business. They can also include a promise not to solicit the employer’s clients or work for the employer’s competitors.

Florida law generally upholds non-compete agreements that place reasonable restrictions on the time, geography, and area of business covered by the non-compete so long as one or more legitimate business interests justify the non-compete.

While the order’s scope extends beyond addressing non-competes, touching upon worker licensure requirements and employer wage collusion, for example, the order has a brief but broad section on non-competes.

The order encourages the Federal Trade Commission (“FTC”) to address “agreements that may unduly limit workers’ ability to jobs” by considering issuing new rules to “curtail” the use of “non-compete clauses and other clauses or agreements” that may “unfairly limit worker mobility.” Specifically, the sole portion of the order addressing non-competes reads:

“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.”

Additionally, the order broadly encourages the FTC to issue additional rules relevant to any “unfair industry-specific practices that substantially inhibit competition.”

A “fact sheet” accompanying the order gives some potential details as to the industries the Biden administration may most want to target concerning use of non-competes. The fact sheet specifically singles out the construction and retail sectors as requiring millions of workers to sign non-compete agreements, making it harder for workers in those industries to switch jobs or get better pay.

The fact sheet further emphasizes that the order encourages the FTC to “ban or limit non-compete agreements,” stating banning or limiting non-compete agreements will help raise workers’ wages and allow them to change jobs more easily.

What does this mean in practical terms? Well, the FTC has yet to issue any rules or act on the order’s encouragement. But, it’s a safe bet to expect some changes. What exactly those changes will be are yet to be known.

Of note is the order’s broad language concerning “other clauses or agreements” that may “unfairly limit worker mobility” or “inhibit competition.” Such language could be read as encouraging the FTC to not only take action regarding non-compete clauses, but also clauses or agreements that forbid a former employee from soliciting the customers of a former employer or even old coworkers. How far the FTC takes its new mandate and in what direction—as well as how any new rule will impact Florida law regarding non-competes—remain to be seen.

We will continue to monitor for new developments and provide updates and analysis regarding any rules the FTC issues in response to the order. In the meantime, employers may wish to revisit their existing non-compete and non-solicitation agreements and discuss the same with legal counsel.

If you have questions about potential impacts to your existing non-compete clauses and agreements, the Lowndes Labor & Employment Law Group is here to help.