LEGAL UPDATES

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Biden Administration Limits Non-Compete Agreements

Service

Labor & Employment

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On July 9, 2021, President Biden issued an executive order entitled Promoting Competition in the American Economy (EO) to combat high prices due to "lack of competition" and low wages resulting from "barriers to competition." To achieve its broad goal of promoting competition, the EO directs federal agencies to implement 72 initiatives aimed at promoting competition to benefit American workers and consumers. Chief among the initiatives is a call to federal regulatory agencies to ban or limit the "use of non-compete agreements and unnecessary occupational licensing requirements that impede economic mobility."

Momentum to regulate non-compete clauses in employment contracts

Citing a 2019 Economic Policy Institute report, the EO states that between 36-60 million private sector workers (26.8% - 46.5%) are subject to non-compete agreements, including workers who receive low wages. In comparison, a 2014 survey found that only 18.1% of workers were subject to non-competes. According to the EO, the combination of the increasing prevalence of non-compete agreements and wage stagnation justifies its request that the Federal Trade Commission (FTC) ban or limit non-compete agreements and ban unnecessary occupational licensing restrictions, and that the FTC and Department of Justice "strengthen antitrust guidance to prevent employers from collaborating to suppress wages to reduce benefits by sharing wage and benefit information with one another."

With respect to the provisions regarding non-compete agreements and occupational licensing restrictions, the language of the EO avoids using language that mandates specific regulatory action and instead couches its initiative to ban or limit non-compete agreements and increase enforcement efforts in terms of "encouraging" FTC regulatory action. Regardless of the

terminology, the EO establishes that limiting the use of non-competes is a priority for the Biden administration. In her remarks on May 4, 2021 at the Consumer Federation of America's Virtual Consumer Assembly and a March 25, 2021 press release, acting FTC Chair Rebecca Kelly Slaughter indicated that a new rulemaking group in the General Counsel's office will undertake new rulemaking to prohibit unfair methods of competition, including rules to prohibit non-compete clauses in most employment contracts. Newly confirmed FTC Chair Lina Khan is widely expected to support the new rulemaking. She was the legal director of the Open Markets Institute, which signed a petition filed with the FTC in 2019, along with several other signatories, for rulemaking that prohibits worker non-compete clauses.

State legislatures also have enacted legislation that limits or bans the use of non-compete agreements under varying conditions. As we noted in a recent commentary, the Illinois legislature passed legislation banning non competes for employees earning $75,000 per year or less *and* banning customer and co-worker non-solicits for employees earning $45,000 or less. Governor Pritzker is expected to sign the legislation by August 2021. Other states continue to modify laws to further restrict the use of non-compete agreements. The District of Columbia banned non-compete agreements with narrow exceptions in 2021. The activity by state legislatures demonstrates a growing trend in state-imposed restrictions on the use of non-compete agreements in employment contracts.

What this means to you

Federal rulemaking is a complex and lengthy process requiring federal agencies to provide a period of notice and an opportunity for stakeholders to file comments. Final rules also are subject to challenge in federal court. Consequently, it is unlikely that any change in federal law will be swift; however, in anticipation of potential changes in the law, including the trend by state legislatures of limiting non-compete clauses in employment contracts, employers should review their employment agreements and identify contracts which impose non-compete agreements against employees. Employers should consider modifying or removing non-compete clauses from employment agreements if the non-compete clause is:

Not narrowly tailored to protect legitimate protectible interests such as trade secrets and confidential information;

Imposed against employees who are low wage earners; and

Not in compliance with state law and anticipated changes in state law.

Additionally, non-compete agreements should include terms that permit courts to reform non-compete clause restrictions that are overly broad.

The changes in the legal landscape regarding the lawful use of restrictive covenants in employment contracts are evolving. If you have questions about the use of non-compete agreements with respect to your business, anticipated federal regulatory changes, or state law requirements, contact Erik Eisenmann, Beth Zewdie or your Husch Blackwell attorney.