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# CLIENT ALERT: President Biden Signs Executive Order Directing Federal Agency to Take Action To Limit Employment Non-Competition Agreements

On July 9, 2021, President Joseph Biden signed an expansive Executive Order that includes directives to consider federal regulations significantly limiting employment non-competition agreements. Although the Executive Order is not yet a regulation, it represents a first step, and directs the Federal Trade Commission ("FTC") to exercise its authority "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

Businesses have historically used non-competition agreements to protect confidential information, trade secrets, and other valuable proprietary assets. Employees who are subject to non-competition agreements are barred from working for competitors for a fixed period, usually less than two years after their employment has ended. According to the White House, half of this country's private sector businesses require employees to enter non-competition agreements.

The use of non-competition agreements has been expanded broadly in recent years—critics say inappropriately—to restrict mobility of lower wage employees who have limited bargaining power. In 2018, Massachusetts joined a handful of other states that limit use of non-competition agreements and barred post-employment restrictions covering most kinds of hourly, "non-exempt" employees, workers laid off or terminated without cause, and employees under 18.

The President's Executive Order does not have immediate effect on employers. For those in states that do not presently restrict the use of non-competition agreements, however, FTC action in the months ahead could mark a dramatic change to the legal landscape. It bears noting that federal regulatory agencies have not generally been involved in this area of the law. Rather, the enforcement of post-employment restrictive covenants is more often addressed by state governments and the courts, which continue to closely scrutinize non-competition agreements when employers seek to enforce them.

Notwithstanding the shifting legal landscape, employers have several tools available to restrict departing employees' use of proprietary company information and customer goodwill. These include non-solicitation agreements aimed at restricting employee poaching and customer solicitation, as well as confidentiality agreements. It is important that employers seeking to protect themselves understand legal limitations before hiring employees who will have access to sensitive information.

There are significant advantages to addressing the potential misuse of confidential information and trade secrets when making initial offers of employment and similar pre-employment agreements. Employers that depend on restricting confidential information should stay apprised of further changes to federal law as the President also asked the FTC to enact rules curtailing "other clauses or agreements that may unfairly limit worker mobility."

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Employers with questions about the advisability of using restrictive covenants and other options to protect themselves should consult with their MBJ attorney. In the meantime, we will continue to monitor federal regulatory action and provide future client updates.

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