

Work Shift | Quicktake

How the FTC's Noncompete Ban Will Affect Bosses and Workers




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By [Matthew Boyle](#)

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For decades, noncompete employment agreements have prevented all sorts of workers – doctors, engineers, even hair stylists – from easily switching jobs. That may soon change after the US Federal Trade Commission approved a near-total ban on such provisions. The move was cheered by President Joe Biden but pilloried by business groups like the US Chamber of Commerce, which immediately sued to block the ban. As the legal challenge plays out, employers and employees were trying to make sense of the 570-page rule and gauge its impact.

1. What is the FTC changing about noncompetes and when?

Existing noncompetes that apply to lower- and mid-level workers would be voided after the rule goes into effect in four months. Employers must provide “clear and conspicuous notice” to such workers that the restriction is no longer in effect. Noncompetes for senior executives in a “policymaking position” who earn more than \$151,164 a year can remain, but no new ones can be written. The rule doesn’t apply to banks, credit unions or nonprofits, because they aren’t subject to FTC regulation, but hedge funds, private equity firms and other asset managers would be covered.

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The FTC made an exception for so-called garden leaves, which are used in finance-industry contracts for employees who are privy to sensitive information, such as knowledge of a money manager's trading strategies or pending deals. As long as a firm keeps paying a departing employee normal compensation during a required garden leave, such an arrangement wouldn't be considered a noncompete agreement. "It seems counter-productive – that's like indentured servitude," said Kevin Passerini, a partner at law firm Blank Rome. "But the FTC blessed it."

2. Will this boost wages or make it easier to change jobs?

In many cases, yes. With nearly 20% of workers subject to noncompetes today, the FTC estimated that it would increase US earnings by at least \$400 billion over the next 10 years. That figure might be conservative, according to Evan Starr, an associate professor at the University of Maryland's Robert H. Smith School of Business who has researched noncompetes extensively. By reducing worker mobility, the FTC says, noncompetes hold down wages for all workers, not just those who have them in their contracts. The ban could create more new jobs as startups can freely hire workers who were once tied down. "This could be a total bonanza for companies that have been struggling to hire," Starr said.

Orly Lobel, a law professor at the University of San Diego who specializes in employment and labor policy, has said that noncompetes can also reinforce gender and racial pay gaps, harming women and people of color. "I don't necessarily think it will make people quit quicker, but I'd think this would encourage companies to not muck around with wages and give workers pay that is more equitable," said Laurie E. Morrison, an employment lawyer who represents workers. "Or, people will vote with their feet."

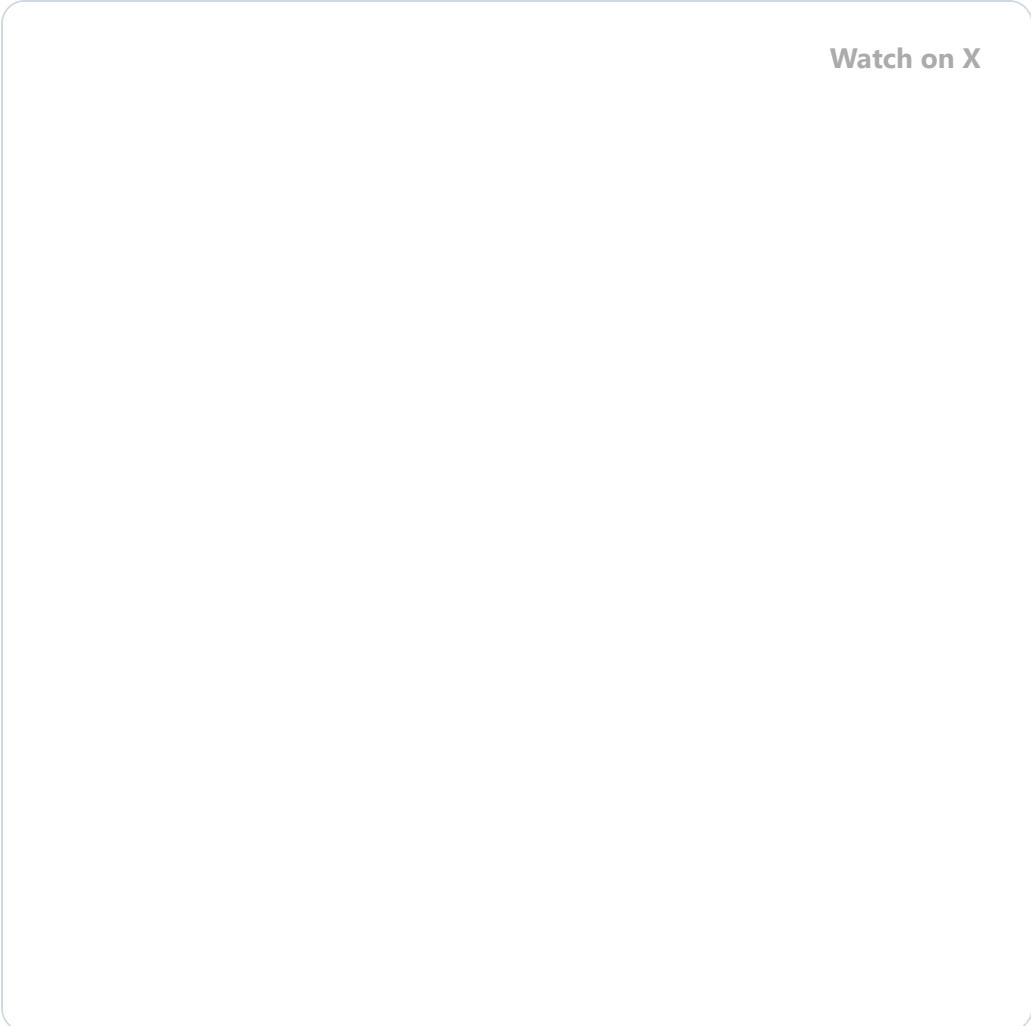
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The US Federal Trade Commission approved a near-total ban on noncompete employment agreements that have historically prevented workers from easily switching jobs.

[@bizboyle](#) breaks down what that means for bosses and workers trib.al/717nT93

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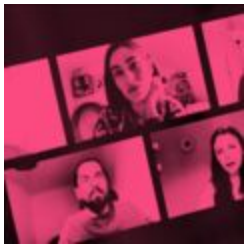
3. What should employers do about it?

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holds up. “Start preparing now – you don’t want to assume that it will get caught up in litigation and then have to give notice to 150 employees overnight,” said [Mariko Paul](#), an assistant general counsel at Engage PEO, which provides human resources services to small and midsize businesses.

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Then, determine what other legal means can be used to protect trade secrets and other sensitive information. Nondisclosure and non-solicitation agreements can help keep proprietary information secure, but make sure such conditions aren’t overly broad, or the FTC might now deem them “functional noncompetes” that are just as restrictive. Companies could also use retention bonuses or stock awards to hold onto staff.



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A big hurdle, of course, is simply determining what knowledge is considered worth protecting. “This is all very confusing for most of us,” [Roxanne Bras Petraeus](#), co-founder

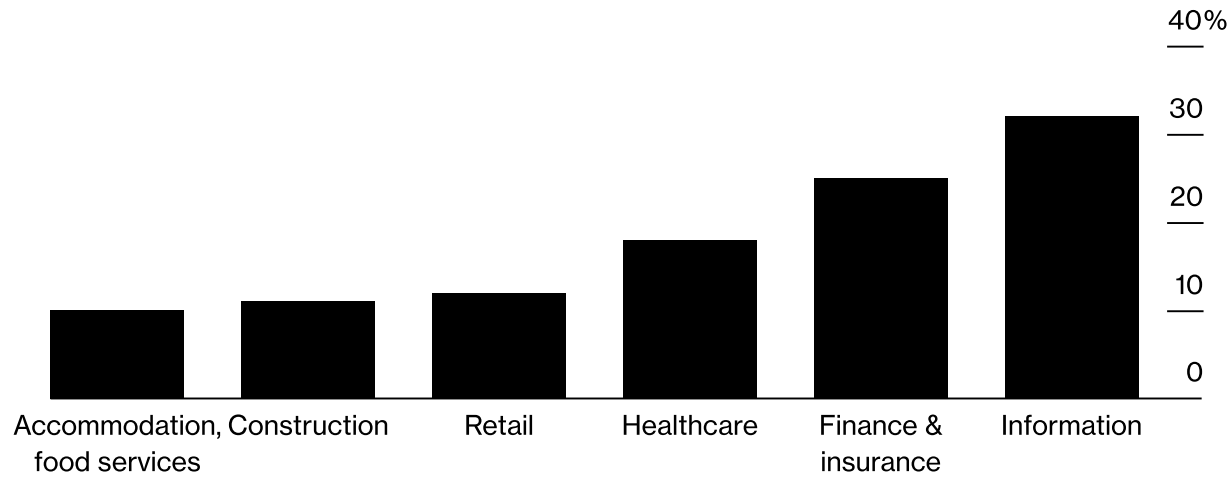
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information and the knowledge they’ve acquired that they *can* bring to competitors, you’d get a “?????”

The best way to make sure that employees don’t leave for a competitor, she said by email, is to “create a work environment that makes your employees want to stay.”

Share of Workers Subject to Noncompete Clauses

Highly paid employees in finance, tech are among the most exposed

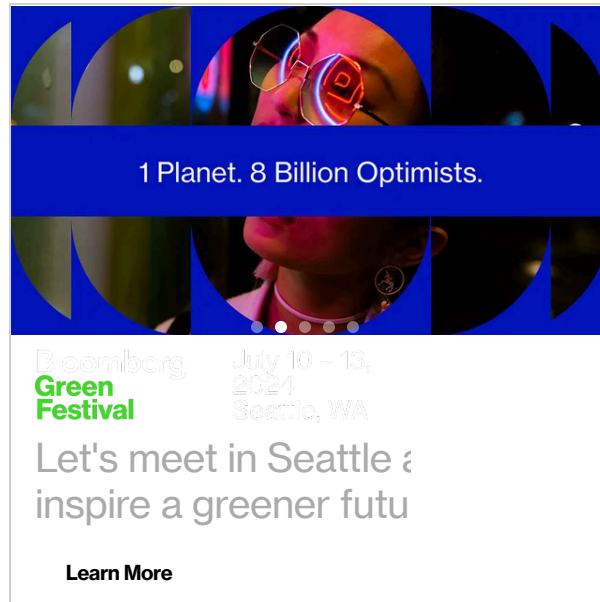


Source: Starr, Prescott and Bishara, “Non-Competes in the US Labor Force,” Journal of Law and Economics 2021

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The FTC’s ruling came on the same day as new Labor Department regulations that expand overtime pay eligibility, allowing roughly 4 million workers to take home more money when they work more than 40 hours a week. Unions and other worker advocacy groups embraced both developments, while business groups have railed against them, mapping out legal challenges.

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As it stands, though, the new rules, combined with a still-robust US labor market and the resiliency of remote work, might once again alter the balance of power between bosses and staff, which lately has been tilting back in favor of management amid layoffs, return-to-office mandates and cost-cutting measures.

“People know about noncompetes now, even if it gets blocked,” said Matt Marx, a professor at Cornell University’s SC Johnson College of Business who’s been researching the topic for two decades. “Whatever happens, it makes workers aware. Everyone is talking about it.”

The Reference Shelf

- The FTC’s fact sheet on its ban.
- Bloomberg Opinion columnist Matt Levine writes that financial firms will probably rely more on nondisclosure agreements in the wake of the noncompete ban.
- A Bloomberg News article explores an exception to the FTC rule for “garden

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- A 2020 [research report](#) showing how pervasive noncompetes are in the US labor force.
 - Does banning noncompetes lead to a rise in trade secret litigation? [This research paper](#) says no.
 - A [report](#) by the US Treasury Department contains an appendix on the legal history of noncompete clauses.
- *With assistance from Leah Nylan*

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