Employee Noncompete Agreements Have Uncertain Future after Executive Order

Federal government to consider supplanting state law with nationwide ban or limits on noncompetes.

President Biden signed an executive order today encouraging the Federal Trade Commission (FTC) to consider rules that would "curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility." The FTC is to work with the newly created White House Competition Council and other agencies to review how noncompetes affect competition for employees. If federal rules are eventually implemented, they could apply nationwide, preempt state noncompete laws, and even void existing agreements.

The order itself does not impose any restrictions on the use of noncompetes. Nor does it even recommend concrete reforms. So it's not clear if future federal action could ban noncompetes altogether, as in California and DC, or if it merely could limit the circumstances where noncompetes are allowed, as in Washington and states with minimum salary thresholds and other prerequisites. The president's public remarks suggest the government's focus will be on noncompetes that restrict lower paid and unskilled employees. But that could change as these agencies review the issue and develop regulations.

Though employers don't yet know if and how federal action will affect their noncompetes, there are steps they can take now to minimize its impact:

1. **Consider using other types of agreements to protect your business.** Noncompetes are just one type of restrictive covenant. Other types of agreements may offer the same result that an employer wants to achieve with a noncompete. **Nonsolicitation agreements** can prevent departing employees from taking customers and other employees with them, for example. **Nondisclosure agreements** can prevent employees from giving your confidential information to a competitor or using it to compete against you. **Invention assignment agreements** can ensure that employers own the rights to intellectual property the employees create and keeps it away from competitors. And an added benefit: these agreements are usually easier to enforce than noncompetes, because they are more tailored to the employer's legitimate business concerns and less likely to prevent the employee from earning a living.
2. **Create robust policies and train employees consistently...and often.** Comprehensive workplace policies are effective ways to buttress post-employment contractual restrictions. Most employers likely already have codes of conduct and confidentiality policies addressing how employees are to handle sensitive and proprietary information. Consider supplementing those with policies describing expectations about network security, use of company devices, and working from personal devices. And be sure to train all

employees on these policies, especially front-line managers who are likely to be the people enforcing these policies. And once isn't enough: a good training program cycles employees back through at least every year, if not more often, and engages employees throughout their tenure, from onboarding to separation.

3. **Sweeten existing noncompete agreements.** Noncompetes are most often criticized when they prevent an employee from leveraging their work experience to earn a living. Employers can avoid that criticism by narrowing or revising existing noncompetes. For example, a noncompete might be revised to take effect only if the employee does something else—like solicit customers or disclose trade secrets—that violates contractual or legal duties they owe (so-called "springing noncompetes"). Or an employer might offer to pay employees some amount during the noncompete period ("garden leave"), which may not be appropriate or feasible for all employees, but might be for particularly important ones. Noncompetes perceived to better balance the employee's interests with the employer's are more likely to be enforced and less likely to be targeted by new regulations.