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Labor and Employment Update: New Executive Order Seeks to Limit Non-Compete Agreements

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(Published in the Summer 2021 issue of *The Bankers' Statement*)

A recent Executive Order from President Biden could have a lasting impact on the ability of your financial institution's employees to change jobs. Issued on July 9, 2021, this Executive Order seeks "to promote competition in the American economy." One of the initiatives in the Order aimed at promoting competition purports to "make it easier to change jobs and help raise wages by banning or limiting non-compete agreements and unnecessary, cumbersome occupational licensing requirements that impede economic mobility." Exactly how that will be done, however, remains to be seen.

However, it is important to note that the Order itself does not limit, ban, or otherwise restrict non-compete agreements or other restrictive covenants. According to the Order's Fact Sheet, approximately half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers. This includes restrictions like those prohibiting former employees of your financial institution from soliciting customers or from hiring their former co-workers (commonly referred to as no-raid or no-poaching agreements). Instead, the Order merely "encouraged" the Chair of the Federal Trade Commission (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."

Interestingly, non-compete agreements are typically governed by state law. In fact, after the Obama Administration released a "Call to Action on Non-Compete Agreements" in 2016, more than 20 states enacted some change to their law governing non-compete agreements. It is unclear what authority the FTC has to regulate contracts under state law, so it is important to note that the executive order directs the FTC to take these actions, and not another administrative agency. Accordingly, an FTC rule to ban or severely restrict the use of non-compete

agreements is likely to face legal challenges.

That said, employers should be aware that non-compete agreements are beginning to face popular opposition across the country. Some jurisdictions (such as California and Oklahoma) ban non-compete agreements entirely, while others restrict or limit their use. For example, Illinois, Maine, Massachusetts, New Hampshire, Rhode Island, and Washington prohibit non-compete agreements for low-wage workers. Who qualifies as a “low-wage” worker varies by state.

Some commenters have pointed to the Order’s usage of the phrase “the unfair use” of non-compete agreements as a sign that not all use of these agreements is going to be curtailed. Indeed, although three states (the two above and North Dakota) completely prohibit non-compete agreements, those laws have been in place for over a century. Against this backdrop then, it is possible that any subsequent FTC rule would merely target those non-compete agreements the Biden Administration deems “unfair,” and not those it deems “reasonable.” At the end of the day, however, the Order provides no details on how it is to be accomplished, or the extent of any “curtailment.” As a result, employers such as your financial institution will likely have to wait for the FTC to begin rulemaking (a process that can take anywhere from several months to years) to get a sense of how this will be implemented.

Furthermore, the Executive Order does not provide a timeline for the FTC to adopt rules to address non-compete agreements. It does, however, direct the White House Office of Economic Policy, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC, to submit a report to the Chair of the White House Competition Council within 180 days “on the effects of lack of competition on labor markets.” Given this, it seems likely that any rulemaking would occur in 2022, at the earliest, but this is worth keeping an eye on in the meantime if your financial institution utilizes non-compete agreements.

Financial institutions with questions about non-compete agreements and related restrictive covenants, or how their regulation may affect bank operations, should contact qualified labor and employment law counsel.