

PRESIDENT BIDEN CHALLENGES NON-COMPETE AGREEMENTS BY AN EXECUTIVE ORDER CALLING ON THE FTC TO CURTAIN NON-COMPETES

On Friday, July 9, 2021, President Biden signed an Executive Order seeking to ban or limit businesses' use of non-compete agreements and licensing requirements, in an effort to promote competition and innovation by small and large firms.¹ The "Executive Order on Promoting Competition in the American Economy" calls on federal agencies to use their authorities to advance the policies expressed in the Order, including specifically calling on the Federal Trade Commission (FTC) to exercise its rule-making authority to curtail the unfair use of non-compete clauses that unfairly limit worker mobility.

The President has waded into legal waters that are traditionally regulated by states. Any rule-making affecting businesses' use and enforcement of non-competes is expected to take years, and will almost certainly be challenged in litigation. Ultimately, an outright ban on all non-compete agreements is very unlikely. But, it is probable that President Biden's initiatives will lead to more narrow non-competition restrictions for low-wage workers.

While a wide-ranging order, the Executive Order contains the following two statements regarding non-compete agreements:

Section 1. Policy.

...

Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions. **Powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs.** And, while many occupational licenses are critical to increasing wages for workers and especially workers of color, some overly restrictive occupational licensing requirements can impede workers' ability to find jobs and to move between States.

...

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

Sec. 5. Further Agency Responsibilities

...

(g) To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to **curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.**

The White House published a Fact Sheet² on the Executive Order that contains the following references to non-compete agreements:

- Tens of millions of Americans—including those working in construction and retail—are **required to sign non-compete agreements as a condition of getting a job**, which makes it harder for them to switch to better-paying options.
- Among other things, they [*initiatives in the Executive Order*] will: Make it easier to change jobs and help raise wages by **banning or limiting non-compete agreements** and unnecessary, cumbersome occupational licensing requirements that impede economic mobility.
- Competition in labor markets empowers workers to demand higher wages and greater dignity and respect in the workplace. **One way companies stifle competition is with non-compete clauses. Roughly half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers.**
- In the Order, the President:
Encourages the FTC to **ban or limit non-compete agreements.**

The Fact Sheet provides commentary on the Executive Order, but given differences between the actual Executive Order and the Fact Sheet, the Executive Order should be relied upon rather than the Fact Sheet.

² <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

During his campaign for the Presidency, Biden made the following tweet³ about non-compete agreements:



The Executive Order, among other things, attempts to deliver on Biden’s campaign rhetoric.

President Biden’s choice of Lina Khan as FTC Chair seems to fit with his view that the FTC should use its rule-making authority to address the potential harms of non-competes. Khan co-authored an article⁴ in 2020 that argued in favor of using the FTC’s rule-making authority to address unfair methods of competition, including non-competes.

The President’s top-down approach to regulating the use of non-competes appears likely to face significant legal challenges. First, regulation of non-competes is normally left to states. Second, there are questions as to whether the FTC even has the authority under the Federal Trade Commission Act to dictate the legal criteria for a non-compete agreement. Critics would argue that Congress, not a federal agency, would be responsible for such implementation. Third, businesses who utilize non-compete agreements to protect their confidential information and trade secrets are opposed to broad-sweeping changes limiting their ability to do so. To them, non-compete agreements are appropriate to ensure that former executives and other high-level employees do not disclose to competitors their unique and valuable trade secrets.

³ <https://twitter.com/joebiden/status/1209263668736745473>.

⁴ Chopra and Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, *The University of Chicago Law Review*, Vol. 87, Page 357. (<https://aboutblaw.com/Yjo>).

The Executive Order itself will have little immediate affect on employers with non-compete agreements with employees. The success of the Order will depend on the success of federal agencies, especially the FTC, in implementing the policies set out in the Order. The rule-making process will be lengthy since it will require the agencies to analyze the issues, draft and issue a proposed rule, invite public comment and consider the comments, and finalize and publish a rule. Employers with non-compete agreements should monitor developments in response to the Order, participate in the rule-making process, and be prepared for changes in the years-to-come, provided that the political winds of change do not render this exercise moot.

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