Client Alert: Biden Administration to Push Ban on Non-Compete Agreements

By RIW on January 18, 2021

In December, President-Elect Biden released his "**Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions**" (the "Plan"), outlining the incoming administration's labor and employment policy goals. Among the Plan's proposals are the "eliminat[ion] of non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and [an] outright ban [on] all non-poaching agreements". The Plan states that the Biden administration intends to work with Congress to achieve these goals. If realized, a federal prohibition against most non-compete agreements would represent a major change in an area traditionally governed by state law in which the approach can vary markedly by state.

Non-compete agreements, as the name suggests, typically restrict a person—whether an employee or, as in some cases, a party to a company sale or other transaction—from working for or otherwise providing services to a competitor of the protected company. Such agreements are often seen as a means to protect against the competitive use of a company's proprietary information, like trade secrets, and other valuable information such as customer lists and market analysis.

Those opposed to such agreements, particularly when drafted broadly with regard to either duration, geography or prohibited activities, view them as stifling mobility, competition and entrepreneurship.

The enforceability of non-compete agreements is state dependent. Most states permit non-compete agreements to some degree, often requiring at a minimum that the non-compete restriction be reasonable in scope, taking into account the duration of the restriction and the size of the geographic area to which it applies. An increasing number of states, however, have enacted stricter rules limiting the permitted use of non-competes. Massachusetts, for example, prohibits non-compete agreements with lower-wage workers and requires that employment-related non-compete restrictions be supported by separate consideration and limited to one year or less following termination of employment. California, meanwhile, has a near total ban on post-employment non-compete agreements.

The Biden proposal follows other activity at the federal level in recent years, as concerns about worker mobility, wage suppression, and anti-competition have prompted calls to curtail the use of non-compete agreements nationwide. In 2016, the Obama administration issued a "State Call to Action on Non-Compete Agreements" urging states to ban them or significantly restrict their enforceability. More recently, the Federal Trade Commission held a public workshop in January 2020 to examine the feasibility of an FTC rule restricting the use of non-compete clauses in employment contracts.

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The actual details of any eventual legislative or regulatory proposals under the Biden administration remain to be seen, but Democratic control of Congress, along with bipartisan sentiment on the need for non-compete reform, increase the likelihood of significant federal changes to non-compete law. To avoid potential conflict with any forthcoming rules, businesses should review their practices with respect to non-compete agreements and consider utilizing such agreements only where necessary to protect the business's actual trade secrets.

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