

EXECUTIVE ORDER MAY CREATE SWEEPING CHANGES IMPACTING COMPENSATION AND LABOR



Overview

On Friday, July 9, 2021, President Biden issued Executive Order 14036, *Promoting Competition in the American Economy*, spelling out 72 initiatives by more than a dozen federal agencies in an aim to address competition issues across the economy. The Administration's view is that the current trend of corporate consolidation requires a whole-of-government approach *to drive down prices for consumers, increase wages for workers, and facilitate innovation*. The executive order also

creates a White House Competition Council, consisting of multiple agencies and the Secretary of Labor, in order to coordinate a cross-agency response to unfair competition and cooperate in implementing the executive order. The following concentrates specifically on the executive order's impact on compensation and labor.

Compensation and Labor Matters

- The order calls on the Federal Trade Commission (FTC) to ban or limit non-compete agreements.
 - In a Fact Sheet, the White House claims that approximately 50% of private sector businesses utilize non-compete agreements, affecting up to 60 million workers, and that such agreements stifle competition. The Fact Sheet indicates that the ultimate desire is to ban or limit non-compete agreements.
 - The executive order encourages the Chair of the FTC to exercise statutory rulemaking authority to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.
- The executive order notes that certain occupational licensing requirements restrict competition, and asks the FTC to ban *unnecessary* occupational licensing restrictions that restrict worker mobility.
 - According to the Fact Sheet, almost 30% of jobs now require a license, up from 5% in the 1950s, and that only a few of such occupations are treated consistently across all 50 states. According to the White House, these requirements impede worker mobility and suppress wages. The Fact Sheet explains that this is intended to ban unnecessary occupational licensing restrictions that impede economic mobility.
 - The executive order encourages the Chair of the FTC to exercise statutory rulemaking authority with regard to unfair occupational licensing restrictions.
- The order encourages the FTC and DOJ to bolster existing guidance to prevent employers from sharing wage and benefit information in a manner that suppresses wages or benefits, and to consider revising their Antitrust Guidance for Human Resource Professionals of October 2016.

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- The executive order states that DOJ and FTC guidance allowing third parties to provide wage data to employers, and not workers, enables employers to collaborate on wage suppression.
 - The executive order directs that the parties consider whether to revise the Antitrust Guidance for Human Resource Professionals, created in 2016, that provided HR professionals with useful guidance on complying with antitrust laws as related to agreements and communications between employers on terms and conditions of employment.
- The Treasury Department is directed to, within 180 days, submit a report on the impact of the current lack of competition on labor markets.

Observations

- The executive order does not provide specific guidance on how to implement the above measures and how this should be accomplished. It is almost a certainty that whatever guidance is issued by the FTC, it will be subject to a high level of analysis and legal challenges.
- The executive order appears to ignore the need for non-compete agreements to protect an employer's legitimate business interests in many instances, as well as that such agreements must meet very specific criteria in order to be enforceable. The criteria for these agreements have been developed and confirmed through the judicial system to ensure that they balance valid business interests against employee interests.
- The executive order challenges the ability of states to ensure the safety and wellbeing of their constituents by determining what standards should apply for specialized occupations. Even if one state may not deem certain standards necessary, this should not prevent other states from applying a higher bar.
- The executive order fails to consider the fact that employers may want to use market data in order to ensure that they are paying competitive rates. Employers are already prohibited from sharing wage information directly with each other to conspire on setting wage rates. The previously issued guidance provided useful information to HR professionals on appropriate and legal ways to obtain employment-related information through a neutral third-party. The executive order would appear to prohibit this process.

EMPLOYER ACTION PLAN

We encourage employers to carefully review all aspects of this executive order. We will continue to monitor the executive order process and related guidance that emerges and provide updates.



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