

FTC Considers Restricting the Use of Noncompete Clauses by Companies -- WSJ

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FULL TEXT

By Dave Michaels and Ryan Tracy

WASHINGTON – Federal Trade Commission Chairwoman Lina Khan said the agency is considering a new regulation to restrict the use of noncompete clauses by companies, which she said hurt lower-wage workers and can stifle competition for talent.

In addition to regulation, Ms. Khan said the agency plans to target the use of noncompete clauses in individual cases through enforcement actions.

Noncompete agreements typically bar employees from joining a competitor for a period after they quit. Long associated with higher-paid, salaried employees, companies have increasingly made them a condition of hire for hourly workers.

"We feel an enormous amount of urgency given how much harm is happening against the workers," Ms. Khan, an appointee of the Biden administration, said in an interview Tuesday. "This is the type of practice that falls squarely in our wheelhouse."

Companies that use noncompete clauses say they protect a business's intellectual property and other investments by preventing employees from sharing those assets with a new employer.

The U.S. Chamber of Commerce argued last year that the FTC lacked the authority to pass a regulation on noncompete clauses. Efforts to fight noncompete clauses should be done on a case-by-case basis through litigation, the Chamber wrote in a letter to the FTC, a strategy that would preserve their use in justified cases.

"Non-competes have a legitimate place in contract law, especially when a business is bought or sold," said a statement Wednesday from Sean Heather, senior vice president of antitrust policy at the U.S. Chamber of Commerce. "A blanket ban on non-competes would be a clear sign of FTC overreach."

The issue is emerging as a test of Ms. Khan's ambitions as the 33-year-old approaches the first anniversary of her swearing-in as FTC chairwoman on June 15. For most of the past year, the FTC has been divided 2-2 between Democrats and Republicans. A third Democrat took office last month.

Noncompete clauses have long been used for executives and others with specialized knowledge of a company's operations. Over time, however, they have been applied to lower-paid employees such as restaurant workers who don't have access to trade secrets.

The restrictions can restrain pay growth and mobility for lower-wage workers, who can't shift between competing companies to seek better pay or promotional opportunities, according to Ms. Khan and other critics of the practice.

Researchers say noncompete clauses may hamper economic activity more broadly by preventing higher-paid people from joining startups or starting their own businesses.

The FTC has in recent months issued subpoenas to a variety of businesses suspected of imposing unnecessary noncompete clauses on workers, according to lawyers representing companies that received the demands.

About 18% of all U.S. workers are bound by noncompete agreements, according to data analyzed by researchers

including University of Maryland management professor Evan Starr.

President Biden last year called on the FTC to consider curtailing the unfair use of clauses in employment contracts that restrict workers' freedom to change jobs.

Ms. Khan said the basis for noncompete clauses "really falls apart" when they are imposed on lower-wage workers. The restraints can also hurt the ability of startups to compete for talented and better-paid workers, she said.

Ms. Khan declined to disclose how the FTC would further curb noncompete clauses. Some states, including California, ban them outright. Others prohibit their application to lower- and middle-income workers. The state of Washington in 2020 banned noncompete clauses for people earning less than \$100,000 a year.

Last year, 7-Eleven Inc., as part of a settlement with the FTC that targeted its acquisition of competing gas stations, agreed to not enforce noncompete provisions against workers looking to switch jobs.

Dialysis provider DaVita Inc. dropped noncompetes for certain physicians in Utah last year as part of a deal to resolve an FTC challenge of its acquisition of competing dialysis clinics in that state. Both deals were approved in bipartisan votes.

Ms. Khan also said the FTC is considering drafting a regulation targeting the use of noncompete provisions. "An FTC rule there could have significant value-add," she said. "We need to be using all of our tools." She said the rules could be adopted via a rarely used FTC authority, a section of the 1914 FTC Act, which says "unfair methods of competition in or affecting commerce" are illegal.

It doesn't appear that Republicans on the five-member FTC would support a regulation banning noncompetes. Republican FTC Commissioner Noah Phillips has said the agency doesn't have legal authority to impose competition rules, although it can use its enforcement power to investigate noncompetes in particular cases. GOP Commissioner Christine Wilson said last year it was "premature" to pass a federal rule because many states had taken their own actions to address noncompetes.

Ms. Khan also said the agency is pushing forward with an ambitious agenda. Many observers expect her to bring an antimonopoly lawsuit against Amazon.com Inc., a company she had publicly argued was harming competition before taking the FTC job. The FTC has been investigating the company for years but hasn't filed a case.

Amazon last year petitioned the FTC for Ms. Khan's recusal from any ongoing investigation, citing her previous criticisms as evidence she had prejudged the outcome.

Ms. Khan declined to comment on that request or pending investigations but pointed to a federal judge's recent ruling that she didn't have to recuse herself from a separate antitrust lawsuit against Facebook owner Meta Platforms Inc.

The judge, she said, set "an extremely high bar to meet when [a defendant is] alleging prejudgment."

"None of these companies are ones that I've worked for," she said, "or for which I have a financial conflict of interest."

Ms. Khan said the FTC is still considering a rule targeting "commercial surveillance practices," even as Congress moves ahead with privacy legislation that could give the agency more regulatory authority.

And she pushed back against criticism that her plans for more aggressive enforcement of antitrust and consumer-protection laws will hurt businesses.

"There is incredible support in the business community for our work," she said. "Maybe not incumbent monopolists, but independent businesses, startups, entrepreneurs, that recognize that the arteries of commerce are currently clogged sometimes by anticompetitive conduct."

As an example, she pointed to independent pharmacists who supported this week's unanimous FTC decision to launch a fact-finding investigation of middlemen in the prescription drug industry.

Write to Dave Michaels at dave.michaels@wsj.com and Ryan Tracy at ryan.tracy@wsj.com

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