

ALERT

President Biden Issues Executive Order Bringing the U.S. One Step Closer to Uniformity Concerning the Use of Non-Compete Agreements

July 12, 2021

WHAT: On Friday, July 9, 2021, President Biden delivered remarks strongly condemning the use of non-compete agreements before signing an Executive Order titled “Promoting Competition in the American Economy” (the “Order”). The Order encourages the Federal Trade Commission (FTC) to adopt rules banning or limiting the use of non-competition agreements and includes 71 other actions and recommendations addressed to more than a dozen federal agencies concerning a range of issues.

Limiting the Use of Non-Competes

The Order recommends that the FTC consider using its authority as follows concerning non-compete agreements:

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.

Executive Order Promoting Competition in the American Economy.

President Biden’s recommendation to the FTC to adopt rules banning or limiting the use of non-compete agreements at the federal level is the culmination of years of advocacy on his part and a step toward

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the fulfillment of campaign promises centered around the promotion of competition and workers' rights.

Non-competes have traditionally been regulated at the state level with a patchwork of statutory and common law standards that dictate the enforceability of the agreements in a given jurisdiction. For example, nearly a dozen states, including Virginia and Maryland, maintain laws that restrict the use of non-competes with "low-wage workers," with each state applying its own definition of that term. California, North Dakota, Oklahoma, and the District of Columbia, meanwhile, have passed laws that effectively ban the use of non-competes either entirely or with very limited exceptions. States without specific laws regulating the enforceability of non-competes generally rely on judicial consideration of a series of factors to determine whether a particular non-compete agreement is reasonable under the circumstances.

Federal action on the issue would presumably put companies and workers in a position to have a clear, commonly applied set of standards addressed to the enforceability of non-competes. The prospect of such federal action has been well known since the Obama Administration launched initiatives aimed at increasing competition in 2016.

There are lingering questions, though, about the FTC's legal authority to regulate non-competes through rulemaking. The general line of thinking is that the FTC has the power to act in this area based on Section 5 (a) of the FTC Act, which prohibits "unfair methods of competition." However, that authority is untested because the FTC has never issued a rule based solely on the FTC Act's prohibition of "unfair methods of competition." Any FTC rulemaking concerning non-competes could also face constitutional challenges on the grounds that the FTC is exercising greater authority than Congress may permissibly delegate to federal agencies (a concept referred to as the "non-delegation doctrine").

Additionally, the FTC could attempt to draw limits around the use of non-competes in certain circumstances or industries, based on its review of the record evidence. Companies should be aware that the FTC may consider targeted approaches as it considers how to exercise its rulemaking authority.

TAKEAWAYS: For the moment, the Order is a primarily symbolic effort by the Biden Administration to make good on its campaign promises, as it encourages but does not require action by the FTC and other federal agencies. That said, recently confirmed FTC Chairwoman Lina Khan has spoken favorably about federal rules targeting anti-competitive practices, including non-competes, in the past. Given Chairwoman Khan's apparent position, companies should likely expect to see some action concerning non-competes from the FTC during President Biden's first term. Still, it remains to be seen what that action will look like and how, if at all, it will be structured to address issues surrounding the propriety of FTC rulemaking in this area. For now, employers should continue to be mindful of state laws and judicially developed considerations related to the enforceability of non-compete agreements and to consult with counsel to ensure that their agreements are enforceable in a given jurisdiction.

For more information concerning the telecom and international trade implications of the Executive Order on Promoting Competition in the American Economy, please follow the links below:

Telecom

International Trade