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CLIENT ALERT

Employers Beware: Biden Executive Order on "Promoting Competition in the American Economy" Could Have Far-Reaching Implications

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On Friday, July 9, President Biden signed an Executive Order ("EO") setting forth a "whole-of-government" effort aimed at promoting competition in the American economy. Within the 72 initiatives directed at more than a dozen federal agencies are directives that, if implemented, will significantly impact the labor market and employers across all sectors.

The Executive Order specifically encourages federal agencies to "consider" the following initiatives:

- **Limiting the Use of Non-Compete Agreements in Labor Markets**

Stating a concern that employees may be unduly restricted by non-compete agreements, the EO encourages the Federal Trade Commission (FTC) to "exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." In the accompanying Fact Sheet, the White House reported that roughly half of private-sector businesses require some form of non-compete agreement for their employees.

Regulating the use of non-compete restrictions in employment agreements is an area that has traditionally been left to the states. While the FTC and DOJ Antitrust Division have increasingly challenged the use of "no-poach" and other non-compete agreements among commercial entities, the antitrust enforcement agencies have not previously brought enforcement actions or issued regulations relating to non-compete agreements between employers and employees. Among other key issues, the FTC will have to decide whether to ban or limit certain non-competes and what sorts of justifications will support a non-compete (e.g. protection of intellectual property). Additionally, the FTC will need to determine whether to examine the full range of employment-related restrictive covenants. For example, the EO does not specify whether the FTC should contemplate limiting post-employment non-competes, non-competes used during the employment relationship, or other specific categories of non-compete provisions determined to be "unfair." Some state and local jurisdictions, including California and, more recently, the District of Columbia, have enacted limitations on the use of employee non-compete agreements by a wide range of employers. The FTC may well study the impact of the approach adopted by such states and local jurisdictions, and consider parallel federal regulations. Note that any FTC rulemaking would involve public notice and an opportunity to comment, as well as potential legal challenges to the final rules.

- **Modifying Occupational Licensing Regulations**

While recognizing the value that occupational licenses have in "increasing wages for other workers," the EO raises concerns that "overly restrictive occupational licensing requirements can impede workers' ability to find jobs and move between States." According to the White House, 30% of U.S. jobs require an occupational license. It, therefore, broadly directs all agency heads to "consider" new rulemaking related to "licensing regulations" that may affect "concentration and competition." The EO specifically encourages the FTC to exercise its own rulemaking authority in the area of "unfair occupational licensing

restrictions." There are, however, no details on what changes agencies should "consider" regarding existing licensing regulations, other than that any changes should increase mobility for workers. For example, since many such restrictions are imposed by states, the FTC faces the issue of whether it can preempt state law in a rulemaking.

- **Revising Agency Guidelines Regarding Wage Collusion**

To protect employees from "wage collusion"—unlawful collaborations between employers to suppress wages—the EO encourages the DOJ and FTC to "consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016." The DOJ and FTC have already shown a renewed focus on bringing antitrust enforcement actions related to wage collusion, wage-fixing, and no-poach agreements. While the EO encourages revision of the 2016 guidelines, it does not offer specific suggestions for revisions. The accompanying White House Fact Sheet states concerns about "employers . . . sharing wage and benefit information with one another," and that the 2016 guidelines allow third parties to make wage data available to employers but not to workers, to the extent either practice may be used to suppress wages or reduce benefits.

- **Modifying Procurement Policies**

All agency heads are encouraged to consider how they could use "their procurement or spending to improve the competitiveness of small businesses and businesses with fair labor practices." This broad directive could affect any federal contractor or subcontractor. Though the text of the EO does not indicate what changes to procurement policies should be considered, agencies could implement this directive in a way that subjects federal contractors and subcontractors to more onerous restrictions than non-contractors.

- **Establishing a White House Competition Council**

The EO establishes a White House Competition Council ("Council") made up of 10 agency heads, including the Secretary of Labor, to meet on a semi-annual basis. The Council will be led by the Assistant to the President for Economic Policy and Director of the National Economic Council and convene to develop a "coordinated response" to implement the actions laid out in the EO and determine whether further regulatory or legislative actions are needed. Additionally, the EO directs the Office of Economic Policy, in consultation with the Attorney General and Chair of the FTC, to submit a report to the Council within 180 days detailing the effect of lack of competition in labor markets. The findings in the report will likely drive any coordinated response and specific measures that the Council recommends agencies implement.

The EO asserts that increasing consolidation, monopolization, and unfair competition are harming the American economy, particularly as the country tries to rebound after the COVID-19 pandemic. It cites research showing that 60% of labor markets are "highly concentrated" leading to workers being paid 58% of their value. "Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions." The EO suggests that if agencies implement these directives, designed to maintain "a competitive marketplace," workers would have access to "more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage."

Importantly, the EO is not self-executing. It is a series of directives and policy goals; but it does not mandate compliance, nor does it lay out exactly how the agencies should implement the directives. Should an agency decide to implement any of these directives, the agency will determine the specifics of the rulemaking and must do so with an eye to the limits of their statutory rulemaking authority.

Crowell & Moring will continue to follow and update on these and related developments.

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