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PRESIDENT BIDEN TARGETS NON-COMPETE AGREEMENTS

On Friday, July 9, 2021, President Biden issued a sweeping Executive Order which included in its scope possibly banning non-compete agreements. The Executive Order overall seeks to promote competitive markets in the U.S. Although Big Tech is a focus of the President and Congress, the Executive Order could affect every private sector employer with a non-compete agreement. The Executive Order is not self-enforcing. Rather, the President has directed the Federal Trade Commission to act on the Executive Order. What the FTC will do remains to be seen.

Non-competition agreements may include agreements not to solicit customers, not to solicit (poach) employees, not to work for a competitor in a competing position, and to forego ownership interests or other relationships with a competitive business. Such agreements are most often used with executive, sales, engineering, and customer service employees. The enforceability of these agreements is primarily determined by state law. During the past five years, approximately 16 states have enacted legislation addressing non-compete agreements. While each state's scheme is unique, the enforceability of these agreements generally depends on the scope of the employer's protectable interest and the scope of the restrictions on the employee (in terms of geography, time, and class of prohibited occupations). By convention, and sometimes as dictated by state statute, courts are reluctant to enforce these agreements on lower- to middle-wage earners. In the absence of a high salary or an employee's knowledge of bona fide trade secrets, many courts will refrain from enforcing agreements that in essence preclude someone from working in the industry where the employee lives.

With increased federal and state scrutiny of non-compete agreements, we recommend that employers with such agreements have them reviewed to ensure they are enforceable. Employers without such agreements should consider whether requiring such an agreement is necessary to protect the business. We suggest that the terms of the agreement should be in response to this question: What is necessary to protect the business? Do not over-reach, as this is an invitation to the court to, at best, rewrite the restriction, and, at worst, to strike the restriction altogether.

If you have any questions, please contact Al Vreeland at 205-323-9266 or avreeland@lehrmiddlebrooks.com.

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