Insights, News & Events

PRESIDENT BIDEN ASKS FEDERAL AUTHORITIES TO CURTAIL "UNFAIR" USE OF NON-COMPETE CLAUSES BY NATION'S EMPLOYERS

Insights
Jul 14, 2021

When various news outlets reported last week that President Biden was considering using his executive authority to ban or limit the use of non-compete restrictions, all manner of speculation arose from employers across the country as to what was coming down the pike. On Friday, the White House released the much-anticipated Executive Order, as well as an accompanying Fact Sheet – and the good news for employers is that it may not have been as drastic as many had feared. What do you need to know about this latest development, and what could be on the horizon?

Executive Order, Summarized

The key provision of the Executive Order is as follows:

> 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.

This was not the sweeping prohibition of non-compete restrictions by executive order that had been discussed earlier in the week. Instead, President Biden simply asked the Federal Trade Commission to look at using its authority on the subject.

What Should We Expect?

Related People

Michael P. Elkon
Partner
404.240.5849

Service Focus

Employee Defection and Trade Secrets

The vague nature of this Executive Order creates a number of possibilities that could unfold over the next several months:

- The FTC may decide that all use of non-compete restrictions is prohibited (the law in Oklahoma).
- The FTC may decide that not only is all use of non-compete restrictions prohibited, but that all related restrictive covenants such as customer non-solicitation provisions are also prohibited (the law in California and North Dakota).
- The FTC may decide to prohibit the use of non-compete restrictions with lower-wage employees. This has been the trend with numerous state statutes in recent years, such as those in Georgia, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Virginia, and Washington.
- The FTC could make additional changes to the way that non-compete provisions are used, such as requiring that an employer disclose in advance to a prospective hire that the new employee will be expected to sign an agreement containing a non-compete paragraph.

What's Next...And is This Even Legal?

The use of the term "*unfair* use of non-compete clauses" seems to indicate that the FTC will lean in the direction of simply preventing their use with lower-wage employees, which would not change much about how the agreements are used in practice – at least when it comes to workplace-related litigation. That said, the rule-making process for the FTC is lengthy and fact-intensive, so it is hard to guess what will come out of the administrative odyssey that is likely forthcoming.

Additionally, hanging over the process is the question of what power the FTC has to regulate non-compete restrictions, given that they have traditionally been interpreted exclusively under state common and statutory law. That issue will almost certainly be litigated, with the frequency and intensity of the challenges depending on the degree to which the FTC chooses to restrict the use of non-compete provisions.

We will be watching for news as the FTC process unfolds and will provide updates as they occur. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the author of this Insight, or any member of our Employee Defection and Trade Secrets Practice Group.