

Biden Calls for Limits on Noncompete Agreements

By Nathan Pangrace

President Biden recently issued an Executive Order directing the Federal Trade Commission to adopt rules banning or limiting the use of noncompete agreements. The Order is part of a larger initiative by the Biden Administration to promote competition in the American economy and remove barriers to economic growth. Below are four things to know about Biden's new mandate.

1. The law on noncompete agreements has not changed. Yet.

President Biden's order does not make noncompete agreements with employees illegal. Much remains to be done before limitations on these agreements by the FTC become reality. The agency's rulemaking process can take months or even years. There is also a question of whether the FTC has authority to regulate this area of law through rulemaking. A sweeping federal rule will be significant departure and will be challenged by businesses in court.

2. Biden has criticized noncompete agreements.

The Biden administration has been critical of noncompete agreements and believes they should be banned or heavily regulated. It argues these agreements keep wages down by making it harder for workers to switch to better paying jobs. Noncompete agreements may discourage employees from demanding better pay and working conditions. Or, an employee may hesitate to accept a job offer with a new employer because of the threat of legal action. This limits the bargaining power of the employee who is forced to remain with his/her current employer and pass on wage increases.

3. A complete ban on noncompete agreements is unlikely.

It is unclear what level of regulation the FTC will pursue. But it is unlikely the FTC will issue a complete ban on noncompete agreements. Many businesses consider noncompetes to be important for employees who possess trade secrets or other confidential information. The FTC may instead take a narrow approach by banning noncompete agreements for low-wage workers rather than for everyone. Several states have already done so because these workers typically have less ability to move outside the geographic area specified in the non-compete.

4. States have traditionally regulated noncompetes.

The enforcement or limitation of noncompete agreements has historically been up to individual states. Each state has its own unique laws about whether and to what extent the agreements are enforceable. These laws vary widely by state. Three states, including California, North Dakota, and Oklahoma, have banned employee noncompete agreements altogether. A dozen other states prohibit them with low wage workers. Most states, including Ohio, enforce agreements that are reasonable in time, scope, and geography.

Noncompete agreements are subject to the laws of individual states until the FTC issues new federal rules. Even in states where they are legal, however, courts may refuse to enforce noncompete agreements that are overly broad or hinder employees' ability to earn a living. For this reason, it is important for businesses to ask their legal counsel to review the agreements and ensure they comply with state law.

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