EXECUTIVE ORDER SIGNALS THE WRITING IS ON THE WALL FOR NON-COMPETE AGREEMENTS

On July 9, 2021, President Biden issued an Executive Order labelled as an effort to promote competition in the American economy. Its primary focus is to encourage the Federal Trade Commission (FTC) Chair—through rulemaking efforts with the help of the rest of the commission—to "curtail" the use of non-compete agreements that "may unfairly limit worker mobility."

It remains to be seen to what extent the FTC will create new rules to discourage unfair non-compete agreement practices. There are, however, a few key takeaways from this executive order both legal professionals and businesses seeking protections should be aware of.

This Is the Next Step in Non-Compete Agreement Disfavor

The executive order represents another milestone along the way in the overall trend against the enforcement of non-competes. For decades, non-compete agreements have become harder to enforce in court. Now, with the federal government involved in what has been a reasonably clear trend line at the state level, it may be time for all of us as legal professionals to recognize the fading relevance of traditional non-compete agreements. While there will always be a role for non-competes in connection with the sale of a business or to protect valuable business information and relationships, the days of including them in every employee's hiring packet may soon come to an end.

Enforcement is difficult because non-compete agreements are expressly contracts in restraint of trade. By their very nature, these agreements limit competition or free enterprise by not allowing employees to freely accept positions with competing businesses or organizations. Such agreements are often seen as running counter to the principles behind capitalism, free enterprise, and even democracy. As a result, courts have leaned towards finding reasons not to enforce them rather than seeking reasons to enforce them.

Businesses Can Still Protect Themselves

When you look at any non-compete agreement, confidential information and customer relationships are almost always the important issues at stake. It makes sense. Confidential information is absolutely valuable and important; it belongs to a business and is entitled to protection, as do customer relationships cultivated by the company over time.

As a business today, instead of putting your energy into creating a non-compete agreement, you might, instead, take stock of your confidential information and your valuable business relationships. Then, focus your efforts on protecting those without limiting an employee's ability to move up in his or her career.

That means, rather than saying an employee is prohibited from working for a competitor, you can draft confidentiality and non-solicitation agreements that outline how a mobile member of the workforce cannot disclose specific confidential information to a new employer or solicit business from relationships given to them while employed by you. Those agreements often are not subject to the same level of scrutiny as non-compete agreements and are far more enforceable in court.

Expect Legal Action in Response to Rulemaking

The executive order still brings into question whether the FTC will indeed engage in any non-compete rule-making at all. And if so, to what extent will it attempt to exert control? If the Commission tries to establish some basic rules of the road about non-competes, there's a better chance the rules won't be challenged in court.

For example, it has been widely speculated the FTC may ban non-competes for people who earn less than a certain level of compensation. This would avoid the scenario that played out in the notorious *Jimmy John's* case. In 2016, under pressure from the attorneys general of New York and Illinois, the sandwich maker was forced to abandon its practice of enforcing non-competes against even its lowest level hourly employees. The case is now seen in the legal community as an egregious example of a corporation's attempt to limit low-wage worker mobility.

An all-out ban, which has been an ongoing narrative going back to the Obama administration, would undoubtedly see litigation arguing whether the FTC may have exceeded its statutory authority. Today, only four states outright ban non-competes: California, Oklahoma, North Dakota and the District of Columbia. While litigation on a nationwide ban is a given, there's a good chance, since this is the first time we are seeing the potential for federal involvement in non-compete agreements, litigation questioning the FTC's statutory authority could arise to challenge any new rules.

The Role of Mediation Will Only Continue to Grow

Mediation and ADR have always had a place in non-compete agreement enforcement matters. Even with the executive order, I don't anticipate that to change, primarily because sensible outcomes in these cases are often not something that can be accomplished in court. Judges are limited in what they can order. Typically, the non-compete will either be enforced or not. At mediation, however, we can create customized solutions for everyone involved. This often includes sensible modification of the contract to account for the unique circumstances of each case.

Mediation is particularly suitable in these cases because non-compete agreement lawsuits can be complex with plenty of gray areas. Arguments with merit can be found on both sides, and that often translates into long, expensive court battles with no real confidence of success for either party. A mediator can bring about a timely resolution that saves money. In fact, if the executive order results in certain federal rules that make non-compete agreements even harder to enforce, companies might be inclined to head to the mediation table sooner than in the past.

Final Thoughts

The executive order on non-compete agreements was crafted partly to make good on political promises made by President Biden to ban non-competes altogether. The order was crafted with language that focuses on employee mobility and worker fairness; language used during previous administrations as well.

Regardless of whether federal rules are created, it appears that confidentiality and non-solicitation agreements are likely the better pathway for businesses going forward. Non-compete agreements will be reserved for special circumstances, such as higher-level employees whose direct knowledge of inner workings or access to trade secrets could damage the company if exposed to a direct competitor. Beyond those circumstances, the hill employers must climb to enforce non-compete agreements appears to have just become even steeper with the issuance of this executive order.

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