

# Biden Administration Executive Order Seeks to “Curtail the Unfair Use of Non-Compete ?Clauses”?

Labor & Employment Workforce Watch

## WRITTEN BY

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As we [previously alerted you](#), on July 9, 2021, President Biden issued an “[Executive Order on Promoting Competition in the American Economy](#).” Among other things, the Executive Order addressed the President’s desire for the Federal Trade Commission (“FTC”) to “curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” That President Biden issued this Executive Order comes as no surprise. Previously, while on the campaign trail, then candidate Biden [tweeted](#) that “[w]e should get rid of non-compete clauses and no-poaching agreements that do nothing but suppress wages.” Similarly, President Biden made campaign promises that included a proposal to eliminate non-compete agreements altogether.

Importantly, the Executive Order appears to be a large step back from President Biden’s prior statements, as it merely directs the Chair of the FTC to “consider” exercising its rulemaking authority to “curtail” these agreements. It is unlikely that—even if the FTC *does* engage in some rulemaking on this issue—that an outright ban on all such agreements would be the result. Indeed, the [President recognizes](#) there are instances in which non-compete agreements may be “absolutely necessary to protect a narrowly defined category of trade secrets.” This position is in line with many state laws that permit the use of non-compete agreements to protect a company’s trade secrets, goodwill, customer relationships, or in connection with the sale of a business.

Although the wording of the Executive Order appears to leave room for the existence of non-compete agreements going forward, the Order also targets “other clauses” that may restrict employee movement such as employee and customer non-solicitation agreements. The Biden Administration’s latest executive order reaffirms their commitment to strengthen federal antitrust laws and give more power to employees. Whether the upcoming rulemaking proposes a complete ban on non-competes, or merely limits their enforceability against lower wage earners, for example, remains to be seen.

In light of the potential rulemaking from the FTC, as well as the recent [trends among state legislatures](#) to also limit the enforceability of non-competes and other restrictive covenant agreements, employers should act now to make sure their existing non-competes and other restrictive covenants are enforceable and compliant with local laws. Employers should also thoroughly evaluate their policies and practices, outside of restrictive covenant agreements, to maximize protection of their trade secrets and other confidential information through non-disclosure agreements and the many practical, technical and other safeguards available to employers.

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