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Executive Order Suggests Future Federal Limitations on Noncompetition Agreements

On July 9, 2021, President Biden's White House issued an [Executive Order](#) on Promoting Competition in the American Economy (the "Order"). As relevant to employers, the Order states that consolidation of industry and marketplaces has increased employer power, which in turn limits workers' ability to bargain for higher wages and better work conditions. The Order also noted that employers often require workers to sign noncompetition agreements that restrict their abilities to change jobs. The Biden Administration believes prohibiting or strictly limiting the use of restrictive covenants will result in increased mobility and bargaining power, leading to higher wages and better jobs.

To address concerns regarding wage collusion, competition and worker mobility, the White House is encouraging the Attorney General of the United States and the Chair of the Federal Trade Commission ("FTC") to consider any necessary revisions to the Antitrust Guidance for Human Resource Professionals. That Guidance, originally released in October 2016, contains rules prohibiting businesses in the same industry from (a) sharing information about the terms and conditions of employment for workers, (b) making agreements to limit or fix wages, benefits or other terms of employment for workers, or (c) making agreements not to solicit or hire workers from competitors.

Even more significantly, the Order encourages the Chair of the FTC to consider the creation of rules to "curtail the unfair use of non-compete clauses or agreements that may unfairly limit worker mobility." In other words, the White House is suggesting the creation of a federal rule limiting or prohibiting restrictive covenants.

Notably, no specific details regarding the kind of limitations or prohibitions on restrictive covenants are provided in the Order. In addition, the rule-making process by federal agencies will take significant time to complete. Nonetheless, restrictive covenants for employees have increasingly been disapproved by state and local courts and authorities, and federal legislation (the Federal Workforce Mobility Act) has been introduced to restrict the use of non-competition agreements. President Biden's Order, therefore, is only the latest example of this trend.

Employer Takeaways:

Employers hoping to use restrictive covenants must be aware of all applicable state and federal laws, as well as current and upcoming federal rules and regulations. Employers should carefully consider the necessity of restrictive covenants as to particular employees, as well as the scope and breadth of such agreements, to create the greatest chance of enforcement.

If you have questions about President Biden's Executive Order, please contact a member of our [National Employment Law Group](#). You may also visit us at www.KutakRock.com.

