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Biden Administration Pushes FTC to Ban or Limit Non-Competes

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On July 9, 2021, President Biden signed the Executive Order on Promoting Competition in the American Economy (the "Order"), a copy of which is available here. The Order contains a myriad of proposals aimed at "the promotion of competition and innovation by firms small and large, at home and worldwide." The Order includes a stated effort by the Biden administration to ban or seriously curtail the use of non-compete agreements.

Overview of the Order's Non-Compete Provision

Among other initiatives, the Order promotes enactment of stringent restrictions, if not an all-out ban, on the use non-compete agreements. Indeed, the Order directs the Federal Trade Commission (FTC) to consider enacting rules to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." While the Order itself does not curb the use of non-competes, the Order's Fact Sheet itemizes "banning or limiting non-compete agreements" as a considered objective of the Order. The Order justifies the need for these restrictions on a national level by claiming that the consolidation of competition "has increased the power of corporate employers" to "require workers to sign non-compete agreements that restrict their ability to change jobs."

The non-compete provisions of the Order should not come as a surprise. Since serving as Vice President for President Obama, President Biden has advocated for the elimination or placement of significant limitations on the use of non-compete agreements.

Implementing the Order

This is not the first time in recent history we have seen the White House exercise its executive authority in an effort to regulate the use of measures perceived to unfairly limit worker mobility. The Obama administration took aggressive action against companies accused of entering into employee no-poaching agreements between companies to not solicit or hire each other's employees, culminating in the issuance by the FTC and the Department of Justice (DOJ) of their comprehensive Antitrust Guidance for Human Resources Professionals. The stated justification or rationale for these actions was that no-poaching agreements violated federal antitrust laws. The DOJ under President Trump continued to raise the stakes by pursuing civil, then criminal, prosecutions against companies for alleged no-poach agreements, the subject of two prior Vedder Price alerts, which can be found here and here. The DOJ under President Biden has continued to issue indictments for no-poach agreements as recently as last week.

Given this precedent to promote employee mobility and sanction efforts to limit it, we anticipate that, in developing rules aimed at banning or restricting non-compete agreements, the FTC may follow a rationale similar to the Obama administration's; namely, that at least some types of non-compete agreements are unlawful. If the FTC follows the Obama administration's playbook, once the new rules are final, the FTC may pursue action against employers who use non-compete agreements in a manner inconsistent with the rules.

It remains unclear what the ultimate scope of the FTC's rule will be, especially in light of the inconsistent messaging by the White House. Indeed, the Fact Sheet calls for the FTC to consider a "ban" on non-competes, the Order simply calls for the FTC to "curtail the *unfair use* of non-compete clauses," and statements by the White House in the wake of the Order suggest that it is really aimed at preventing the use of non-competes with blue collar workers and low wage employees.

The use of the term "unfair" in the Order is certainly a nod to the FTC's authority under Section 5 of the FTC Act to prohibit "unfair methods of competition." Since 2015, the FTC's policy has been to treat its authority to prevent anticompetitive conduct under Section 5 as no broader than under the Sherman Act, but in a 3-2 vote, it withdrew that policy on the same day the Executive Order was issued. This frees the FTC to take action against conduct that may not violate the antitrust laws (possibly including some types of non-competes), at least unless and until the courts rule otherwise. Thus, although it remains to be seen how broad of restrictions the FTC will propose, the FTC will not consider itself constrained by the antitrust laws in promulgating them, and the current Democratic majority can reasonably be expected to pursue goals consistent with those of the Biden administration.

Potential Pushback and Legal Challenges

Unlike the Obama administration, which focused primarily on no-poaching agreements entered into between competitors, the Order will likely impact a much wider array of employers. Indeed, while opportunity for the proliferation of no-poaching agreements is somewhat limited and tied to certain business arrangements or settings, a significant portion of employers throughout the United States commonly rely upon non-competition and non-solicitation agreements to protect legitimate business interests.

Given the broader impact of the Order, it is likely that the FTC rules will be met with significant resistance from the business community across economic sectors. As part of the FTC's rulemaking process, any draft rule implementing the Order will be subject to public notice and comment. During this process, businesses and other stakeholders will have the opportunity to submit comments on the proposed rule, which must be addressed by the FTC prior to issuing its final rule. While not guaranteed to have an impact, this process *can* lead to changes to a proposed rule.

It is also possible that the Order and the corresponding FTC rule will be subject to legal scrutiny, including constitutional challenges. Non-compete agreements are historically governed by state law. Many states have statutes governing the lawful use of non-compete agreements and other restrictive covenants. The remaining states have decades of common law jurisprudence from state courts directly addressing the enforceability of restrictive covenants. Thus, absent federal legislation expressly preempting state law, there may be legal challenges alleging constitutional encroachment and overreach by the Executive Branch.

Federal Legislation on Non-Compete Agreements?

The Order clearly demonstrates a desire by the Biden administration to curtail or ban the use of non-compete agreements. The most direct way to achieve this goal would be through federal legislation. Over the years, there have been many unsuccessful efforts to pass such legislation, and the current iteration of such legislation, the Workforce Mobility Act, has failed to gain any traction in Congress.

While the Biden administration has not yet openly pushed for federal legislation on non-compete agreements, it would not be surprising to see such efforts in the near future. However, even if President Biden pushed for federal legislation to ban or limit non-compete agreements, given the current makeup of Congress and political tension pitting workers against employers, it is not clear that such legislation could pass both the House of Representatives and the Senate.

Vedder Price will continue to monitor for updates on the Order and the FTC's efforts to implement the Order.

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