

# Biden Plans to Ban Noncompete, No-Poaching Clauses

The incoming president could push for legislation or use FTC authority

By Roy Maurer  
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**P**resident-elect Joe Biden has indicated that his administration will be more aggressive in minimizing employers' use of noncompetition clauses in employment contracts and institute an outright ban on no-poaching agreements.

Specifically, Biden said he will support federal legislation that would eliminate most noncompete agreements, only allowing those "that are absolutely necessary to protect a narrowly defined category of trade secrets."

Proponents of eliminating the clauses argue that noncompete agreements—which bar workers from accepting new employment in their field or industry for a certain period, often a year or more after they leave an employer—reduce competition among businesses and stifle workers' job mobility and wage growth. The clauses were first introduced to prevent upper-level employees from taking trade secrets to rival businesses but have since proliferated to low-wage and low-skill workers.

"It's simple: companies should have to compete for workers just like they compete for customers," Biden said in December 2019. "We should get rid of noncompete clauses and no-poaching agreements that do nothing but suppress wages."

No-poaching agreements—when employers agree not to hire workers from one another—make it harder for workers to be recruited by competitors or negotiate better terms of employment.

The Obama administration in 2016 called on U.S. states to ban noncompete and no-poaching agreements, saying it would lead to a more competitive labor market and faster wage growth.

The antitrust division at the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued joint guidance for HR professionals ([www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/wage-fixing-nonpoaching-agreements-illegal-ftc.aspx](http://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/wage-fixing-nonpoaching-agreements-illegal-ftc.aspx)) in October 2016 affirming that it is against the law for employers to agree to fix wages or to not hire one another's workers.

The Trump administration also spoke out against the practices ([www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/justice-department-targets-nonpoaching-agreements.aspx](http://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/justice-department-targets-nonpoaching-agreements.aspx)). The DOJ filed several lawsuits against employers over the last few years, and the FTC held public events to determine whether it should issue regulations outlawing the agreements.

## Legislative Action

Susan Guerette, a partner in the Philadelphia office of Fisher Phillips and co-chair of the firm's employee defection and trade secrets practice group, noted the recent bipartisan attempts to regulate noncompetition clauses ([www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/democrats-propose-bans-noncompete-no-poach-agreements.aspx](http://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/democrats-propose-bans-noncompete-no-poach-agreements.aspx)) on the federal level. Legislation banning the agreements may depend on the outcome of the Jan. 5 runoff elections for Georgia's two seats in the U.S. Senate.

"Democrats have typically been more apt to call for limits on the use of restrictive covenants that they perceive as impeding employee mobility, and especially in light of the pandemic and the massive unemployment rate, it would not be surprising to see the new Congress and President Biden team up to implement a national approach to noncompetition," she said.

Even if a push for legislation at the federal level fails to gain traction, employers can still expect movement over the next four years at the state level, Guerette said. "If federal restrictions on noncompetition agreements do not take hold, we are likely to see states continue to consider restrictive covenants and implement laws to limit their use."

Nearly every state allows noncompete agreements, but legal battles are often waged over their validity. Some states, such as California, North Carolina and Oklahoma, disregard these agreements, while others outline which occupations may be subject to noncompetition. Courts generally focus on the length of time the agreements are in effect, their geographical limits and whether employees had access to trade secrets.

### Regulatory Authority

Daniel Hanley, a policy analyst at the Open Markets Institute, a Washington, D.C.-based think tank focused on antitrust issues, said that the Biden administration should instruct the FTC to enact rules prohibiting noncompete agreements and exclusionary practices. "The FTC has broad rulemaking authority to define and prohibit unfair or deceptive acts or practices and unfair methods of competition," he said. "The FTC can take advantage of this power to prohibit noncompete agreements and exclusive dealing agreements."

Somewhere between one-quarter and nearly one-half of private-sector workers are subject to some kind of noncompete agreement ([www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/noncompete-agreements-have-become-more-common.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/pages/noncompete-agreements-have-become-more-common.aspx)), according to a study from the Economic Policy Institute.

Many businesses have legitimate reasons for requiring workers to sign the agreements, and individualized assessments of the agreements that consider the industry and the geographical location should be conducted instead of an outright ban, said Beth Milito, senior legal counsel at the National Federation of Independent Business.

"Should noncompetes be limited by a Biden administration, employers would have to consider new ways to protect their customer relationships, financial investments, business goodwill and confidential information," said Ana Dowell, an attorney in the Atlanta office of Ackerman.

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