

## Time For Federal Action To Ban Noncompetes

By **Gerald Sauer** (February 23, 2021, 4:37 PM EST)

These could soon be very good days for employees. The Biden administration has pledged to do a pretty thorough rewrite of the employment laws, tilting the playing field back in the direction of workers. The White House's proposals range from raising the minimum wage to a hefty \$15 per hour to buttressing protections for organized labor. Yes, things are definitely looking up for people who still have jobs.



Gerald Sauer

But for tens of millions of workers whose employment the pandemic has mercifully spared, the risk of looking for new work could outweigh any potential benefit in wages, working conditions or opportunity. Employees ranging from hourly workers to the executive suite have been bound by onerous noncompetes in their employment agreements. In some states, lower-wage workers may not even know that their hands are tied by the routine paperwork they signed when hired, learning of the constraints only when they seek new employment.[1]

These workers may be barred from taking a job in the same line of work, or they could be forced to relocate if they want to keep working in the same profession. They might have to make life-altering changes just to stay gainfully employed. Even when they are legally unenforceable, noncompete agreements can trap workers in abusive and discriminatory work environments: They fear being sued, and they prefer a paycheck over no paycheck.

Employers rarely face resistance from new hires who believe they have to accept all employment terms if they want to pay rent, utilities and other obligations.[2] Even low-wage workers who have been terminated by an employer can, if they reside in employer-friendly states, find themselves barred from taking positions that could improve their skills and future earning potential.

In 2016, the U.S. Department of the Treasury reported that noncompete clauses in contracts reduced wages and wage growth over time.[3] Then-Vice President Joe Biden urged their elimination, saying workers "can't reach their true potential without freedom to negotiate for a higher wage with a new company, or to find another job after they've been laid off." [4] Now President Biden has made clear his desire to get rid of noncompetes in the employment context, with limited exceptions.

During a time in the nation's history when millions have lost jobs and thousands of businesses have been shuttered, it makes sense that a pro-worker administration would act to protect and expand job opportunities.

The shift away from noncompetes has actually been in the works, albeit slowly, over the past few years at the state level. In response to an overbroad use of noncompetes by companies such as Amazon.com Inc.,<sup>[5]</sup> which prohibited warehouse workers from accepting employment or starting a business anywhere in the world in any line of Amazon business that the employee supported for 18 months after leaving, several states banned or severely restricted noncompete clauses.

Most noncompetes are unenforceable in California, and the District of Columbia recently adopted a near-universal prohibition on noncompetes.<sup>[6]</sup> Oklahoma and North Dakota allow noncompetes in narrow circumstances, and in 2020 Virginia enacted a partial ban on noncompetes for employees making up to \$62,000 a year.<sup>[7]</sup> Texas law, which disfavors restraints on trade, requires valid consideration, as well as reasonable limits on time, geographic scope and covered activities.<sup>[8]</sup> New York law similarly disfavors broad noncompetes.<sup>[9]</sup>

Is there any place for noncompetes in the workplace? Employers who have valid concerns about protecting customer lists and other proprietary information from rivals have better tools at their disposal. They can use trade secret and other intellectual property laws to protect in-house know-how, and they can offer raises, promotions and loyalty bonuses to incentivize employees to stay for a specified period.

That being said, it takes time and money to litigate IP breaches, and noncompetes offer an easy way for employers to cover themselves. If we acknowledge that there is still a place for noncompetes in the workplace, we must require that they be narrowly drafted, with reasonable time limits, to address legitimate employer concerns without erecting a one-size-fits-all barrier against employee mobility. Such a change would lift constraints on most job seekers looking for new employment.

Federal legislation could bring uniformity to employment laws in all states and provide a measure of certainty to workers at all levels on the professional and socioeconomic spectrum. Even with a Democratic majority, however, it is uncertain that a noncompete ban will pass in Congress.

Nevertheless, Biden can take steps to effect a ban. He can buy at least four years of protection for employees by issuing an executive order barring government contractors from using noncompetes in their employment agreements, and appointing individuals to the Federal Trade Commission who are committed to advancing worker rights.<sup>[10]</sup>

In March 2019, the Open Markets Institute along with the AFL-CIO, Service Employees International Union, United Food and Commercial Workers International Union, and more than 60 other organizations, called on the FTC to ban noncompetes.<sup>[11]</sup> They filed a formal petition for rulemaking to end most noncompetes, stating "[n]on-compete clauses inflict significant harms on workers."<sup>[12]</sup>

The legal director of the Open Markets Institute recently noted that the two Democrats currently on the FTC support a rule restricting noncompete clauses and that several congressional Republicans have publicly called for FTC action against noncompetes.<sup>[13]</sup> Given shifting tides at the state level — capped by the District of Columbia's almost complete prohibition on noncompetes — the time seems finally right for Congress or the Biden administration to do the right thing.

Now, more than ever, workers should have the freedom to work. As states like California have done,<sup>[14]</sup> regardless of what happens in Washington all states should restrict noncompetes to specific, narrowly tailored situations. Any noncompete that falls outside the scope of these clearly defined exceptions should be presumed invalid unless the employer can demonstrate why a noncompete is needed.

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*Gerald Sauer is a founding partner at Sauer & Wagner LLP.*

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[1] <https://www.cbsnews.com/news/half-of-u-s-businesses-ask-employees-to-sign-noncompete-agreements-and-half-of-them-are-low-wage-workers/>.

[2] [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2625714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714).

[3] <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.

[4] <https://www.reuters.com/article/us-usa-noncompetes/white-house-urges-ban-on-non-compete-agreements-for-many-workers-idUSKCN12P2YP>.

[5] <https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts>.

[6] [https://lims.dccouncil.us/downloads/LIMS/43373/Signed\\_Act/B23-0494-Signed\\_Act.pdf](https://lims.dccouncil.us/downloads/LIMS/43373/Signed_Act/B23-0494-Signed_Act.pdf).

[7] <https://law.lis.virginia.gov/vacode/title40.1/chapter3/section40.1-28.7:8/>.

[8] <https://statutes.capitol.texas.gov/Docs/BC/htm/BC.15.htm>.

[9] <https://ag.ny.gov/sites/default/files/non-competes.pdf>.

[10] <https://news.bloomberglaw.com/us-law-week/biden-can-free-millions-from-coercive-employment-contracts>.

[11] <https://www.openmarketsinstitute.org/publications/open-markets-afl-cio-seiu-60-signatories-demand-ftc-ban-worker-non-compete-clauses>.

[12] <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>.

[13] <https://news.bloomberglaw.com/us-law-week/biden-can-free-millions-from-coercive-employment-contracts>.

[14] <https://www.dhillonlaw.com/blog/non-compete-agreements-valid-california/>.