



President Biden's Executive Order Concerning Non-competition Agreements

As part of a larger push to “promote competition in the American economy,” on July 9, 2021, President Biden signed an executive order which, in part, encourages the Federal Trade Commission (“FTC”), the enforcer of federal antitrust law, to ban or limit employee noncompetition (“non-compete”) agreements.

The non-compete serves as a mechanism to protect the employer's interest in its confidential, proprietary data shared with the employee, and its need to prevent such data from being used by the employee and others to unfairly compete. A typical non-compete restricts an employee, after his/her separation of employment, from working for a competitor or otherwise competing with their former employer. They are for a set duration and normally limited in geographic or other scope.

To be clear, President Biden's executive order does not *itself* prohibit or limit non-competes. It is an instruction to the FTC to **consider** taking action as a regulatory body. It is not entirely clear whether the FTC has the authority to ban or limit non-competes, traditionally the province of state law, and there is bound to be pushback on any major regulation. It is quite possible that in the near future the FTC will take some steps to limit the use of non-competes.

The FTC's likely focus will be lower level/minimum wage employees and others who do not normally have the type of sensitive proprietary information that could subvert their employer's interests. For now, the law remains unchanged and, to the extent non-competes were enforceable before the executive order, they still are, at least for the time being.

Specific enforceability of non-competes and similar employment restrictions under Texas law can be a somewhat complex and nuanced issue. Your decision whether to have employees sign non-competes in the first place, in light of other available protections for confidential and proprietary information, can be challenging. More difficult still, is the decision whether to pursue sometimes costly injunctive relief (e.g. temporary restraining orders) in Court to enforce them.

Look for more thoughts on the above, including what you need to protect your assets and considerations for enforcement to come in future AM Law Alerts. In the meantime, contact us for any assistance and stay tuned for updates on any FTC developments.

For more information, please contact [Chuck Jeremiah](#).