



AFTER 200+ YEARS UNDER STATE LAW, FTC PROPOSES TO BAN NONCOMPETES IN UNAUTHORIZED POWER GRAB

by Erik W. Weibust, Peter Steinmeyer, and Stuart Gerson

For over 200 years, the regulation of noncompetition agreements (“noncompetes”) has been entirely the province of state law. Forty-seven states currently permit noncompetes, and the most recent state to ban them was Oklahoma in 1890. Yet the Biden Administration and its activist Federal Trade Commission (“FTC”) Chair want to do exactly that nationwide. Especially given a recent decision of the United States Supreme Court, the FTC’s jurisdiction in the matter is subject to serious question. And whatever the agency attempts to promulgate should be challenged both on jurisdictional and substantive bases.

Introduction

Shortly after his inauguration in 2021, President Biden issued an executive order entitled “Promoting Competition in the American Economy,” which “encourage[d]” the FTC to “consider” exercising its putative rulemaking authority to curtail noncompetes. Current FTC Chair Lina Khan has not shied away from sharing her view that noncompetes are inherently anticompetitive and should be prohibited altogether. It was thus unsurprising when, on January 5, 2023, she (with the support of the Commission’s other two activist members) issued a proposed Rule banning noncompetes nationwide, with retroactive effect. However, banning noncompetes is inconsistent with the expressed will of the people, as evidenced by numerous failed efforts to do so in Congress and in the legislatures of some of the most employee-friendly states and cities in the nation. Nor does the Biden Administration appear even to have the constitutional authority to do so for the reasons outlined in the Supreme Court’s recent *West Virginia v. EPA* decision. This LEGAL BACKGROUNDER outlines the history of noncompete regulation in the states and identifies recent trends in that regard; describes the Biden Administration’s efforts to nationalize the regulation of noncompetes; and explains why banning noncompetes nationally is neither the will of the people nor consistent with the Constitution.

State Regulation of Noncompetes

Noncompetition agreements are a form of post-employment restrictive covenant that constrain the permissible subsequent competitive conduct of an employee. Typically, they prohibit a former employee from working in a competitive role for a competing business within an identified geographic area for a certain amount of time. But noncompetes are not like most other contracts in the sense that they are not necessarily enforceable just because there is an offer, acceptance, and consideration. Rather, in the 47 states that permit noncompetes,¹ they must be narrowly tailored to protect a company’s legitimate business interests, they must be reasonable in scope, and there are often special-consideration requirements. In addition, some states have begun carving out exceptions for “low wage” workers and requiring advance notice of noncompetes to employees.

As of the date of publication of this article, 29 states and the District of Columbia have statutes governing noncompetes generally.² While the basic requirements in each state that permits noncompetes are the same (as outlined below), the laws of those states can have material differences, and different judges within the same jurisdictions will sometimes rule differently on similar fact patterns.

Erik W. Weibust, Peter Steinmeyer, and Stuart Gerson are partners with Epstein Becker & Green in the firm’s Boston, Chicago, and New York and Washington, DC offices, respectively. Mr. Weibust is a member of, and Mr. Steinmeyer is Chair of, the Trade Secret and Employee Mobility practice group. Mr. Gerson is a member of WLF’s Legal Policy Advisory Board.

Legitimate Business Interests. In the context of noncompetes, legitimate business interests most often include trade secrets, confidential information, and customer goodwill or relationships. Absent a showing that a noncompete is intended to protect one of these interests—as opposed to restricting fair competition—it will not be enforceable. Moreover, the agreement must be narrowly tailored to protect such interests and cannot be broader than necessary to do so; and courts will often look to see if there are less restrictive means of protecting the company’s interests.

Reasonableness Requirements. Although not typically addressed under the rubric of antitrust law in modern times, noncompetes are subject to what many antitrust practitioners might recognize as the “rule of reason” because they are vertical agreements between an employer and an employee that restrict the employee’s ability to participate in the labor market. Specifically, in addition to being narrowly tailored to protect a legitimate business interest, noncompetes must also be reasonable in geographic scope, duration, and scope of proscribed activities, which is a highly factual inquiry. The narrower and more closely tied to a former employee’s actual location or territory and duties or influence a restriction is, the more likely a court will find it reasonable.

Consideration Requirements. While courts generally do not delve into the sufficiency of consideration when analyzing the enforceability of a contract, some states require more than “a mere peppercorn” when it comes to noncompetes.³ For example, in Massachusetts a “noncompetition agreement [must] be supported by a “garden leave” clause or **other mutually-agreed upon consideration** between the employer and the employee,” whatever that may mean.⁴ While in most states continued employment is typically sufficient consideration for existing employees being asked to sign new or updated noncompetes, in certain states continued employment in and of itself is not sufficient; something more (such as a raise, bonus, promotion, access to new confidential information, etc.) is required.⁵

Recent Trends: Compensation Thresholds and Notice Requirements. Although no state has banned noncompetes since Oklahoma in 1890, over the past decade or so legislatures in certain states have begun placing limitations on their use and enforcement. The two biggest trends in this respect have been the implementation of compensation thresholds and notice requirements.⁶

Many national media outlets take cases of extreme noncompete abuse and frame them as the norm instead of the outliers that they are. The media often portrays employers in a negative light for allegedly forcing noncompetes on employees who purportedly have no choice in the matter and receive no benefit from the transaction.⁷ Although the data does not bear this out, eleven states plus the District of Columbia have nevertheless passed laws prohibiting the use and enforcement of noncompetes against “low wage” workers, defined as those earning compensation of anywhere from \$14.50 per hour to \$250,000 per year.⁸ Some are simple wage thresholds (*e.g.*, District of Columbia, Illinois); others are formulas based on minimum wage, the poverty level, or the like (*e.g.*, Maine, Virginia); and a few are based, at least in part, on whether an employee is exempt under the Fair Labor Standards Act (*e.g.*, Massachusetts, Rhode Island).

While the use of noncompetes with low-wage workers may be overstated, there is actual empirical evidence that workers who are presented with noncompetes before accepting job offers receive higher wages and more training, and are more satisfied in their jobs than those who are not bound by noncompetes.⁹ Eight states plus the District of Columbia currently have statutory notice requirements.¹⁰ Some are tied to when an offer is made (*e.g.*, Maine, D.C.) or accepted (*e.g.*, Colorado, New Hampshire); others are tied to the commencement of employment (*e.g.*, Illinois, Massachusetts, Oregon); Virginia requires the posting of a notice at all times; Colorado requires a separate, standalone notice to be provided to employees subject to noncompetes; and Oregon additionally requires that the employer provide a signed copy of the noncompete to an employee within 30 days *after* his or her termination.

Federal Efforts to Regulate Noncompetes

As noted above, the regulation of noncompetes has been entirely the province of state law for over 200 years.¹¹ Nevertheless, on July 9, 2021, President Biden signed his “Executive Order on Promoting Competition in the American Economy,” which “encourage[d]” the FTC to “consider” exercising its statutory rulemaking authority “to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker

mobility.”¹² Lest there be any confusion about what was intended, President Biden stated clearly when he signed the Executive Order that “my executive order calls on the FTC to ban or limit non-compete agreements. Let workers choose who they want to work for.”¹³ Not that there was any question that Chair Khan would accept this encouragement (as she has made her distaste of noncompetes crystal clear since the time she was a law school professor¹⁴), but the FTC did just that on January 5, 2023, when it issued a proposed rule banning noncompetes nationwide, with a narrow exception for noncompetes entered in connection with the sale of a business.¹⁵

This proposed comprehensive nationwide rule governing noncompetes is an unprecedented move by the federal government. Although the Obama Administration first took aim at noncompetes in its 2016 “State Call to Action on Non-Compete Agreements,” the focus of that was to encourage *state legislatures* to adopt policies to reduce the misuse of non-compete agreements and recommended certain reforms to *state law books*.¹⁶ Then-Vice President Biden posted a lengthy message at the time on his Facebook page linking to a White House survey that encouraged employees to share with the administration “how non-compete agreements or wage collusion are holding you down,” but he nevertheless stopped short as Vice President of advocating a nationwide ban, instead promising that the administration would “put forward a set of best practices and call to action for *state legislators* to make progress on reforms to address the misuse of non-competes.”¹⁷

Whatever motivated his more limited statements as Vice President, President Biden’s current position that the FTC should broadly prohibit noncompetes is not entirely surprising. During the 2020 presidential campaign, then-candidate Biden issued “The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions,” which included a clear and unambiguous pledge to ban most noncompetes at the federal level should he be elected:

As president, Biden will ensure that workers receive the pay and dignity they deserve. He will: . . . *Eliminate non-compete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.* In the American economy, companies compete. Workers should be able to compete, too. But at some point in their careers, 40% of American workers have been subject to non-compete clauses. If workers had the freedom to move to another job, they could expect to earn 5% to 10% more – that’s an additional \$2,000 to \$4,000 for a worker earning \$40,000 each year. . . . *As president, Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements.*¹⁸

Notably, then-candidate Biden acknowledged that he would have to “work with Congress” to accomplish this goal. Having failed to do so—or even try—he has now turned to unelected bureaucrats at the FTC to get it done.

Banning Noncompetes is Neither the Will of the People, Nor is it Constitutional

In her dissenting statement to the proposed rule, Commissioner Christine Wilson noted that “[t]he proposed Non-Compete Clause Rule represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction.”

Although legislators in several states have proposed banning virtually all noncompetes within their jurisdictions over the years, as noted above no state has done so since the late 1800s. Rather, every state that has considered banning noncompetes has ended up either doing nothing legislatively or enacting compromise legislation (Michigan passed a law banning noncompetes that was enacted in 1905 but repealed in 1985). For example, over the past few years Massachusetts and Illinois both passed more modest noncompete legislation following years-long, drawn-out legislative processes (in the case of Massachusetts, almost a decade), both of which began with proposals to ban noncompetes outright. In 2020, the District of Columbia Council passed a law that would have banned noncompetes for most employees,¹⁹ but by the time it went into effect in late 2022, the legislature had so watered down the law through amendments such that, as enacted, it only prohibits noncompetes for employees earning less than \$150,000 annually (and medical specialists earning less than

\$250,000 annually)²⁰—a far cry from a complete ban. In other words, despite having been tested time and again in what Justice Louis Brandeis termed our “laboratories of democracy,”²¹ no state has taken the drastic action that the Biden Administration is now contemplating taking on a national basis for well over 100 years.

Fortunately, Supreme Court precedent remains a deterrent to executive power grabs. Earlier this year in *West Virginia v. EPA*, the Court further elaborated on the major questions doctrine, holding that administrative agencies must be able to demonstrate “clear congressional authorization” when they claim the power to make decisions of vast “economic and political significance.”²² There is nothing in the FTC Act, textually or otherwise, that supports a delegation of authority to the FTC to regulate noncompetes, much less ban them, but rather it vaguely delegates to FTC the authority to regulate “unfair methods of competition.”²³ As we have previously written, “[p]ermitting the FTC to regulate—*i.e.*, ban—noncompetes nationwide under the auspices of the ‘unfair methods of competition’ language of Section 5 of the FTC Act, which is undoubtedly a politically and economically consequential act, would upend a significant portion of the U.S. economy and fly in the face of centuries of thoughtful contemplation, vigorous debate, and reasonable compromise at the state level.”²⁴ As such, “based on the Supreme Court’s reasoning and holding of *West Virginia v. EPA*, the FTC likely would be held to lack the authority to regulate, much less ban, employee noncompetes nationwide.”²⁵

Regardless of the public’s will or any constitutional limitations, the FTC has now used its rulemaking authority to propose a ban on noncompetes nationwide. While the FTC could have taken a more modest approach and proposed a Rule setting a nationwide compensation threshold, requiring advance notice, or the like, given Chair Khan’s prior statements on the subject and the aggressive posture the FTC has taken under her leadership, the proposed Rule is not a surprise. This will, of course, lead to legal challenges, so the issue is unlikely to be resolved anytime soon.

NOTES

1. The three states that ban noncompetes are California (1872), North Dakota (1865), and Oklahoma (1890). Michigan legislatively banned noncompetes in 1905 but the legislature repealed the law in 1985. Contrary to popular belief in some quarters, Montana does not ban noncompetes. See *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 362 Mont. 496, 503-07 (Mont. 2011).
2. Epstein Becker & Green, P.C. has prepared a 50-state survey of noncompete laws, available for no charge at <https://www.ebglaw.com/50-State-Noncompete-Survey>. As noted in the survey, some of these 29 states, and others, have separate statutes governing noncompetes in certain industries, such as healthcare.
3. See *J. Aron & Co v. SemCrude, L.P.*, 504 B.R. 39, 55 (Bankr. Del. 2013) (“Traditional contracts law teaches that a mere peppercorn suffices as consideration.”) (internal citations omitted).
4. Massachusetts Noncompetition Agreement Act (“MNCA”), Mass. Gen. Laws. Ch. 149, § 24L (emphasis added). There are very few published decisions interpreting the Massachusetts statute, as it was only enacted in October 2018, but one decision arguably holds that initial employment, in and of itself, is insufficient consideration. See *KPM Analytics N. Am. Corp. v. Blue Sun Scientific, LLC*, 2021 WL 2982866 (D. Mass. July 15, 2021).
5. For example, in Massachusetts, when an existing employee is required to sign a new or updated noncompete, it “must be supported by fair and reasonable consideration independent from the continuation of employment.” Mass. Gen. Laws. Ch. 149, § 24L. Again, the phrase “fair and reasonable consideration” is not defined, but continued employment is clearly insufficient.
6. Other recent trends include limitations on enforcement of noncompetes against discharged employees and purported prohibitions on the use of out-of-state choice-of-law and forum selection clauses, the latter of which raises questions of state sovereignty and will not necessarily be enforced by courts in other jurisdictions. See *Hilb Grp. of New England, LLC v. LePage*, 2022 WL 1538583 (E.D. Va. May 16, 2022) (rejecting MNCA’s prohibition on use of out-of-state venue provisions because “to allow the MNCA to trump the parties’ contractual choice of forum would allow provincial attitudes to dominate”).
7. The FTC is no better than the media. In its Fact Sheet concerning the proposed rule, the FTC offers several outlier exceptions as though they are the norm, such as a security guard earning minimum wage and a textile worker. https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf.

8. On one end of the spectrum is New Hampshire, where the threshold is \$14.50 per hour. On the other end is the District of Columbia, where the threshold is \$150,000 for most employees and \$250,000 for medical specialists. Other states with compensation thresholds include Colorado, Illinois, Maine, Maryland, Massachusetts, Nevada, Oregon, Rhode Island, Virginia, and Washington. Some of the thresholds increase annually or on other set schedules, whereas others utilize formulas tied to inflation. A few will not increase without statutory amendments. See <https://www.ebglaw.com/50-State-Noncompete-Survey>.
9. Starr, Evan and Prescott, J.J. and Bishara, Norman D, *Noncompetes in the U.S. Labor Force*, J. OF LAW AND ECON. 2021, (Oct. 2020), available at SSRN: <https://ssrn.com/abstract=2625714>.
10. Colorado, Illinois, Maine, Massachusetts, New Hampshire, Oregon, Virginia, Washington, and the District of Columbia. See <https://www.ebglaw.com/50-State-Noncompete-Survey>.
11. See *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St. 3d 356, 363 (2012) (Pfeifer, J., dissenting) (“Since the early 18th century . . . many jurisdictions have allowed noncompete agreements to be enforced when they are reasonable.”); *Hess v. Gebhard & Co.*, 808 A.2d 912, 918 n.2 (Pa. 2002) (“The earliest known American case involving a restrictive covenant is *Pierce v. Fuller*, 8 Mass. 223 (1811).”).
12. Exec. Order No. 14036, 86 C.F.R. 36987 (July 9, 2021).
13. <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.
14. FTC Chair Khan is an acolyte of the “New Brandeis” antitrust movement and was one of the principal authors of the 2019 “Utah Statement,” which set forth a series of concrete proposals for the future of antitrust law and enforcement, including that “[b]y rule or statute, non-compete agreements should be made presumptively unlawful.” <https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7>. Moreover, in a 2020 law review article Chair Khan co-authored with former FTC Commissioner Rohit Chopra, she opined that noncompetes “deter workers from switching employers, weakening workers’ credible threat of exit, and diminishing their bargaining power” and that “[b]y reducing the set of employment options available to workers, employers can suppress wages.” Rohit Chopra and Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 373 (Mar. 5, 2020). Khan previously served as legal director at the Open Markets Institute, which petitioned the FTC in 2019 to ban noncompetes. See Petition for Rulemaking to Prohibit Worker Non-Compete Clauses (Mar. 20, 2019), <https://aboutblaw.com/YkQ>.
15. <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>. This came just one day after the FTC issued a press release announcing that it “has taken legal action against three companies and two individuals, forcing them to drop noncompete restrictions that they imposed on thousands of workers.” See <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>. The companies entered into consent agreements that “prohibit the companies and, where applicable, their individual owners from enforcing, threatening to enforce, or imposing noncompetes against any relevant employees,” among other things. *Id.* As the FTC acknowledges in the press release, “these actions mark the first time that the agency has sued to halt unlawful noncompete restrictions.” *Id.*
16. <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>.
17. <https://www.facebook.com/VicePresidentBiden/posts/1786398901588706:0>.
18. <https://joebiden.com/empowerworkers/> (emphasis added). So-called “no-poach” agreements are horizontal agreements between competitors in the labor market not to hire each other’s employees. Unlike post-employment restrictive covenants, the employees subject to such agreements typically have no idea and no say in the matter. When these types of agreements are “naked” (*i.e.*, not ancillary to any legitimate business collaboration) the DOJ and FTC consider them to be *per se* violations of the Sherman Act because they unreasonably restrain the labor market. We do not necessarily agree that the DOJ has the right to attack no-poach agreements, but they are not the subject of this article.
19. Ban on Non-Compete Agreements Amendment Act of 2020, D.C. Act 23-563.
20. Non-Compete Clarification Amendment Act of 2022, D.C. Law 24-175.
21. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).
22. *West Virginia, et al. v. Environmental Protection Agency, et al.*, 597 U.S. ---, 142 S. Ct. 2587 (2022).

23. 15 U.S.C. § 45.

24. Erik W. Weibust and Stuart M. Gerson, *FTC Authority to Ban Noncompetes Shaky After EPA Ruling*, LAW360 (July 14, 2022), <https://www.law360.com/articles/1511340/ftc-authority-to-ban-noncompetes-shaky-after-epa-ruling> (subscription) and <https://www.ebglaw.com/insights/ftc-authority-to-ban-noncompetes-shaky-after-epa-ruling/>.

25. *Id.* Commissioner Wilson agreed with this sentiment in her dissenting statement, noting that the proposed Rule “is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in ‘unfair methods of competition’ rulemaking, (2) the major questions doctrine addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals. In short, today’s proposed rule will lead to protracted litigation in which the Commission is unlikely to prevail.” https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.