



US moves to bar non-compete agreements in labour contracts

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The FTC proposal is the latest in a series of aggressive and sometimes unorthodox moves to rein in the power of large companies under the agency's chair, Lina Khan. PHOTO: AFP

IN a far-reaching move that could raise wages and increase competition among businesses, the Federal Trade Commission (FTC) on Thursday (Jan 5) unveiled a rule that would block companies from limiting their employees' ability to work for a rival.

The proposed rule would ban provisions of labour contracts known as non-compete agreements, which prevent workers from leaving for a competitor or starting a

competing business for months or years after their employment, often within a certain geographic area. The agreements have applied to workers as varied as sandwich-makers, hair stylists, doctors and software engineers.

Studies show that non-competes, which appear to directly affect roughly 20 per cent to 45 per cent of private-sector US workers, hold down pay because job switching is one of the more reliable ways of securing a raise. Many economists believe they help explain why pay for middle-income workers has stagnated in recent decades.

Other studies show that non-competes protect established companies from startups, reducing competition within industries. The arrangements may also harm productivity by making it hard for companies to hire workers who best fit their needs.

The FTC proposal is the latest in a series of aggressive and sometimes unorthodox moves to rein in the power of large companies under the agency's chair, Lina Khan.

President Joe Biden hailed the proposal on Thursday, saying that non-compete clauses "are designed simply to lower people's wages". "These agreements block millions of retail workers, construction workers and other working folks from taking a better job, getting better pay and benefits, in the same field," he said at a Cabinet meeting.

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The public will be allowed to submit comments on the proposal for 60 days, at which point the agency will move to make it final. An FTC document said the rule would take effect 180 days after the final version was published, but experts said it could face legal challenges.

The agency estimated that the rule could increase wages by nearly US\$300 billion a year across the economy. Evan Starr, an economist at the University of Maryland who has studied non-competes, said that was a plausible wage increase after their elimination.

Starr said non-competes appeared to lower wages both for workers directly covered by them and for other workers, partly by making the hiring process more costly for employers, who must spend time figuring out whom they can hire and whom they can't.

He pointed to research showing that wages tended to be higher in states that restrict non-competes. One study found that wages for newly hired tech workers in Hawaii increased by about 4 per cent after the state banned non-competes for those workers.

In Oregon, where new non-competes became unenforceable for low-wage workers in 2008, the change appeared to raise the wages of hourly workers 2 per cent to 3 per

cent.

Although non-competes appear to be more common among more highly paid and more educated workers, many companies have used them for low-wage hourly workers and even interns.

About half of states significantly constrain the use of non-competes, and a small number have deemed them largely unenforceable, including California.

But even in such states, companies often include non-competes in employment contracts, and many workers in these states report turning down job offers partly as a result of the provisions, suggesting that these state regulations may have limited effects. Many workers in those states are not necessarily aware that the provisions are unenforceable, experts say.

“Research shows that employers’ use of non-competes to restrict workers’ mobility significantly suppresses workers’ wages – even for those not subject to non-competes, or subject to non-competes that are unenforceable under state law,” Elizabeth Wilkins, the director of the FTC’s office of policy planning, said in a statement.

The commission’s proposal appears to address this issue by requiring employers to withdraw existing non-competes and to inform workers that they no longer apply. The proposal would also make it illegal for an employer to enter into a non-compete with a worker or to try to do so, or to suggest that a worker is bound by a non-compete when he or she is not.

The proposal covers not just employees but independent contractors, interns, volunteers and other workers.

Defenders of non-competes argue that employees are free to turn down a job if they want to preserve their ability to join another company, or that they can bargain for higher pay in return for accepting the restriction.

Proponents also argue that non-competes make employers more likely to invest in training and to share sensitive information with workers, which they might withhold if they feared that a worker might quickly leave.

A ban “ignores the fact that, when appropriately used, non-compete agreements are an important tool in fostering innovation”, Sean Heather, a senior vice-president at the US Chamber of Commerce, said in a statement.

At least one study has found that greater enforcement of non-competes leads to an increase in job creation by startups, though some of its conclusions are at odds with

other research.

Starr said non-competes did appear to encourage businesses to invest more in training, but there was little evidence that most employees entered into them voluntarily or that they were able to bargain over them.

One study found that only 10 per cent of workers sought to bargain for concessions in return for signing a non-compete. About one-third became aware of the non-compete only after accepting a job offer.

Michael R Strain, an economist at the American Enterprise Institute, said that while there were good reasons to scale back non-competes for lower-wage workers, the rationale was less clear for better-paid workers with specialised knowledge or skills.

“If your job is to make minor tweaks to the formula for Coca-Cola, and you’re one of 25 people on Earth who knows the formula,” Strain said, speaking hypothetically, “it makes total sense that Coca-Cola might say, ‘We don’t want you to go work for Pepsi.’”

He said that it might be possible to satisfy an employer’s concerns with a less blunt tool, like a non-disclosure agreement, but that the evidence for this was lacking.

In a video call with reporters on Wednesday, Khan said she believed the FTC had clear authority to issue the rule, noting that federal law empowers the agency to prohibit “unfair methods of competition”.

But Kristen Limarzi, a partner at Gibson, Dunn & Crutcher who previously served as a senior official in the antitrust division of the Justice Department, said she believed such a rule could be vulnerable to a legal challenge.

Opponents would probably argue that the relevant federal statute is too vague to guide the agency in putting forth a rule banning non-competes, she said, and that the evidence the agency has on their effects is still too limited to support a rule. NYTIMES

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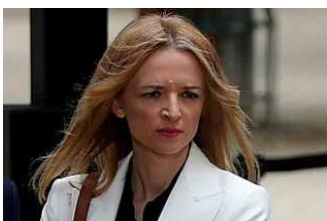
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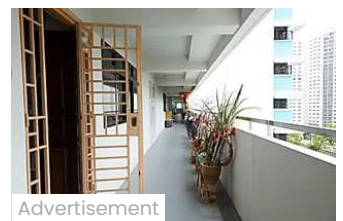
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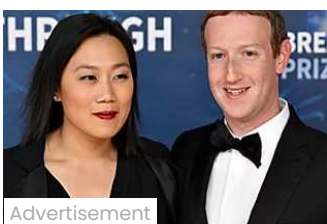
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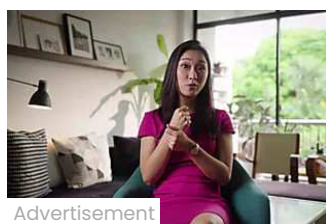
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