

Biden Executive Order on Promoting Competition in the American Economy and its Potential Impact on Louisiana State Law

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On July 9, 2021, President Biden signed an Executive Order on Promoting Competition in the American Economy (the "Order") "encourag[ing]" the Federal Trade Commission (the "FTC") to use its statutory rulemaking power "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." This e-alert discusses the Order and its potential impact on Louisiana law governing non-compete agreements.

Louisiana Law:

Non-competition agreements restrict an employee's ability to engage in a business similar to his or her employer. They also restrict the employee's ability to solicit the employer's customers. These types of agreements are used by companies to protect trade secrets and customer goodwill developed by the company. Louisiana allows the use of non-competition agreements only under limited circumstances. Specifically, under Louisiana law, a non-compete agreement is valid as long as (1) the agreement specifies the geographic territory (consisting of one or more parishes or municipalities, or parts thereof) where the restriction applies, (2) the employer conducts a similar business within the restricted geographic territory, and (3) the duration of the restriction does not exceed two years. La. R.S. 23:921(C); *H & E Equipment Services, Inc. v. Kleinpeter*, No. 2020-CA-0798, 2021 WL 1609250, at *2 (La. App. 1 Cir. Apr. 26, 2021); *Heard, McElroy & Vestal, LLC v. Schmidt*, 57,783 (La. App. 2 Cir. 9/25/19), 280 So. 3d 806, 811. In fact, as recently as August 2020, Louisiana expanded the permissible scope of non-compete agreements in favor of companies by permitting corporations, partnerships, and limited liability companies to enter into agreements that restrict their shareholders, partners and members, respectively, from becoming employees of a competing business if the same three requirements are met. See La. R.S. 23:921(J), (K), and (L).

Biden Executive Order:

As to President Biden's Order, it does not expressly forbid or otherwise affect current law governing noncompetition agreements. Rather, it "encourage[s]" (and does not require) the FTC to "consider" using its authority to ban or limit non-compete agreements. While it appears that the Order narrowly targets "unfair" non-compete agreements, a statement issued by the Biden Administration explains that the Order "[e]ncourages the FTC to ban or limit non-compete agreements" generally, not only those that are "unfair." Nevertheless, the language of the Order itself is vague in that it does not specify the manner or to what extent the FTC should regulate non-competes, which ultimately gives the FTC flexibility in deciding how, if at all, it should follow

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It would not be surprising if the FTC were to respond favorably to President Biden's order, given that current FTC Chair Lina Khan, prior to her nomination, published an article proposing that "the FTC might consider engaging in rulemaking" on the issue of non-compete agreements. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357, 373-74 (2020). At this point, however, the FTC has not directly responded to this aspect of the Order, and it is unclear when or if it will ultimately initiate new rules governing non-competes.

If the FTC were to establish a comprehensive federal rule governing non-compete agreements, this would represent a shift in the current regulation of these types of contracts. For the past century, non-compete agreements have been primarily regulated by the states, with many, like Louisiana, enacting their own legislation.

We will continue to monitor this situation to see what, if anything, the FTC's response will be in terms of establishing a federal rule governing non-compete agreements.