Engage PEO Client Alert:

Executive Order May Restrict Employee Non-Compete Agreements

On July 9, 2021, President Biden issued an Executive Order focusing on enhancing economic competition. The Order mainly takes aim at non-compete agreements as the President directs the Federal Trade Commission (FTC) to pursue a legal course of action that would eliminate or severely curtail non-compete agreements' effectiveness. In issuing the Order, President Biden hopes to increase worker mobility, thus increasing opportunities for economic advancement for employees.

Although the Executive Order does not ban non-compete agreements, it does direct the FTC to use its regulatory authority to "curtail" their use, along with other contracts that limit an employee's mobility in the marketplace. In the fact sheet accompanying the Order, the White House states its belief that non-competes are being used in an abusive manner by employers, preventing workers from moving on to new, higher-paying positions.

Additionally, the President's Order creates a White House Competition Council comprised of several regulatory agencies to examine ways to combat anti-trust violators, foreign competitors, and other factors that limit Americans' ability to increase their earning potential in the labor force. For instance, non-solicitation agreements, no-hire provisions, and non-servicing provisions in employment contracts will also be subject to review by the newly formed council.

As daunting as these potential new measures may seem for employers, **only those companies that require their employees sign restrictive covenants that limit a worker's ability to freely change positions (such as a non-compete agreement), should be prepared to adjust their hiring practices. For now, employers should follow best practices concerning restrictive employment covenants to ensure enforceability. Below are some best practices when drafting restrictive employment covenants:**

- Agreements should be narrowly drafted, meaning they should be contained to a small geographical radius, have a reasonable time restriction, and be limited to a specific set of activities related to the employee's role within the organization.
- Use of such agreements should be reserved for integral employees, not all staff.
- The agreement should be specific in its intended purpose. For example, the purpose of the agreement could be to protect company trade secrets from falling into the hands of competitors.

Ultimately, until rules are issued by the White House Competition Council agencies, it will be difficult to determine the impact of the coming changes on employers. Legal challenges may also be introduced that question the authority to implement some of the regulatory changes proposed.

Should you have any questions concerning this Executive Order or require guidance on this or any other topic, please reach out to your Engage Human Resources Consultant.