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Executive Order Restrains Use of No-Poach & Non-Compete Clauses

As summarized in the [July 9, 2021 King & Spalding Client Alert](#), President Biden issued an executive order on July 9, 2021 designed to enhance competition across multiple sectors of the U.S. economy.¹ One of the order's key areas of focus is the employment market and workers' "freedom to switch jobs or negotiate a higher wage."²

In seeking to address these goals, the order targets three issues: 1) wage collusion, 2) employee non-compete clauses "and other clauses or agreements that may unfairly limit worker mobility," and 3) "unfair occupational licensing restrictions."³ Significantly, the order does not require agencies to issue specific rules but instead "encourage[s]" 1) the DOJ and FTC "to consider" revising the 2016 Antitrust Guidance for Human Resource Professionals ("2016 Guidance") to combat wage collusion, 2) the FTC to use its rulemaking authority to "curtail the unfair use" of non-compete and related clauses, and 3) the FTC to issue rules to "address" unfair licensing. The Treasury Department's Office of Economic Policy must issue a report within six months evaluating competition in the labor market.

Despite the lack of rulemaking mandates, the order comes in the wake of increased antitrust enforcement in the labor market over the last five years, especially with regard to no-poach agreements. Although the order does not specifically call out no-poach agreements, such agreements likely fall within other "agreements that may unfairly limit worker mobility."

As described in prior King & Spalding client alerts about DOJ's first and second no-poach investigations and first criminal wage-fixing complaint, the 2016 Guidance promised to prosecute "naked" no-poach agreements. DOJ also entered civil lawsuits, filed amicus briefs in private suits, and issued the first criminal no-poach indictment in 2020.

The impact of the order on the use of labor markets remains to be seen. Federal oversight of non-compete clauses and other restrictive covenants would represent a significant change; historically, states have regulated



such employment clauses. In addition, although the FTC does have rulemaking authority, it rarely exercises it. Nevertheless, the current Commission, headed by recently appointed Chair Lina Khan, has signaled that it likely will take a more aggressive overall approach to enforcement, including using its rulemaking powers. The Commission’s withdrawal of the FTC’s 2015 Section 5 enforcement statement may be an initial step in this direction.⁴

Given this uncertainty, employers should begin reviewing their employment agreements to identify, evaluate, and prioritize non-competes and other restrictive covenants. Employers should continue monitoring FTC and DOJ enforcement actions as well as the scope and direction of the Treasury Department’s labor market report in six months’ time.

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¹ *Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE BRIEFING ROOM (July 9, 2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² *Id.* at Section 1.

³ *Id.* at Section 5.

⁴ The 2015 Statement set forth a more restrictive view of FTC’s Section 5 enforcement authority, significantly reducing standalone Section 5 enforcement actions. See Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, *available at* https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.