August 9, 2021

Are Non-Compete Covenants Likely to Become Unenforceable after the Issuance of the Biden Administration's Executive Order? Don't Bet On It

Client Bulletins

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On July 9, 2021, President Biden signed a sweeping Executive Order ("EO") intended to promote competition in a number of sectors of the economy, including healthcare. The EO targets 4 areas of healthcare in particular--prescription drugs, hearing aids, hospitals and health insurance companies. The Biden Administration intends to promote competition in a number of ways, including through rulemaking targeting non-compete covenants the Administration deems to be unfair. According to the White House summary of the EO:

"Competition in labor markets empowers workers to demand higher wages and greater dignity and respect in the workplace. One way companies stifle competition is with non-compete clauses. Roughly, half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers."

The key provisions of the EO relating to non-competes or other restrictions on employment purport to do the following:

- Encourages the FTC to ban or limit non-compete agreements;
- Encourages the FTC to ban unnecessary occupational licensing restrictions that impede economic mobility;
- Encourages the FTC and DOJ to strengthen antitrust guidance to prevent employers from collaborating to suppress wages or reduce benefits by sharing wage and benefit information with one another.

While the language in the EO refers to the "unfair" use of non-compete clauses, the Biden Administration's Executive Order Fact Sheet notes that "the President encourages the FTC to ban or limit non-compete agreements," generally. In the short time since the EO was published there has been growing concern about how anticipated FTC rules could impact the specifically targeted healthcare areas, and there has also been rampant speculation about the potential impact on existing and future non-compete agreements with physicians and other healthcare providers. Some commentators have even speculated that all such restrictions could become unenforceable.

While the EO and potential FTC rulemaking raise questions about the viability of current and future non-compete covenants, it would be risky for healthcare providers to conclude that all non-competes could be eliminated in the near future. A comprehensive federal rule governing non-competes would be an unprecedented move since the regulation of non-compete agreements has historically been left to the states. Also, there are several considerations that may moderate sweeping changes to the current non-compete environment, including the following:

1. **Differences between high paid and low paid workers**. While the federal government, like some states, may restrict the use of non-competes for lower-wage workers in industries where workers have few business protections and little access to legal representation when signing such covenants, the same rationale often does not hold true for highly compensated professionals, like physicians and healthcare executives, who may enjoy greater business leverage and access to legal representation to obtain contractual protections. As such, the federal government may distinguish between different groups of workers based on pay.
2. **Differences between employment and ownership non-competes.** States have consistently recognized that there is a significant difference between non-competes entered into in connection with employment, and those signed by owners of a business or in connection with the sale of a business. Legislators and courts more closely scrutinize non-competes entered into in connection with employment while viewing ownership and sale of business non-compete covenants more favorably. It remains to be seen how FTC regulations would take into account this long-established precedent, and restrictions in connection with the ownership interest in a business may continue to be treated differently.
3. **The role of non-competes in protecting a company's legitimate business interests.** Courts have generally been more willing to enforce employment non-competes where a business has identifiable trade secrets, or other protectable confidential information, substantial goodwill, and/or otherwise can demonstrate the need for a narrowly tailored employment non-compete to protect a legitimate business interest. Presumably, the federal government will consider those interests in taking the steps directed by the EO.

These considerations, and their interplay in any particular non-compete scenario, likely limit any sweeping generalizations that may be made about the future enforceability of non-compete covenants in the healthcare sector, particularly until more specifics are seen from the federal government. As such, healthcare providers should avoid basing current non-compete covenants primarily on expectations of what may (or may not) happen in the future based on the recent EO.

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