Breaking News: President Biden Signs Sweeping Executive Order Targeting Noncompete Agreements

Client Advisories

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We have written in the past about continuous efforts at the state and federal levels to eliminate or limit employers' ability to require employees to sign noncompete agreements ("NCAs"). In what has become a familiar refrain in successive Congresses, a bi-partisan group of lawmakers reintroduced the Workforce Mobility Act, a bill for federal legislation targeting NDAs, and then the bill languishes for the term.

Because these efforts have yet to gain traction, President Biden has stepped in and utilized executive authority to achieve the same goals as the stalled congressional action. On July 9, President Biden signed an executive order ("EO") broadly aimed at "Promoting Competition in the American Economy" where he attempts to do just that.

The EO is lengthy and has many components. For our purposes, the most notable portion deals with NCAs. One of the goals of the EO is to "[m]ake it easier to change jobs and help raise wages by banning or limiting [NDAs]." To do this, the EO "[e]ncourages the [Federal Trade Commission ("FTC")] to ban or limit [NDAs]." It remains to be seen what form this FTC action could take. But rest assured, at the very least, it would likely reduce the number of employees against whom NCAs could be enforced, particularly for certain types of workers, such as low-wage earners. In addition, because this regulation would take place on the federal level, it would affect all employers throughout the country.

The EO is far from the last word on the matter. Whether the FTC will act on the EO's encouragement and, if so, how it will remains to be seen. More importantly, whether the federal government has the constitutional authority to act in an area traditionally left to the states is an open question. And even if it does, it is unclear whether the executive branch has the authority to mandate these changes to the law, or whether this authority belongs solely to the legislative branch. These questions will likely lead to legal challenges to the EO, with the courts having the ultimate say in the matter.

Irrespective of how this process ultimately plays out, employers who use NCAs should not wait to let this process unfold, and should instead now take whatever steps they can in the event that the EO withstands legal scrutiny. Because if it does, the EO will affect employers in some major ways, perhaps rendering their existing NCAs unenforceable. For one thing, employers should take inventory of the types of agreements they now use to determine whether a different type of restrictive covenant, such as a nonsolicitation agreement, can protect the same interests for which the employer now uses an NCA. If an NCA is necessary, they should revise them to ensure compliance with the EO and any applicable state law. Second, employers should review and, if necessary, revise company policies to ensure they are taking the proper steps to protect confidential information and trade secrets. Third, employers should train new and existing employees about the importance of protecting, and the means by which to protect, confidential information and trade secrets. Our Trade Secret Protection and Non-Compete Group can help you with all three of these steps and help you implement a new strategy to this changing legal landscape right now.

The EO can drastically alter the landscape for NCAs and affect employers throughout the nation. If you have any questions about your existing NCAs and how they may be affected by the EO, feel free to contact Tom Muccifori, Chair of Archer's Trade Secret Protection and Non-Compete Group at 856-354-3056 or tmuccifori@archerlaw.com, or any member of the Group in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.

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Thomas A. Muccifori

Partner

tmuccifori@archerlaw.com

856.354.3056

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