RETHINKING NON-COMPETE AGREEMENTS

PRESIDENT BIDEN RECENTLY ISSUED AN ORDER TITLED “EXECUTIVE ORDER PROMOTING COMPETITION IN THE AMERICAN ECONOMY”. THERE ARE SEVERAL PROVISIONS IN THIS ORDER THAT FOCUS ON PROMOTING EMPLOYEE COMPETITIVENESS, ONE OF WHICH ADDRESSES NON-COMPETE CLAUSES IN EMPLOYMENT AGREEMENTS. OVER THE LAST FEW YEARS SEVERAL STATES, INCLUDING CALIFORNIA AND WASHINGTON, HAVE PASSED LEGISLATION THAT SEVERELY RESTRICTS NON-COMPETE AGREEMENTS.

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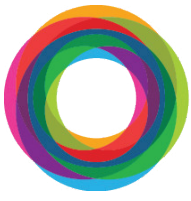
There are exceptions in the legislation including compensation of the employee. For example, if a company terminates an employee but does not want the employee to seek immediate employment with a competitor, the company would need to compensate the employee for that non-compete period.

In states where specific legislation has not been implemented, courts have been inclined to limit employers on the scope of non-compete clauses. For example, in Indiana, in order to enforce a non-compete an employer must demonstrate that it has a legitimate interest in being protected by the agreement. Additionally, the agreement must be reasonable in its scope including duration of the agreement and the functional activity of the employee. This judicial interpretation is consistent in many states including New York and New Jersey.

What does the recent executive order mean for employers who have current non-compete clauses with their employees? In the short term, likely very little changes. The executive order asks that the Federal Trade Commission (FTC) consider using its authority to curtail the use of non-compete clauses. The order did not instantly nullify all non-compete clauses in employment agreements. Some experts have weighed in, suggesting that the FTC will limit the ban to low-income or blue-collar workers. But we have all seen instances of executives sued by former employers in situations where the employee has gone directly to a competitor. In recent years, courts have been unwilling to side with the former employer because confidentiality hasn't yet been broken nor have trade secrets been violated. Employers have had difficulty persuading courts of potential future harm. It seems unlikely that the FTC would ignore executives because these instances have occurred.

In the long term, between actions by the FTC, state legislatures, and judicial analysis, it is time for employers to take the initiative of consulting with legal counsel now to anticipate responses to these potential changes. It is critically important that business interests remain protected including protection of trade secrets and confidential information. Legal counsel and senior human resources executives will help navigate these complexities while addressing employment agreements that acknowledge an employee's ability to effectively manage their careers.



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