



## BELL NUNNALLY'S KRIS HILL AND SCOTT LARSON ON TEXAS CEO MAGAZINE UPDATE ON BIDEN ADMINISTRATION PUSH TO ELIMINATE NON-COMPETE AGREEMENTS

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**Bell Nunnally Partner Kristopher D. Hill and Associate Scott R. Larson authored the *Texas CEO Magazine* piece “What Are the Implications of President Biden’s Latest Executive Order?” The piece is an update to their February [article](#) delving to President Biden’s campaign vow to eliminate most non-compete agreements. On July 9, the president issued an executive order aimed at “eliminat[ing] all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets.” The EO specifically covered perceived anti-competitive trends in several industries, taking particular aim at tech, agriculture and health care sectors, Hill and Larson write.**

Hill and Larson follow with a review of noncompetes and how they vary by state and offer analysis on the July noncompete EO:

The president's order does not outright ban non-competes. Rather, the order is mostly aspirational and does nothing—currently—to change existing non-compete law, which is still governed mainly at the state level. Instead of enacting new law, the order directs the Federal Trade Commission to enact regulations curbing the effects of non-competes and “other clauses or agreements that unfairly limit worker mobility,” which likely includes standard non-solicitation agreements....It remains to be seen how the FTC will attempt to regulate non-compete agreements. It will likely strike some balance between what it deems to be acceptable and unacceptable non-compete agreements.

They later add:

Though prudent employers should avoid siren calls to immediately change their non-compete and related agreements in light of the president's order, federal regulation of non-competes and similar

agreements may be a question of “when” and “how,” not “if.” Accordingly, savvy employers should work closely with experienced non-compete counsel to develop plans for addressing coming changes in non-compete regulation....Further, regardless of when or how non-competes are regulated by the FTC, federal regulation will certainly introduce new considerations for employers in enforcing non-competes.

Full text of the article is below and can be viewed on *Texas CEO Magazine's* website, by clicking [here](#).

## What Are the Implications of President Biden's Latest Executive Order?

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On July 9, President Biden issued a sweeping executive order that constitutes the first step in the direction of attempting to fulfill his [campaign promise](#) to “eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets.” The order specifically addresses perceived anti-competitive trends in several industries, taking particular aim at tech, agriculture, and healthcare sectors.

The president's order does not [outright](#) ban non-competes. Rather, the order is mostly aspirational and does nothing—currently—to change existing non-compete law, which is still governed mainly at the state level. Instead of enacting new law, [the order](#) directs the Federal Trade Commission to enact regulations curbing the effects of non-competes and “other clauses or agreements that unfairly limit worker mobility,” which likely includes standard non-solicitation agreements.

It remains to be seen how the FTC will attempt to regulate non-compete agreements. It will likely strike some balance between what it deems to be acceptable and unacceptable non-compete agreements. Every state except California, North Dakota, and Oklahoma allows non-competes according to either statutory regimes or judicial precedent. The FTC may enact regulations that enforce non-competes and similar agreements so long as they protect a “legitimate business interest” of the former employer, such as the employer's trade secrets, which is the standard employed by Texas law. Other proposals limit non-competes to certain industries or to exempt employees under the Fair Labor Standards Act. The FTC may select one of these options or develop its own novel method of regulation.

It will be some time before we know how the FTC decides to regulate non-compete agreements. The FTC's ability to enact regulation is subject to a prolonged process called “formal rulemaking.” The process involves the FTC proposing a regulation, comment from the public on the proposed regulation, potential revisions by the FTC to the regulation, more comment, and finally a proposed final regulation. This process takes many months, if not years, to complete. Accordingly, President Biden's order will not see actual effect, if any, for some time.

Further, the FTC's ability to regulate non-competes will almost certainly be challenged. The FTC has only the regulatory powers delegated to it by Congress. The Biden administration will rely on the FTC's ability to regulate “unfair business practices” as grounds for regulation of non-compete agreements. This would be a fairly novel use of the FTC's regulatory authority—especially in light of existing state law across most

states in the country that expressly allows non-competes with certain restrictions—and will likely be challenged in the courts.

Though prudent employers should avoid siren calls to immediately change their non-compete and related agreements in light of the president's order, federal regulation of non-competes and similar agreements may be a question of "when" and "how," not "if." Accordingly, savvy employers should work closely with experienced non-compete counsel to develop plans for addressing coming changes in non-compete regulation.

Further, regardless of when or how non-competes are regulated by the FTC, federal regulation will certainly introduce new considerations for employers in enforcing non-competes. As discussed above, non-compete agreements are usually creatures of state law and are usually enforced in state courts. With the advent of federal regulation, employers will likely have the option of enforcing non-compete agreements in federal courts. Federal and state courts have differing benefits, which should be weighed on a case-by-case basis. Again, informed employers should consult experienced non-compete counsel in making these decisions.

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