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Biden noncompete agreement order a warning for businesses

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Patrick Thibodeau

President Joe Biden's executive order on noncompete agreements adds to a growing backlash over employee restrictions in Congress and states. But for businesses, Biden's EO doesn't change anything — for the moment.

The executive order, released Friday, seeks a national standard on noncompete agreements that broadly restricts them. It is asking the U.S. Federal Trade Commission (FTC) to take specific action to ban or limit noncompete agreements.

> "Companies need to recognize right now that there's a real chance of there being some sort of federal limit on noncompete agreements," said Eric Ostroff, managing partner and co-chair of the Trade Secrets and IP Group at Meland Budwick PA, a law firm in Miami.

Noncompete agreements set restrictions on the ability of workers to take a job with a competitor. Some agreements set limits on time, such as barring a worker from taking a job with a competitor for six or 12 months, while others may also bar someone from seeking a job within a specific geographical area.

Although Biden indicated support for a ban on noncompete agreements during his campaign, "this is the first time since he's been president that he's taking action on this issue," Ostroff said. "This, first of all, tells employers that the Biden administration is serious about their commitment to restrict noncompete agreements."

He added, "It's possible that this action will encourage or will increase the pace at which Congress acts."

Bipartisan Support

Noncompete agreements have become a widely used tool. In 2019, a survey by the Economic Policy Institute found that nearly half of the 634 U.S. businesses with 50 to more than 5,000 employees across all industries, reported some use of noncompete agreements, and nearly 32% said that all employees "were required to enter into a noncompete agreement, regardless of pay or job duties."

Biden's order has some bipartisan support. U.S. Senators Chris Murphy, D-Conn., and Todd Young, R-Ind., introduced the Workforce Mobility Act last year to limit the use of noncompete agreements.

"Noncompete agreements depress wages and stifle innovation," Murphy and Young said in a joint statement released in support of Biden's order.

But, so far, states have set the rules on noncompete agreements — not the federal government.

In California, for instance, noncompete agreements have been made unenforceable, and in some other states, such as Massachusetts and Connecticut, lawmakers are trying to do the same.

Indeed, at a legislative hearing on the issue in March, Connecticut Attorney General William Tong warned businesses of the overuse of noncompete agreements, especially for lower-wage workers, such as janitors and landscapers.

But Tong said noncompete agreements still have a valid role to play.

The Connecticut bill, which has stalled, "allows businesses to use targeted noncompetes to bind high-skilled, high-compensation employees in ways that protect trade secrets and preserve customer relationships," Tong said. "But many, if not most, noncompetes do not work that way today."

Biden's executive order "signals a broad federal interest in reforming noncompete policies, which is something that we have never seen before," said Evan Starr, an assistant professor of management and organization at the University of Maryland's Robert H. Smith School of Business, who recently testified on Connecticut's noncompete legislation.

"Noncompetes clearly fall under the purview of the FTC per the Sherman Act,

because they are restraints of trade," Starr said. "But for whatever reason, the federal government has not generally regulated noncompetes, leaving it mostly to states. So it will be interesting to see where the FTC goes from here."

Patrick Thibodeau covers HCM and ERP technologies. He's worked for more than two decades as an enterprise IT reporter.

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