

Publications

New Executive Order Seeks To Limit Non-Compete Agreements

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On July 9, 2021, President Biden issued an Executive Order “to promote competition in the American economy, which will lower prices for families, increase wages for workers, and promote innovation and even faster economic growth.” The Order seeks to do this through a **“whole-of-government effort to promote competition in the American economy” involving 72 initiatives by more than a dozen federal agencies. One of these initiatives will** “make it easier to change jobs and help raise wages by banning or limiting non-compete agreements and unnecessary, cumbersome occupational licensing requirements that impede economic mobility.” Exactly how that will be done remains to be seen.

Non-Compete Agreements

The Order states that “powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs.” According to the Order’s Fact Sheet, approximately half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers.

Importantly, the Order itself does **not** limit, ban, or otherwise restrict non-compete agreements or other restrictive covenants such as those prohibiting former employees from soliciting customers or from hiring their former co-workers (commonly referred to as no-raid or no-poaching agreements). Instead, “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.” The Order provides no details on how this will be done or the extent of any “curtailment.” Employers have to wait for the FTC to begin rulemaking.

Non-compete agreements are the product of state law – statutes and/or common law. It is unclear what authority the FTC has to regulate contracts under state law. An FTC rule to ban or severely restrict the use of non-compete agreements is likely to face legal challenge.

That said, employers, especially those with multi-state operations, need to be aware of jurisdictions that have banned non-compete agreements (such as California, Oklahoma, and the District of Columbia) as well as those that restrict or limit their use. For example, Illinois, Maine, Massachusetts, New Hampshire, Rhode Island, and Washington prohibit non-compete agreements for low-wage workers. Who qualifies as a “low-wage” worker varies by state. In New Hampshire, the threshold is about \$30,000 annually; in Washington, the threshold is \$100,000 (\$250,000 for independent contractors).

Occupational Licensing

The Order further targets “overly burdensome occupational licensing requirements that impede worker mobility and suppress wages also restrict competition.” Nearly 30% of jobs in the United States require a license. However, fewer than 5% of occupations that require licensing are treated consistently across all 50 states, which limits people’s mobility.

As with the Order’s focus on non-compete agreements, the Order does not limit, ban, or otherwise restrict occupational licensing. Instead, the Chair of the FTC, in the Chair’s discretion, is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority, “as appropriate and consistent with applicable law,” in addressing “unfair occupational licensing restrictions.” The Order provides no details on how such a restriction would be deemed “unfair” or how such unfairness would be addressed. Employers have to wait for the FTC to begin rulemaking.

Like non-compete agreements, occupational licensing is a function of state law, and it is unclear what authority the FTC has to require an employer in one state to recognize an employee’s occupational license granted by another state. An FTC rule may face legal challenges here as well.

Conclusion

The Executive Order does not provide a timeline for the FTC to adopt rules to address non-compete agreements and occupational licensing. The White House Office of Economic Policy, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC, is required to submit a report to the Chair of the White House Competition Council, within 180 days “on the effects of lack of competition on labor markets.” Given this, it seems likely that any rulemaking would occur in 2022, and we will report on any developments as they occur. In the interim, contact your Vorys lawyer if you have questions about non-compete agreements and related restrictive covenants.