



Noncompete ban: A new chapter for workers?

by Chuck Green / June 17, 2024 /

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Chalk one up for United States workers.

In April, the Federal Trade Commission (FTC) [prohibited](#) the enforcement of noncompete clauses among for-profit U.S. employers. The vote was 3-2 among the FTC's five commissioners, with two turning a thumbs down because they believed the rule was "unlawful" and "won't survive legal challenge," [CNN reported.](#)

The final rule is scheduled to go into effect on September 4, 2024. Tens of millions of workers would be impacted by the ban.

Courts hold the key

Perhaps not surprisingly, it didn't take much time for challenges to the ban to emerge.

"We've already seen some challenges to the legality of the FTC's rule, including the Ryan, LLC case in the U.S. District Court for the Northern District of Texas," says [R. Scott Oswald](#), managing principal of The Employment Law Group in Washington, D.C. "Big business is obviously threatened and is trying to stop the FTC — or at least to slow it down — until the balance of power in D.C. shifts again, possibly after the November election."

Obviously, Election Day is a waiting game. [Paul Burke](#), general counsel at Ray Quinney & Nebeker in Salt Lake City, says it remains to be seen whether the proposed ban will ever take effect.

"Administrative delays in the implementation of proposed regulations are not uncommon, and business interests are virtually certain to challenge this regulatory ban by seeking a court injunction to prevent it from taking effect," he says.

In recent years, Burke continues, federal courts have been "increasingly sympathetic" to challenges of administrative rules.

"The outcome could hinge on whether the federal judiciary concludes that banning noncompetition agreements is a 'major question' beyond the FTC's statutory authority to stop anti-competitive business practices," he says.

[Cheylynn Hayman](#), an attorney with Parr Brown Gee & Loveless in Salt Lake City, thinks there's a "decent chance" the FTC's broad rule will not survive a legal challenge — in whole or in part.

"While courts wrangle with whether the FTC has the congressional authority to issue such a rule in the first instance and evaluate other substantive challenges to the rule's provisions, I anticipate the rule will likely be judicially stayed before it goes into effect while the courts evaluate and resolve those important legal issues," she says.





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Free to compete

Oswald calls the ban “a major step toward workplace fairness.” Noncompetes, he adds, have been “horribly abused by employers, and this ban is those chickens coming home to roost.”

The FTC wants to stop businesses from inhibiting competition for labor through such restrictive covenants, Burke says.



“The Biden administration hopes that the economy will benefit from increased competition for employees in a fair labor market and that employees will enjoy more freedom to change jobs and earn higher wages,” Burke says.

Oswald adds that the FTC “correctly” says noncompetes have become a “huge drag” on the U.S. economy by strangling people’s ability to benefit from the skills and experience they’ve worked hard to acquire.

In fact, Oswald even hesitated to call the documents “agreements.”

“The only reason most employees ever signed these documents was that they had no choice,” he says. “Why tolerate this sort of exploitation, which helps a person’s former employer while hurting literally everyone else in the economy? It makes no sense.”

Writing in [Harvard Business Review](#), [Orly Lobel](#) — Warren Distinguished Professor of Law and director of the Center for Employment and Labor Policy at the University of San Diego and previously a member of former President Barack Obama’s team — said, “For those like me who have long argued against the use of noncompetes, this moment has been a long time coming.”

“Even the corporations that previously tried to choke off their competition will benefit because they’ll need to raise their game.”

Gains and pains

But not everyone shares that feeling. In a recent opinion piece, the [Washington Post](#) stated the FTC’s noncompete clause rule “goes too far.”

So, then, bringing the issue closer to home, what does Utah’s business landscape have to gain — and lose — from this ban?

Hayman notes that California has banned noncompete agreements under its state law for years. “I’d expect this new rule to transform Utah’s business landscape in much the same way that it impacted — and continues to impact — California’s business landscape.”

Employers in the state became prohibited from entering into or attempting to enforce noncompete agreements after Gov. Gavin Newsom signed Senate Bill 699 into law on September 1, 2023. Typically, California paces the nation’s legislative landscape, according to [Bloomberg Law](#). Noncompete laws are no exception.

While the new rule might benefit employees and their ability to change jobs, “it may also impact and undermine the ability of Utah businesses to effectively protect their confidential information and goodwill,” Hayman says. The new rule might also negatively impact Utah businesses’ willingness to invest in the training and education of their employees.

Oswald says the upside is clear: Utahns will move from job to job with fewer limits, free to maximize their value in the state’s economy. “Even the corporations that previously tried to choke off their competition will benefit because they’ll need to raise their game,” he continues. “That’s good for everyone.”

Utah had already [banned](#) noncompetes that last more than a year, indicating that state lawmakers knew these tools could be harmful and needed to be regulated. “This federal ban just finishes the job they started,” Oswald says. “I see no real losers in Utah except the lawyers who used to get paid to fight over these shabby



contracts.”

[Benjamin Perkins](#), an attorney at Parsons Behle & Latimer in Salt Lake City, notes that if the final rule goes into effect, it will stop businesses from relying on noncompetes to protect their business interests.

“In exchange for giving up noncompetes, the FTC suggests that the final rule will alleviate ‘harm [to] competitive conditions in labor, product, and service markets,’” he continues. “Only time will tell if the FTC’s correct.”

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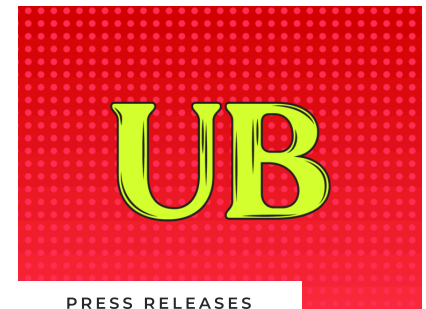
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