

April 23, 2024

Today's Driving Events

- **TikTok Lost the Battle in Congress But Can Still Win the War:** The foreign aid package, including legislation that could lead to a TikTok ban, appears to be on a glide path to passing the Senate, potentially as soon as today, but this will be far from the end of the app's conflict with Washington.
- **FTC Poised to Pass Non-competes Ban:** The Federal Trade Commission will hold a meeting today to vote on its proposed ban on non-compete agreements in employment.
- **Nursing a Grudge:** Vice President Harris announced yesterday that the Biden administration was going forward with a controversial rule to institute minimum staffing standards for nursing homes.

What Comes Next for TikTok?: After clearing the House over the weekend, the Senate appears to be on a glide path to passing the foreign aid bill, which includes legislation that would start the process toward a sale or ban of TikTok. **There is little doubt that there will be enough votes for the package, with almost all Senate Democrats expected to support the bill and about half of Senate Republicans likely to back the measure.** The current question is how fast the upper chamber may vote on the bill. **The first votes in the Senate are scheduled for later this afternoon, starting with a procedural vote. Once that passes, a maximum of 30 hours of debate will occur. This timeline will mean the final passage should occur no later than Wednesday evening.** However, with the Senate already giving up some of their recess this week to stay in town and vote on the bill, an agreement on what amendments will be voted on is possible. Such a deal would speed up the passage and could see the upper chamber clear the package as soon as later today. Based on this expected timeline in the Senate, President Biden will likely sign the legislation later this week or early next week. Aside from aid for Ukraine, Israel, and Taiwan, the most closely watched measure is the provision to force a sale of TikTok or trigger a ban on the app. Although the language largely resembles the TikTok ban legislation passed by the House earlier this year, Senate Commerce Chair Maria Cantwell (D-WA) [has endorsed](#) the new text. The key change that secured Cantwell's support was the extended sale period, up from 180 to 270 days. Cantwell had also previously raised questions about the law's constitutionality by

explicitly naming TikTok in the text but appears to have put aside those concerns for now. **Biden's signature will start the 270-day clock for the app to be divested by ByteDance, which would expire after the election. Whoever wins the presidential election would have the option to extend this period to sell the app for another 90 days. However, the widely-expected legal challenge from TikTok will likely postpone the effective date of this provision. A preview of TikTok's likely argument can be seen in its case filed [last May](#) against a Montana law that sought to ban the app in the state.** At the time, this was the first law that would have banned the app in the US, though previous measures to restrict its use on government networks and devices had been signed into law and gone unchallenged. There are some differences between Montana's and Congress' justifications for the legislation, with the first pointing to data privacy and security concerns, while the latter focuses on national security fears. Still, as the only other comparable data point, it is worth examining. **In [an initial ruling](#) last November, the judge overseeing the case blocked the Montana law while the court challenge was underway. In that decision, the judge wrote that the state had "[overstepped] state power" and "likely [violated] the First Amendment."** Even though questions about state power will not be relevant in a case against Congress' new law, the potential First Amendment violations will be pertinent and were among Cantwell's worries about the legal defensibility of the bill. The White House had also previously expressed concern about the legislation's ability to survive a legal challenge. However, those seem to have been put aside, and Biden has repeatedly indicated that he will sign the bill into law if it comes to his desk. **If the US government wins TikTok's court challenge, which will probably take several years, there is uncertainty as to whether China will approve a sale or who will even be able to purchase the app [given its potential valuation](#).** In addition, as no divestment will happen until after the election, even if TikTok were not to challenge the law, the election outcome will likely affect the potential list of suitors that the president at the time will allow to bid for the app. **The simple reality is that while Biden may be days away from signing a law that would force ByteDance to divest TikTok or the app would be banned, an actual ban of TikTok is likely years away – if it even happens – making any changes to the status quo far from imminent.**

FTC to Vote on Non-compete Ban: Over a year after initially proposing a ban on non-compete agreements in employment, the Federal Trade Commission (FTC) is now set to vote on it at an open meeting today. **The exact contours of the FTC's final non-compete rule are not yet known, but according to an agency [press release](#), "the proposed final rule being considered would generally prevent most employers from using non-compete clauses."** The [proposal](#) from January 2023 would ban non-compete agreements for workers classified as employees and independent contractors alike, and to both paid and unpaid workers. It would also void existing non-competes. Nondisclosure agreements (NDAs) in and of themselves would not be subject to the ban, but any employment restriction, such as an NDA, that is expansive enough to act as a non-compete agreement could be

covered. The FTC also stated in last week's press release that over 26,000 comments from the public were submitted and the commission will not solicit additional input on the final rule. Because the FTC is not opening the final rule to public comment, this indicates that it will likely not be stricter than the proposal in order to adhere to federal regulatory procedures. **Though the FTC's Democratic majority is poised to approve the non-competes ban, it is virtually certain to face legal challenges and thus there may be a delay before it takes effect.** By voting on it in April, the FTC will likely evade the Congressional Review Act's lookback period, which allows Congress to repeal regulations by majority vote, and could expose rules finalized later in Biden's term to the risk of repeal by a potential Republican White House and Congress next year. The rule is likely to be the target of litigation from the business community, however. Last year, the US Chamber of Commerce [submitted](#) a comment on the FTC's proposed non-competes ban arguing that the commission lacked the authority to enact it and that the proposal violated the Administrative Procedures Act. In her February 2023 [Wall Street Journal op-ed](#) explaining her decision to resign from the agency, former Republican FTC Commissioner Christine Wilson took aim at the non-competes ban, previewing a potential legal line of attack. "This proposed rule defies the Supreme Court's decision in *West Virginia v. EPA* (2022), which held that an agency can't claim 'to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority,'" she wrote. The *West Virginia* decision invoked the "major questions" doctrine, which requires that federal agencies must have authority clearly delegated by Congress in order to act on issues of great economic or political significance. Opponents of the non-competes ban are likely to cite this standard. **While a potentially lengthy court battle may stand in the way of the FTC's non-compete ban, states and municipalities could advance their own more quickly.** Four states have adopted total bans (California, Minnesota, North Dakota, and Oklahoma) and additional states have partial bans or limits on their use. A [non-compete ban](#) was introduced in the New York City Council in February following Governor Kathy Hochul's (D-NY) veto last year of a statewide ban passed by the legislature. **In addition to the FTC's open meeting, today is a doubly important day for President Biden's labor agenda because the Supreme Court will be hearing oral arguments in [Starbucks Corp. v. McKinney](#), a case that challenges the authority of the National Labor Relations Board (NLRB).** The case hinges on the NLRB's ability to obtain preliminary injunctions under Section 10(j) of the National Labor Relations Act in federal court (in this instance, to reinstate seven fired employees) while an NLRB complaint moves through the agency's adjudication process. A ruling in favor of **Starbucks (SBUX)** could erode the power of one of the NLRB's most significant tools in labor disputes.

Nursing Home Minimum Staffing Rule Moves Forward: Staffing and turnout is a perennial and broad challenge for nursing homes (NH) across the country. A [survey](#) of 759 NH operators found 87 percent self-reported a moderate or high level staffing shortage. One [study](#) found that from 2017-2018, almost 75 percent of NHs almost never met the Centers for Medicare & Medicaid Services (CMS) expected

registered nurse (RN) staffing levels based on resident acuity. Median 12-month staff turnover was 53 percent and one-quarter of facilities reported rates higher than 64 percent in 2023. **Yesterday, Vice President Harris [announced](#) that the Biden administration had finalized a [rule](#) to institute minimum staffing standards for nursing homes. Medicaid and Medicare collectively make up [75 percent](#) of all funding for NHs, giving them massive leverage over requirements to qualify.**

At current, federal requirements require that a RN be present eight hours a day every day of the week and separately that there should be “sufficient” staff to provide care for residents. The rule would create an explicit standard of 0.55 hours per resident day (HPRD) for RNs and 2.45 for nurse aides (NAs) (3.48 in total); additionally, facilities will be required to have a RN onsite 24 hours a day.

Implementation is staggered and contains exemptions. Non-rural facilities must meet the 3.48 HPRD total service requirements and have a 24/7 RN within two years, and must meet the specific 0.55 RN and 2.45 NA HPRD requirements within three. Rural facilities will have three and five years, respectively, to take these two steps. Exemptions to any of these requirements can be earned if the facility provides documentation of good faith efforts to hire and retain staff and is located in an area where the ratio of RN, NA, or combined to population is 20 percent or below the national average. **As such, although most of the US as a whole can be said to suffer from a NH staffing shortage, only particularly affected areas will receive exemptions for it.** This is the latest and most impactful of a series of rules relating to the industry. In November, CMS mandated that NHs must disclose their owners. In 2022, CMS began collecting and publicly releasing staff turnover data for each specific facility. **This rule will have large impacts. The debate is over how much.** The 24/7 RN requirement is seen as the least demanding requirement by far, one which 87 percent of facilities meet and doesn’t scale with facility size. Minimum staffing is another story: CMS estimates that 41 percent of facilities do not meet the 0.55 RN HPRD requirement and 68 percent don’t match the 2.45 NA requirement, and these are more costly to implement. The agency predicts that total national costs for all rules will be \$4 billion annually by year three (up from \$246 million in year two before many minimums kick in). Costs in year ten will be \$5.7 billion and total costs over that decade \$41 billion. **The industry has responded with larger numbers.** One trade group looking at a similar proposal found it would cost [\\$6.4 billion](#) annually and require hiring 116,000 full-time equivalents. **Nursing homes characterize the rule as a quixotic unaffordable standard that will force many homes to close. Many in Congress hold the same opinion: the GOP is uniformly opposed with some Democrats also critiquing the proposal.** The House Ways and Means Committee passed a [bill](#) blocking the policy with all Republicans and one Democrat voting in favor; several House Democrats also expressed concern in a [letter](#) to CMS. In the Senate, five Democratic-caucusing senators joined one of two [other appeals](#) to stop the plan. **However, some Democrats and patient advocates say the proposal doesn’t go far enough.** A 2001 CMS [study](#) found 4.1 hours of direct care per resident per day was needed to maximize patient health — an even higher number and one some advocates wish the government had chosen instead. **Whatever the impact, while the rule’s implementation will be broadly felt, it will also specifically disproportionately**

hit homes in specific states. Nursing homes in Texas, California, and Missouri alone account for 43 percent (\$153 million) of all costs to keep an RN on-site 24/7; Texas, New York, and Illinois make up 28 percent (\$1.17 billion) of the costs associated with meeting staffing requirements. **One thing's for certain: the rule depends on President Biden winning a second term.** Despite some bipartisan criticism, there does not currently appear to be enough votes in both chambers to overcome a Biden veto to block the initiative. **But if a Republican wins the White House in 2024, this effort will almost assuredly be scrapped entirely.**

House

The House is not in session today.

Senate

The Senate will reconvene at 10:00 a.m. and will resume consideration of a motion to proceed to the Federal Aviation Administration reauthorization bill. At 1:00 p.m., the chamber is expected to hold two procedural votes on a bill that packages the House-passed foreign aid bills to provide funding to Israel, Ukraine, Taiwan and other allies, and to force the divestment of TikTok. Additional votes on the foreign aid package are possible.

White House

President Biden will receive his daily intelligence briefing at 10:00 a.m. At 12:00 p.m., the president will depart the White House en route to Tampa, FL, where he will arrive at 2:15 p.m. At 3:00 p.m. and 4:15 p.m., he will participate in two campaign events. At 5:15 p.m., Biden will depart Tampa en route to Washington, DC, where he will arrive back at the White House at 7:30 p.m.

Macroeconomic

At 8:30 a.m., the US Chamber of Commerce and BusinessEurope will hold the 2024 Transatlantic Business Works Summit, with the theme "Driving Competitiveness in a Changing World." [More information here](#). Expected participants include:

- Gina M. Raimondo, secretary, Department of Commerce

Antitrust and Consumer Protection

At 2:00 p.m., the Federal Trade Commission will hold an open meeting. [More information here.](#)

Cybersecurity

At 9:00 a.m., the Intelligence and National Security Alliance will hold a virtual discussion titled issues including incorporating acquisition, cyber, and enterprise security into supply chain risk management programs, emerging technology and supply chain challenges, threats to critical infrastructure and collaborative approaches to supply chain integrity. [More information here.](#)

Defense

At 1:30 p.m., the Henry L. Stimson Center will hold a discussion titled "Maritime Power for Global Security." [More information here.](#) Expected participants include:

- Carlos Del Toro, secretary of the navy, Department of Defense

At 4:00 p.m., the Atlantic Council will hold a discussion titled "Space Industry for Space Strategy." [More information here.](#)

Energy, Environment, and Natural Resources

At 8:00 a.m., the Wilson Center and US National Laboratories will hold its "Innovations in Climate Resilience Conference." [More information here.](#)

At 11:00 a.m., the House Oversight and Accountability Committee Subcommittee on Economic Growth, Energy Policy, and Regulatory Affairs will hold a field hearing in Plano, TX titled "Drilling Down: Oversight of the Challenges and Opportunities Facing US Energy Production." [More information here.](#)

Geopolitical

At 9:00 a.m., the Council on Foreign Relations will hold a virtual discussion titled "The US-ASEAN Relationship." [More information here.](#)

At 10:00 a.m., the Atlantic Council will hold a virtual discussion titled "How to build lasting economic resilience in Ukraine." [More information here.](#)

At 10:45 a.m., the Center for Strategic and International Studies will hold a conference

titled "Energy Security and Geopolitics." [More information here](#). Expected participants include:

- Geoffrey Pyatt, assistant secretary for energy resources, Department of State

At 1:00 p.m., Washington Post Live will hold a virtual discussion titled "The Israel-Gaza Conflict and Fears of Wider Mideast Escalation." [More information here](#).

Healthcare

At 12:30 p.m., the Bipartisan Policy Center will hold a virtual discussion titled "Optimizing Medicare-Medicaid Integration for Dually Eligible Beneficiaries." [More information here](#).

Expected participants include:

- Kerry Branick, deputy director of the Medicare-Medicaid coordination office, Centers for Medicare and Medicaid Services

Housing

At 10:00 a.m., the Bipartisan Policy Center will hold a discussion titled "HUD's role in addressing the housing supply shortage, the agency's priorities, and how those are reflected in its latest budget request." [More information here](#). Expected participants include:

- Adrienne Todman, acting secretary, Department of Housing and Urban Development

Judicial

At 10:00 a.m., the Supreme Court will hear oral arguments in the case of *Starbucks Corp. v. McKinney*.



Website



Twitter



LinkedIn



Email

Copyright © 2024 [Beacon Policy Advisors LLC](#)

1701 Pennsylvania Avenue, NW, Suite 200 Washington, DC 20006 | (202) 729-6335

[Our Compliance Policy](#) [Unsubscribe](#)