Biden administration tells employers to stop shackling workers with 'noncompete agreements'

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Most American workers are hired "at will": Employers owe their employees nothing in the relationship except earned wages, and employees are at liberty to quit at their option. As the rule is generally stated, either party may terminate the arrangement at any time for a good or bad reason, or none at all.

In keeping with that no-strings-attached spirit, employees may move on as they see fit—unless, that is, they happen to be among the tens of millions of workers bound by a contract that explicitly forbids getting hired by a competitor. These noncompete clauses may make sense for CEOs and other top executives who possess trade secrets, but they can seem nonsensical when they're applied to low-wage workers such as draftsmen in the construction industry.

President Joe Biden expressed concern about the oppressive nature of noncompete contracts in July 2021.

And the Federal Trade Commission—a federal agency responsible for policies that affect competition within the economy—has now decided to ban them. On April 23, 2024, in a 3-2 vote, the majority agreed to curb noncompete contracts.

Previous noncompetes for senior executives will remain in place, but all others, with few exceptions, will no longer be enforceable.

The rule is slated to go into effect in late August. However, legal actions could delay or block these changes. The U.S. Chamber of Commerce and other business groups sued the government to stop it soon after the FTC vote.

As a scholar of employment law and policy, I have many concerns about

noncompete clauses—such as how they tend to aggravate the power imbalances in relationships between workers and bosses, suppress wages and discourage labor market mobility.

Labor rights and the law

Courts began to enshrine the at-will doctrine in the 19th century, making exceptions only for employees with fixed-term contracts.

With the passage of the National Labor Relations Act in 1935, all private-sector workers and unions gained the power to collectively bargain with employers. Subsequent labor agreements, such as the one negotiated by the Steel Workers Organizing Committee with Carnegie-Illinois Steel in 1937, made employers prove "just cause" before firing any person covered by the contract.

The Civil Rights Acts of 1964 and 1991 added employment protections prohibiting discrimination based on race, gender, religion and national origin. And the Americans with Disabilities Act, which Congress passed in 1990, ensured that people with disabilities would have access to jobs with or without reasonable accommodation.

Those laws and other measures, including modern exceptions to the at-will rule, offer workers some job security.

But despite some restrictions by individual state governments, until now there has been no federal protection from noncompete clauses.

Noncompetes and low-wage workers

FTC chair Lina Khan has estimated that nearly 1 in 5 workers, some 30 million Americans, are in this boat.

Noncompete clauses are more common among higher-paid Americans, but more than 1 in 10 workers who earn US$20 or less an hour are covered by noncompete agreements, according to a 2021 study by the Federal Reserve Bank of Minneapolis.

Wages for U.S. workers will rise by $400 billion to $488 billion over the next decade once there are fewer noncompete clauses, the FTC estimates.

In announcing the ban, the FTC offered advice to employers that might fear losing high-performing workers due to the new rules.

"Instead of using noncompetes to lock in workers, employers that wish to retain employees can compete on the merits for the worker's labor services by improving wages and working conditions."

Put another way, when employers pay workers better, their employees are more satisfied and less likely to quit.

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