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### **DOJ Down, But Not Out In Fight Against Worker Restrictions**

So far, the Biden Administration has come up empty in its quest to eliminate restrictions on worker's ability to change jobs. From the administration's perspective, non-compete and non-solicit agreements (and even some confidentiality agreements) unfairly limit a worker's ability to seek new jobs and negotiate higher pay. From many employers' perspectives, such restrictions are necessary to protect intellectual property and their investment in training and employee development. In some jobs, an employee can become the face of the company and develop close relationships with key clients. Without some protection, the employee can take those relationships – developed on the company's dime -- and auction them to the highest bidding competitor.

In January, the Federal Trade Commission announced that it intends to issue rules which would drastically limit the use of such restrictive covenants nationwide, something that has been a state matter until now. The contours of what that rule will ultimately look like are still up in the air but will inevitably face fierce legal challenges from the business community. Many experts are skeptical that the Commission has the legal authority to issue such a groundbreaking rule.

Meanwhile, the Department of Justice has been doggedly pursuing criminal anti-trust charges against employers who DOJ alleges have entered no-poach agreements – making commitments not to hire their employees. Because these are criminal prosecutions, they significantly up the stakes in the debate over such restrictions. But so far, the DOJ has struck out. Several juries have rejected these charges outright. And most recently, a federal judge threw out charges against aerospace companies who had agreed not to hire each other's engineers. The judge held that employers did not necessarily commit an antitrust violation where exceptions to the no-poach pact were common.

Despite these significant setbacks, DOJ has signaled that it is not giving up on these criminal prosecutions, including one against a major healthcare company nearing trial. With this in mind, employers should continue to be cautious about sharing compensation, recruiting and other hiring related information with other companies, including through trade associations and professional organizations (such as HR groups).

If you would like to discuss this further, you can contact Al Vreeland at (205).323.9266 or at [avreeland@lehrmiddlebrooks.com](mailto:avreeland@lehrmiddlebrooks.com).