July 29, 2021

President Biden Issues Executive

On July 9, President Biden issued an expansive executive order for the stated purpose of reducing the trend of corporate consolidation, increasing competition and delivering concrete benefits to America's consumers, workers, farmers and small businesses. The executive order creates the White House Competition Council and charges various federal agencies with addressing different competition-related concerns.

Significantly, the executive order encourages the Federal Trade Commission (FTC) to "consider" exercising its statutory rulemaking authority to "curtail" unfair use of noncompetition clauses and other clauses or agreements that may limit worker mobility. While a ban or limit on noncompetition agreements will create concerns for employers, it is important to note that the executive order only seeks to limit the use of noncompetition agreements as a policy. As of now, the FTC has not issued any policy or rule curtailing the use of noncompetition agreements, so employers need not take immediate action. Any rule the FTC may eventually issue also would likely face challenges in court by employers. The FTC would have to overcome significant political and constitutional hurdles to create and enforce any such rules. Given these challenges and other procedural prerequisites, even if the FTC were to determine that a rule curtailing the use of noncompetition agreements is appropriate, it would likely be years before it could issue one.

This is not the first time the White House has taken aim at noncompetition agreements. In April 2016, President Obama issued an executive order titled "Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy," which, similar to President Biden's recent executive order, directed federal agencies to, among other things, consider actions they could take to eliminate barriers to competition and reduce anticompetitive activity. In October 2016, the White House issued a "State Call to Action," which urged state lawmakers to adopt "best practice policy objectives" in order to reduce what the White House believed to be the "misuse" of noncompete agreements.

This also would not be the first time the FTC has reviewed the use of noncompetition agreements. In January 2020, the FTC held public workshops regarding the use of noncompetition agreements; however, no specific rule or rulemaking process resulted from those workshops.

Takeaway

While the executive order represents an effort to regulate the use of noncompetition agreements at the federal level, employers should be aware that, for now, noncompetition agreements remain subject to state law. Certain jurisdictions (including, for example, Massachusetts, Rhode Island and Washington, D.C.) already impose limits on employers' use of noncompetition agreements, and several state legislatures (including, for example, New Jersey, New York and Connecticut) are considering or have considered proposed legislation. Employers should continue to use noncompetition agreements to protect themselves and their legitimate business interests, but should be aware that limiting legislation may be on the horizon. Additionally, employers should review their existing noncompetition agreements to ensure that they comply with current state law and to make amendments as necessary. We will continue to monitor and provide guidance should new legislation affecting noncompetition agreements be proposed and/or enacted.

Authors



Francine Esposito
Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ | (973) 966-8199

New York, NY | (212)-297-5800

hbrochin@daypitney.com



Theresa A. Kelly
Partner

Parsippany, NJ | (973) 966-8168

tkelly@daypitney.com



James M. Leva
Partner

Parsippany, NJ | (973) 966-8416

Stamford, CT | (973) 966-8416

jleva@daypitney.com



Michael J. Napoleone
Partner

West Palm Beach, FL | (561) 803-3518

mnapoleone@daypitney.com



Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com