LABOR AND EMPLOYMENT LAW LITIGATION
INFORMATION MEMO
JULY 14, 2021

Executive Order has Little Immediate Impact on Employee Non-Competition and Related Restrictive Covenants

On Friday, July 9, 2021, President Biden signed an Executive Order on "Promoting Competition in the American Economy" (the Order) aimed at limiting certain anti-competitive practices across multiple sectors, including agriculture, telecommunications, technology and pharmaceuticals. The Order highlights a multitude of anti-competitive practices in these sectors, including the increasing pervasiveness of non-competition and related agreements throughout the American economy. While the Order itself does not prohibit non-competition agreements — and is not expected to have any immediate effect on their enforceability — employers should view the Order as a possible precursor to further actions over the coming months and years.

With 72 initiatives, President Biden's Executive Order is certainly sweeping in scope; however, as it relates to employee non-competition, non-solicitation and related restrictive covenants, it is very limited in both scope and immediate effect. Specifically, the Order encourages the Federal Trade Commission (FTC) to create rules "to *curtail* the *unfair* use of non-compete clauses and *other clauses or agreements* that may unfairly limit worker mobility." (Emphasis added). The Order thus merely encourages, but does not mandate, the FTC to commence the rule-making process to limit the unfair use of non-competition covenants and other restrictive covenants, which may include non-solicitation, non-poaching and/or non-servicing restrictions.

In other words, the Order does *not* prohibit, or even limit, employee non-competition agreements or other restrictive covenants. Rather, at most, it previews possible future agency action designed to "curtail" (notably, not "ban" or "eliminate") the "unfair use" of such agreements. To the extent that the FTC does take action, as the Order encourages it do, we expect that some definition will be provided on, among other things, how the FTC plans to "curtail" the use of such agreements and what is considered "unfair." We will continue to monitor the situation and provide necessary updates if and when any such future action, agency or otherwise, occurs.

In the meantime, clients may continue to utilize non-competition and related agreements, consistent with applicable law, which are reasonable in geographic and temporal scope and necessary to protect their legitimate business interests (*e.g.*, the use, disclosure and/or loss of confidential and trade secret information, customer relationships and goodwill). However, with the potential of future action at the federal level limiting the use of such agreements, clients should exercise prudence with respect to their employee restrictive covenants and take necessary steps to ensure that they are utilizing best practices with their restrictive covenants, including, without limitation, ensuring that adequate consideration is provided, avoiding a "one size fits all" approach, and periodically updating their restrictive covenants to account for any change in law.

If you have any questions about the information presented in this memo, please contact Bradley A. Hoppe, Samuel P. Wiles or any attorney in Bond's Labor and Employment or Litigation practice.

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