

President Biden Issues Executive Order Targeting Non-Compete Agreements



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On Friday, July 9, President Biden issued an “Executive Order on Promoting Competition in the American Economy.” The Executive Order requests that more than one dozen federal agencies consider making various new administrative rules aimed at increasing competition within the American economy. Included in the Executive Order’s list of “encouraged” rulemaking initiatives is a request that the Federal Trade Commission (FTC) consider using its 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.”

President Biden said that the Order is a response to the increasing number of non-compete agreements being utilized, especially with low-wage workers. The Biden Administration estimates that as much as 47% of American private-sector employees are subject to non-compete agreements, a sharp increase from the 18% of workers who reportedly were subject to non-compete agreements just a few years ago, as noted in a 2014 survey.

Significantly, the Executive Order does not itself make any changes to existing law or impact the enforceability of agreements containing non-compete clauses or other types of restrictive covenants, such as customer or employee non-solicitation provisions. And it does not require employers to change their existing agreements. The Executive Order merely directs the FTC to consider making new rules to limit the “unfair use” of contractual noncompete provisions and other restrictive covenants that may “unfairly limit” employees’ ability to change jobs.

Moreover, the Executive Order is unlikely to produce changes to the enforcement of non-compete agreements or other restrictive covenants any time soon. This is because the FTC’s rulemaking process can take months, or even years, to complete. Furthermore, any future FTC regulatory action likely would face lengthy litigation challenging the FTC’s legal authority to implement restrictions on non-competes,

among other things.

We will continue to monitor developments concerning this issue, including any rulemaking or other actions that the FTC may take in the future in response to the Executive Order. In the meantime, employers may want to review, and seek legal advice about, their existing agreements containing non-compete provisions, customer or employee non-solicitation provisions, or non-disclosure clauses to ensure that they are fully-compliant with the applicable existing law and written so as to avoid being characterized as “unfair.”

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors, Curry Sexton (CSexton@sb-kc.com), Mark Opara (mopara@sb-kc.com), or Brenda Hamilton (BHamilton@sb-kc.com), or any other shareholders in Seigfreid Bingham’s Employment Law Group, including: John Vering, John Neyens, or Shannon Johnson, or your regular contact at Seigfreid Bingham at 816-421-4460.