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Meridian Client Update

President Biden Seeks Overhaul of Non-Compete Agreements

President Biden signed an Executive Order related to non-compete clauses and agreements on July 9, 2021. Under the Executive Order, the Federal Trade Commission (FTC), which has a bipartisan mission to protect consumers and promote competition, is "encouraged" to adopt rules that would curtail the unfair use of such agreements that may unfairly limit worker mobility.

Currently, the Executive Order has no effect on outstanding non-compete agreements.

President's Biden's Executive Order "Promoting Competition in the American Economy" takes aim at a number of business practices that the White House claims "stifle competition" and "drive wages lower." Among these business practices, the Executive Order specifically identifies non-compete agreements. The Executive Order appears to be principally concerned with agreements covering rank-and-file employees. However, the Executive Order provides no specific guidance or recommendations as to the details of any future FTC rulemaking.

What is the current effect of the Executive Order?

The Executive Order standing alone without FTC rulemaking:

- "Encourages" but does not require the FTC to consider adopting rules that would "curtail the unfair use of non-compete clauses … that may unfairly limit worker mobility."
- Does ***not*** directly affect any currently outstanding non-compete agreements and will ***not*** affect agreements entered into at a future time absent FTC rulemaking.

Unless and until the FTC adopts rules, the enforceability of non-compete agreements will continue to be governed by applicable state law.

What is the rationale for the Executive Order?

Non-compete agreements are widely used by both private and public companies. In their most-restrictive form, these are clauses or provisions in employment, hiring and severance arrangements that prohibit employees from accepting employment at competing organizations within a defined geography for a fixed period of time following termination of employment (usually one or two years). Prohibitions against soliciting customers and other employees may also be part of the provisions that commonly apply to executive officers, and may extend to broader employee groups.

Citing a survey conducted by the Economic Policy Institute (EPI), the White House notes that "roughly half of private-sector businesses require at least some employees to enter non-compete agreements,

affecting some 36 to 60 million workers." The EPI survey also claims that "nearly a third" of private sector employers require all employees to enter non-compete agreements, regardless of pay or job duties.[1]

The implication of these numbers is that the overwhelming majority of non-compete agreements are entered into with employees who are not executive officers or part of senior management. These statistics suggest that the underlying rationale of the Executive Order is to address the adverse effects of non-compete agreements on this population of employees who do not have the bargaining power of executives to negotiate the terms of their employment, correspondingly limiting worker mobility to other "better paying" job opportunities.

What are the terms of the Executive Order?

The Executive Order is sparse in its terms and clearly relies upon the FTC to fill in the blanks. Specifically, the Executive Order encourages "the Chair of the FTC … to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

Any rule adopted by the FTC would presumably address (i) the definition of "unfair" use of such agreements, (ii) the class of employees covered, (iii) the nature of any curtailment, (iv) the manner in which the rule would be enforced, (v) penalties for non-compliance and (vi) reporting requirements.

Meridian comment. Whether the FTC has the authority to adopt rules governing non-compete agreements is not clear and has been debated widely in legal articles. If the FTC determines that it has the authority to press ahead with rulemaking in this area, the adoption of final rules would not be imminent. At best, the rulemaking process could take less than a year but often spans several years. So far, the FTC has not publicly commented on if or when it will begin to examine the need to regulate non-compete agreements.

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The ***Client Update*** is prepared by Meridian Compensation Partners' Governance and Regulatory Team led by Donald Kalfen. Questions regarding this Client Update or executive compensation technical issues may be directed to Donald Kalfen at 847-235-3605 or dkalfen@meridiancp.com.

[1] The EPI survey used a random sample of 634 private sector businesses and was conducted from March 2017 to July 2017. The EPI survey should not be considered representative of employment practices by large and midsized public companies. The EPI survey does not include a list of surveyed companies; however, it does provide that slightly over 70% of surveyed companies employed between 50 and 499 employees. Given their relatively small employment levels, we believe it is likely that the overwhelming majority of these surveyed companies were not large or midsized publicly traded entities.