

Biden Administration Aims to Limit Non-Compete Agreements

By [Janet A. Hendrick](#)

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On July 9, President Biden issued Promoting Competition in the American Economy, a sweeping policy-based executive order that purports to encourage innovation and competition in the American workplace. Earlier that day, the White House issued a press release addressing the initiatives, one of the most notable being a goal of “banning or limiting non-compete agreements and unnecessary, cumbersome occupational licensing requirements that impede economic mobility.”

Although non-competes and similar restrictive covenants are banned or limited in a handful of states, including Oklahoma, they remain alive and enforceable in most states, including Texas, as long as they meet certain requirements – generally that they are reasonable in time and territory and necessary to protect a legitimate business interest. A 2016 U.S. Department of the Treasury report cited data showing that 15% of workers without a four-year college degree were subject to non-competes, as were 14% of workers bringing home less than \$40,000 per year. The Biden administration claims that

“[c]ompetition in labor markets empowers workers to demand higher wages and greater dignity and respect in the workplace” and that “[r]oughly half of private-sector businesses require at least some employees to enter non-compete agreements, affecting some 36 to 60 million workers.”

So, does the Biden administration’s executive order prohibit or limit non-competes? The short answer is “no” or at least “not yet.” The executive order creates the White House Competition Council and directs federal rulemaking authorities to consider competition-related issues. Specifically, the order asks the Federal Trade Commission to exercise its statutory rulemaking authority to curtail what it deems “the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”

President Biden’s recently confirmed FTC chair, Linda Khan, appears to be a zealous advocate of the goals of the executive order, at least as it relates to the use of non-compete agreements in the employment context. In a 2019 law journal article, she took the position that non-compete agreements “deter workers from switching employers, weakening workers’ credible threat of exit, and diminishing their bargaining power” and suggested that “the FTC might consider engaging in rulemaking on this issue.”

While such rulemaking is a possibility, it is unclear to what extent the FTC will address the issue. The administration will also certainly face multiple legal challenges by businesses, leading some to predict the FTC will approach this rulemaking cautiously.

Phillips Murrah’s [Labor and Employment](#) attorneys continue to monitor this development.

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