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Biden administration issues order to curb noncompetes

President Joe Biden recently signed an executive order calling for restrictions against the use of noncompete agreements.

Businesses sometimes use noncompetes to stop workers from accepting jobs with competitors for a certain amount of time after leaving their employment.

The new order doesn't change the laws on noncompetes in and of itself.

However, the order asks the Federal Trade Commission (FTC) to issue a rule to "curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility."

According to the White House, the order "includes 72 initiatives by more than a dozen federal agencies to promptly tackle some of the most pressing competition problems across our economy." Of those, one provision focuses specifically on noncompetes.

The fact sheet that accompanies the order includes somewhat stronger language, encouraging the FTC to "ban or limit" noncompete agreements.

According to the fact sheet, around half of private businesses require at least some employees to sign noncompete agreements. That amounts to around 36 to 60 million workers.

What does it mean for companies?

It is unclear at this point whether the FTC will issue regulations in response to this order.

However, the executive order likely means that noncompete agreements and other similar provisions will be closely scrutinized by the Biden administration.

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It's possible that the FTC will issue new regulations restricting noncompetes. If so, it would likely take months or even years for a rule to be issued and finalized.

The FTC and Department of Justice could also try to fight noncompete agreements more often and/or expand the definition of what is considered "anti-competitive" in these agreements.

In response to calls to apply federal antitrust laws more strictly to non-

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Independent contractor test halted

The Biden administration has taken action on the definition of "independent contractor" under the federal Fair Labor Standards Act.

The administration will not be implementing a business-friendly test planned by the Trump administration but instead will stick with a more restrictive "economic realities" test.

The Biden administration noted three reasons for the decision:

- The Trump administration's proposed rule conflicted with the test under the FLSA and its stated purpose, along with court rulings that have interpreted the meaning of the FLSA;
- The way the proposed rule prioritized the nature and degree of control over the work and the worker's opportunity for profit or loss to classify a worker as an independent contractor didn't align with the way many courts review the totality of the circumstances; and
- The proposed rule would have created a narrower set of factors in analyzing whether a worker should be classified as an independent contractor.

What's next?

It's unclear what the future holds for the independent contractor test on the federal level. Although the Biden administration has said that it does not plan to propose a more restrictive test, some observers predict that Biden will seek to further narrow the definition.

On several occasions, President Biden has indicated his support of a test known as the "ABC" test, similar to California's new independent contractor rule.

That rule presumes that all workers are employees instead of contractors, and a worker must meet all three of the following factors for a business to classify them as an independent contractor:

- The worker is free from the control and direction of the company;
- The worker performs tasks that fall outside of the company's core service or product; and
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work they are performing.

What rule applies right now?

Under the current test, the DOL determines independent contractor status based on the following factors:

- The extent to which the services rendered are an integral part of the principal's business;
- The permanency of the relationship between the worker and business;
- The amount of the alleged contractor's investment in facilities and equipment;
- The nature and degree of control by the principal;
- The alleged contractor's opportunities for profit and loss;
- The amount of initiative, judgment or foresight in open market competition with others required for the success of the claimed independent contractor; and
- The degree of independent business organization and operation.

To ensure your business is classifying workers properly, consult an attorney.

Consumer product safety enforcement on the rise

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For businesses that sell products to consumers, reporting of safety hazards is always important, but this year enforcement activity by the Consumer Product Safety Commission (CPSC) for reporting violations is up.

In January, the Department of Justice announced that Walter Kidde Portable Equipment, Inc. had agreed to pay a civil penalty for allegedly failing to timely notify CPSC about problems with its fire extinguishers. The DOJ also alleged that Kidde knowingly made material misrepresentations to CPSC and knowingly sold fire extinguishers with unauthorized certification marks.

As a result, Kidde was slapped with a $12 million civil penalty and future compliance requirements and improvements, as well as liquidated damages in the amount of $5,000 per violation per day if the company violates the requirements.

Then, in February, the agency announced that Cybex International, Inc. agreed to pay a $7.95 million civil penalty for alleged late reporting of potential product safety hazards with its exercise equipment. The penalties are the result of two recalls, involving the company's arm curl machines and smith press machines, both due to hazards related to an unreasonable risk of serious injury or death.

The Cybex settlement covers late reporting from a time when the company had a different owner.

For any business, the level of these fines and requirements are significant, and the extent of enforcement is likely to rise even more under the Biden administration.

Businesses that sell consumer products should consult an attorney to ensure they are handling the reporting of any safety issues to the letter of the law.

U.S. Supreme Court rules on workers' data misuse

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Consider a situation where someone who works for you prepares to leave to work for a competitor. Then, imagine that worker accesses your company's sensitive data before leaving, copies it to a USB drive and takes it with them to their next place of work.

A recent U.S. Supreme Court ruling closes the door on one possible way to fight such an action after the fact.

The decision in *Van Buren v. U.S.* serves as a reminder for companies that preemptive action to protect sensitive competitive information is more important than ever.

The case before the court was a criminal case, but the impact extends beyond criminal activity.

It involved Nathan Van Buren, a police sergeant in the Cumming, Georgia Police Department. As part of his job, Van Buren had access to the state law enforcement computer database, which contained license plate information that he was authorized to use "for law-enforcement purposes."

An acquaintance of Van Buren offered him $5,000 to access the database to figure out whether another individual was an undercover police officer, and Van Buren agreed. Unfortunately for him, the acquaintance was cooperating with an FBI investigation.

Van Buren was charged with a felony violation of the Computer Fraud and Abuse Act, which imposes both civil and criminal liability on anyone who "intentionally accesses a computer without authorization or exceeds authorized access."

Like many companies in civil cases under the CFAA, the Department of Justice argued that even though Van Buren was authorized to use the database, he exceeded his "authorized access" because he was not allowed to access the database for a reason unrelated to his job.

Van Buren was convicted and a federal appeals court affirmed his conviction.

But the U.S. Supreme Court agreed with Van Buren, finding that computer users do not violate the CFAA by using their authorized access for unauthorized purposes. Rather, the Act's ban on "exceed[ing] authorized access" only applies to users who access a computer, or areas of a computer system, they have not been authorized to access.

Given this result, and the fact that similar reasoning can be applied to civil cases under the Act, companies must ensure they have airtight confidentiality and non-disclosure agreements, computer-use policies, and stricter restrictions on particularly sensitive information.

Biden administration issues order to curb noncompetes

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compete agreements, the FTC and DOJ could also revise their Joint Antitrust Guidance for Human Resource Professionals to address noncompetes more specifically.

No matter what happens, the order sends a signal to companies to review and reevaluate their use of noncompete and similar covenants based on the following factors:

- Evaluate what business interest you are trying to protect and whether the agreement is narrowly tailored to specifically protect that interest.
- Consider which employees will be required to sign noncompetes. That may depend on income, job level and other factors.
- Evaluate to what extent your noncompete is reasonably limited in geographic scope and duration. It's important to consider whether the agreement would prevent the employee from earning a living.
- Look at whether the noncompete stops an employee from doing business with clients or customers they knew before working at your company.
- Determine whether you could have less stringent provisions that would accomplish the same goal, such as a confidentiality, non-solicitation or non-interference agreement.
- Decide whether existing statutes or common law offer enough protection to avoid a noncompete entirely.

While companies await any further action by the federal government, the current state rules around noncompetes vary significantly across the country.

California, North Dakota and the District of Columbia essentially prohibit them. Meanwhile, Illinois, Maine, Massachusetts, New Hampshire, Rhode Island and Washington all ban noncompete agreements as a requirement for low-wage workers. Several other states require that noncompetes and other restrictive covenants remain reasonably limited in scope and duration.

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IRS gears up for increased tax enforcement for businesses

The IRS is in the midst of hiring thousands of new auditors.

In recent years, audit rates have fallen, especially for corporations and high wage earners.

The surge in hiring is part of the agency's preparation for a big tax enforcement push if the American Jobs Plan passes Congress and is signed into law. That plan includes $40 billion to expand audits over 10 years, with the goal of generating $100 billion in new tax revenue.

As of the end of July, the plan was backed by a group of 21 senators and was still in negotiations in Congress.

Businesses should be aware of this possibility and ensure that their records are in order.

In particular, the IRS small business and criminal investigations divisions are looking for employees to ramp up after losing around 17,000 audit staff members over the past 10 years.

According to De Lon Harris, co-commissioner of the IRS small business unit, who spoke about the matter at a tax conference at New York University, the division is planning to add about 2,000 new workers, including 1,300 revenue agents, before the end of September.

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The criminal investigations division expects to hire more than 500 workers this year.

This surge in hiring at the IRS far surpasses the agency's activity over the past several years. The increase in staff will allow the IRS to quickly increase its audit capacity if the bipartisan plan passes.