

President Biden's Recent Executive Order and Pending New Jersey Bill Highlight a Growing National Trend to Curtail the Use of Non-Compete Agreements

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On July 9, 2021, President Biden signed the [Executive Order on Promoting Competition in the American Economy](#) which, among other directives, encourages the Federal Trade Commission (FTC) to exercise its statutory rulemaking authority to curtail the use of non-compete clauses and other agreements that may unfairly limit worker mobility. The Executive Order has no immediate impact on the enforceability of non-compete agreements, and even *if* the FTC exercises its statutory rulemaking authority, any regulations will take some time to become effective.

Nonetheless, the Executive Order highlights a legal trend toward limiting or eliminating the use of non-compete agreements. For example, California, Oklahoma, North Dakota, and the District of Columbia have banned non-compete agreements, and many other state legislatures have enacted laws significantly limiting their application and enforceability. In New Jersey, a bill pending in the State Assembly (A1650) declares that non-compete agreements discourage innovation, impose hardships on employees and specialized professionals, and restrain trade/commerce. If passed into law, the Bill would not completely ban non-compete agreements, but would make them unenforceable against certain categories of employees including: (a) nonexempt employees under the Fair Labor Standards Act; (b) employees who have been terminated without a determination of misconduct or laid off by action of the employer; (c) independent contractors; and (d) employees whose period of service to the employer is less than one year.

Under the proposed Bill, even for employees that do not fall into one of the aforementioned categories, employers would be required to follow new restrictive requirements in drafting non-compete agreements. Employers would also be required to continue to pay an employee his or her full salary and make benefit contributions on the employee's behalf during the period of time covered by the non-compete agreement. If an employer intends to enforce a non-compete agreement, the Bill mandates that the employee must be notified in writing within ten days of termination, or else the agreement is void.

Significantly, as drafted, the Bill would not apply retroactively, and agreements already in effect on or before the date of enactment would not be subject to the Bill's requirements. However, given the national trend toward unenforceability, employers should understand limitations exist with any non-compete agreement.

Employers are encouraged to contact counsel to ensure their non-compete agreements comply with current state laws and monitor changing trends in the law. Additionally, employers should

consider alternate ways to protect their business interests and proprietary information such as through the use of non-solicitation and confidentiality agreements.