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Biden's Executive Order on Non-Compete Clauses & Agreements

On July 9, 2021, President Biden issued his Executive Order directing federal agencies to implement seventy-two different initiatives intended to promote competition across the American economy. Ideally, these initiatives will spur economic growth and recovery. Critical for employers, President Biden's "Executive Order on Promoting Competition in the American Economy" seeks to ban or limit the ability of employers to use non-compete agreements in order to make it easier to change jobs and raise wages. Although the executive order does not render non-compete provisions illegal, employers should take particular caution in deciding whether a non-compete provision is necessary to protect their business interests moving forward.

Non-compete agreements are frequently implemented by employers to protect trade secrets and other confidential business information from being taken to a competing entity by a current or former employee. A fair number of states already limit or effectively ban non-compete agreements with very limited exceptions. The President's executive order directs the Federal Trade Commission [FTC] to begin a rulemaking process that would ban or limit the use of non-compete agreements under federal law. Although no rules have been promulgated yet regarding the enforceability of non-compete agreements on a federal level, employers should begin thinking about how they may still protect their business interests in the event the FTC proceeds with rulemaking.

During an address at the signing of the executive order, President Biden called non-competes "ridiculous" and posited that they are implemented only to keep wages low, not to protect the interest of the employer as intended. President Biden also noted that one in five American workers without a college degree are subjected to non-compete agreements, potentially indicating his intent to direct limitations on non-compete agreements for low-wage, hourly workers. Employers should, therefore, specifically consider whether non-compete provisions should necessarily be imposed on low-wage employees. To discuss best practices and strategies, consult with your Stokes Wagner counsel.

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