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Noncompete agreements: Are their days numbered?

BY STEVEN M. FREDERICK

If you quit your job and then work at a competitor, you might find yourself in court. President Biden, it seems, wants to change that.

Many people are required to sign noncompete agreements when starting a new job. These agreements typically prevent an employee, for a specified period of time, from leaving one employer and going to work for a different, competing firm in the same, or a similar, industry. Noncompetition agreements often apply even if the employee is terminated by the employer.

The employer's fear, which may be quite valid, is that the worker will steal customers or bring confidential information from the old firm to the new one. Preventing the person from working for a competitor may be the best way to eliminate that business threat.

If employees are not permitted to work for a competing business, it will be impossible for them to intentionally or carelessly disclose confidential information to their new colleagues.

While employers often feel they need noncompetition agreements to remain viable, such agreements can pose a hardship on

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the employee. If employees are prevented from working in an industry where they have devoted their career and developed skills and built relationships, they may lose income not only during the time they must "sit out," but also over time – because they might need to accept a lower paying job in a new industry.

In order to be enforceable, noncompetes must be limited in time and scope. That being said, it is not uncommon under appropriate circumstances for courts to enjoin people from working throughout the country, or even the world, for periods exceeding one year.

It is not just highly paid, white-collar workers that may find themselves bound by noncompete agreements. A Boston yoga studio found itself in the news recently when more than two dozen former teachers learned they could not work at other studios or in private homes for a year if located within miles of the Boston facility.

Noncompetes are pervasive. A 2019 report from the nonprofit Economic Policy Institute noted that nearly a third of private-sector businesses required employees to sign noncompete agreements, regardless of job duties or compensation.

The issue has recently come to the forefront because President Biden asked the Federal Trade Commission to come up with regulations to "curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility." This request was part of the president's campaign pledge to protect workers.

Currently, three states refuse to enforce noncompete agreements against employees: California, Oklahoma and North Dakota. It is possible that Biden's executive order, by simply raising the issue, might prompt other states to act.

It seems unlikely that the FTC will attempt to ban all noncompetes. In some cases, noncompetes are necessary to prevent key employees from unfairly competing by using relationships and information that were developed, often at great cost and expense, by the former employer. But the FTC may try to prevent businesses from overusing these agreements in circumstances where they are not necessary to protect the business and impose undue hardships on former employees.

While the FTC considers this issue, the House of Representatives and Senate will review the Workforce Mobility Act of 2021, which has been introduced with bipartisan support. If enacted, this bill would limit the use of noncompetes. Because similar bills have failed in the past, and emotions run deep on both sides of the debate, it is unlikely that the issue of noncompetes will be resolved by Congress.

One thing is clear. Until the FTC imposes regulations or new federal laws are enacted, the enforceability of noncompetition agreements will be left to the individual states.

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