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# Federal Trade Commission Proposes to Eliminate Almost All Non-Competes: Caution is Warranted Although the Proposed Rule May Not Survive Likely Legal Challenges

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## No More Non-Competes?

On January 5, 2023, the Federal Trade Commission (FTC) issued a Notice of Proposed Rulemaking for a "Non-Compete Clause Rule" (NCCR) that would prohibit non-compete agreements between employers and employees, along with other employment related agreements such as non-disclosure provisions that, in the FTC's view, function as "de facto" non-compete clauses. The FTC maintains that it has the authority to regulate, and prohibit, such provisions under Section 5 of the FTC Act.[1]

Specifically, the proposed rule would provide that it is "an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause."[2] The one exception in the proposed NCCR is for non-compete clauses between the seller and buyer of a business, so long as the restricted party has at least a 25% stake in the business.[3] The proposed NCCR also defines certain terms like "workers" to carve-out non-competes between franchisors and franchisees (as opposed to non-competes restricting employees and independent contractors).[4]

The proposed NCCR, if promulgated in its current form, effectively treats non-compete agreements as *per se* illegal, meaning they would be summarily invalidated regardless of any actual or likely harm to competition. *Per se* treatment is currently reserved for only the most egregious anticompetitive agreements, such as price-fixing, bid-rigging, and customer/market allocation. If promulgated as a final rule, the NCCR would mark a stark departure from current antitrust and employment law governing non-competes.

## Don't Hit the Panic Button Yet

While this is a significant development, we advise caution before reacting too soon or too dramatically. Employers should consider (and discuss with counsel) the following factors before making changes to their employment and employment-related contracts such as equity, option, and other incentive agreements:

- *Time* – The proposed NCCR will not become final until sometime after the close of the 60-day public comment period, putting the earliest effective date at March 6, 2023. Even if promulgated without any changes, the proposed NCCR offers a "safe harbor" for businesses that terminate offending non-compete clauses with current and former employees during the 180-day period following the issuance of the final rule. That makes the earliest date for non-compliance September 2, 2023.[5] In reality, both dates are likely to land a few months later because the FTC will likely need time to review and consider comments on the proposed NCCR before issuing a final rule.
- *Modifications* – The FTC has solicited comments on specific alternatives that would limit or otherwise impact the scope of the proposed rule. For example, the FTC wants to know whether the proposed NCCR should apply uniformly to all workers or whether there should be exemptions or different standards for categories of workers such as senior executives.[6] It has also asked whether the proposed NCCR should only *presume* non-competes are unlawful, but still give companies the ability to rebut that presumption.[7]
- *No Private Right of Action* – Private parties, such as employees, can only sue for violations of the Sherman Act; not the FTC Act.[8] The proposed NCCR is being considered under the FTC Act only. While private lawsuits and class actions often follow FTC investigations or enforcement actions, a private party cannot (without more) rely on a rule under the FTC Act as a basis for stating a claim or violation under the Sherman Act when challenging a non-compete. Having said that, many state laws (like California's Unfair Competition Law) allow plaintiffs to sue for conduct that is "unlawful" under federal law, even if federal law does not itself provide a private right of action. Former employees will likely rely on these types of generic state laws to try to enforce the standards in the NCCR. Even though the proposed rule would preempt state non-competition laws (see below), suits under these more generic unfair competition statutes may follow and may not be stayed pending any legal challenge to the NCCR.
- *Legal Challenge* – As we have seen in response to regulatory efforts by other agencies, given the breadth of the proposed NCCR and its likely impact across every industry, one can expect there to be legal challenges to the new rule before it goes into effect. For example, interested parties could challenge the FTC's authority to issue such a rule under the "major questions doctrine" which generally requires that an administrative agency have clear congressional authorization before it regulates matters of major economic significance. A challenge along these lines would argue that the FTC lacks a clear source of authority to issue the proposed NCCR. The NCCR may also be challenged under the non-delegation doctrine, as exceeding Congress's authority to delegate legislative authority to administrative agencies. There are also a variety of objections under both the Administrative Procedure Act and substantive law that may be available to challengers, including that the rule exceeds the agency's statutory authority. And challenges to the rule may also be combined with constitutional challenges to the Commission's composition and structure.
- *Political Administrations* – By the time the proposed NCCR becomes effective in fall of 2023 or later, the FTC may only have a year or two to enforce the rule before the 2024 election cycle. A new administration (or Congress) could change or rescind the rule, and there has been a trend over the last several years of different administrations taking varying approaches to Section 5 enforcement. Indeed, the current FTC recently rescinded the agency's previous Section 5 guidance, which had more narrowly construed the FTC's authority under the Act to be consistent with how courts have interpreted the Sherman Act.[9]

## What Should Companies Be Doing With This Uncertainty?

While the proposed NCCR process plays out, companies should be cautious and prudent when it comes to non-competes. They should be able to answer the following types of questions to ensure their non-competes can withstand scrutiny from a traditional antitrust challenge under the Sherman Act.

- *Legitimate Business Reason* – Have a credible and straight forward explanation for why a contract has a non-compete. For example, is the company going to make substantial investments in training the covered employees? Will those employees have access to trade secrets and other sensitive information that the company safeguards and that could be misused by competitors? Do they possess significant goodwill with clients and customers? Would a confidentiality agreement or customer non-solicit be insufficient to protect these investments and information? Answering yes to these types of questions will put you on safer ground to defend such non-competes under existing law.
- *Reasonable Scope* – Ensure that the non-compete is reasonably tailored in terms of geographic scope and duration and that it does not unduly limit the pool of competitors for which the employee would be restricted from working. Be able to show why the terms of the non-compete are needed and not overbroad.

Going forward, companies should work with counsel to ensure their contracts comply with state antitrust and employment laws. Companies should also consider working with counsel to audit non-competes and other restrictive covenants contained in their employment and equity agreements to ensure that they know what type of agreements they have, and whether those agreements comply with not only the proposed NCCR but also comply with many new state laws that have been enacted over the last several years. For example, investigate whether any former employees are still subject to non-competes or if they have expired. For current employees, look into whether the non-competes are based on position, pay scale, or access to certain types of information. Also look at any non-competes with independent contractors, as they are subject to the proposed NCCR as well.

## Where Did the FTC's Proposed Non-Compete Ban Come From?

For context, both the FTC and the Antitrust Division of the Department of Justice (DOJ) have been focused on allegedly anti-competitive agreements impacting labor mobility and wages.

In the 1990s, the FTC brought a civil case against Debes Corporation under Section 5 of the FTC Act for allegedly entering into agreements to boycott temporary nurses' registries in order to eliminate competition among nursing homes for the purchase of nursing services.[10] The FTC also brought a case in 1995 against the Council of Fashion Designers of America and a competitor under Section 5 of the FTC Act for attempting to reduce the fees and other terms of compensation for models.[11] Both cases ended in consent decrees against the entities whereby they agreed to end their challenged practices.

In 2010, DOJ sued a number of technology firms civilly for allegedly violating Section 1 of the Sherman Act by agreeing not to solicit employees from competing firms.[12] The DOJ's action ended in a settlement in which the defendants agreed to a five-year prohibition against entering into any agreements to refrain from cold calling, soliciting, recruiting, or otherwise competing for each other's employees.[13] The DOJ action was followed by a class action lawsuit by private plaintiffs who sought money damages for their artificially depressed wages.[14] The parties settled that matter for $415 million in 2014.[15]

Fast forward to 2016, when the agencies issued joint guidance to Human Resources Professionals.[16] In that guidance, DOJ for the first time warned that it would prosecute so-called "no poach" and wage fixing cases *criminally*. In 2021, DOJ brought its first ever criminal wage fixing and non-solicitation cases.[17] A number of civil actions have also been filed under state and federal antitrust laws, challenging non-compete, no-poach, and similar provisions.[18]

Two bills also have been proposed in Congress in recent years in an attempt to legislate the use of non-competes, neither of which passed. The Federal Freedom to Compete Act, introduced in the Senate in 2019 (S. 124), sought to ban the use of non-competes with any workers who are not exempt from the requirements of the Fair Labor Standards Act. And the Workforce Mobility Act, introduced with bipartisan cosponsors in the Senate in 2019 (S. 2614) and the House in 2020 (H.R. 5710), sought to ban all non-competes except those associated with a sale of business or the dissolution of or disassociation from a partnership, and to limit the scope of permissible non-competes even in those scenarios.

In July 2021, President Biden signed Executive Order 14036 on Promoting Competition in the American Economy.[19] The Executive Order encouraged FTC Chair Lina Khan to "exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." Chair Khan has previously taken the position that non-compete agreements hurt workers and should be restricted. In response, on August 5, 2021, the Commission issued a solicitation for public comment on contract terms that may harm competition, including "non-compete clauses that prevent workers from seeking employment with other firms."[20]

More recently, in November 2022, the FTC released a policy statement interpreting Section 5 of the FTC Act as having a broader application than the federal antitrust laws.[21] On December 28, 2022, the FTC reached consent agreements under Section 5 of the FTC Act with two manufacturers of glass containers used for food and beverage packaging and a firm operating in the security guard services industry.[22] Pursuant to the consent agreements, which are still subject to final approval, the glass container manufacturers and security guard services firm agreed to end the non-compete agreements they had in place and agreed further to refrain from entering into non-compete agreements in the future. The parties are subject to the consent agreements for 20 years, and the security guard services firm is required for the next 10 years to provide clear and conspicuous disclosures to all prospective employees that they will not be subject to a non-compete. The FTC emphasized the impact of the security guard services non-competes on low-wage workers, which has been an area of particular agency concern.

In addition to the federal antitrust agencies, the states have been aggressively scrutinizing employment restrictions. One of the most notable efforts has been the State of Washington's crusade against alleged "no-poach" restrictions in franchise agreements, racking up "Assurance of Discontinuance" agreements (similar to consent decrees) with hundreds of corporate chains.[23] One economic study evaluating the impact of Attorney General Bob Ferguson's No-Poach Initiative concluded that it increased wages for low-income franchise workers nationwide by 3.3%. The FTC has cited similar studies to justify its more aggressive stance in the employment space. Similarly, Illinois, New York, and Washington have in recent years sued companies for allegedly unlawfully using non-compete clauses.[24] Attorney General Bob Ferguson reached a consent decree on July 14, 2022 in one of these cases under the terms of which Tradesmen International LLC must inform workers it has employed since January 1, 2020 — the date Washington's law banning non-compete agreements went into effect — that its non-compete agreements are no longer enforceable and it cannot require them in the future.

## Summary of the Proposed FTC Ban on Non-Competes

*Per Se Treatment vs. Rule of Reason* – The FTC's proposed NCCR rule would make all new and existing non-competes, along with employment related agreements that function as "de facto" non-compete clauses, *per se* illegal. Employers would be barred from agreeing or attempting to agree to a non-compete with an employee. The rule would replace the fact-specific inquiry that is now required by federal antitrust law and would supersede any "inconsistent" state laws, creating a national "regulatory floor" for non-compete clauses. In particular, under current federal law, non-competes are generally analyzed under the Sherman Act using the traditional "rule of reason" approach.[25] This analytical framework means that courts must carefully examine procompetitive business justifications, as well as the scope and duration of the clauses, to determine whether they are on balance unreasonable and therefore unenforceable.

*State Law Preempted* – In practice, a number of state laws regarding non-competes are more restrictive than their federal analogues, and are more typically used to challenge the agreements. The states have taken varying approaches, with California, North Dakota and Oklahoma banning the use of non-competes for nearly all workers, while other jurisdictions, such as the District of Columbia, have banned enforceability of non-competes based on a worker's earnings or occupation. Some states have also enacted "garden leave" provisions that require employers to compensate workers during their post-leave period in which workers are bound by the non-compete. Washington's statute provides that a restricted period exceeding 18 months is presumed unreasonable and unenforceable, such that a party seeking enforcement of a non-compete covenant of longer than 18 months must prove by "clear and convincing" evidence that the longer duration is necessary. Massachusetts and Oregon have imposed one-year limits. The proposed rule would displace the existing state laws governing the use of non-compete clauses and replace them with a uniform prohibition like the one in California.[26]

*"De Facto" Non-Competes Banned Too* – The rule also would apply to employment contract terms that the FTC views as *de facto* non-compete clauses. As an example, the FTC refers to nondisclosure agreements that are "written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer," and to requirements that workers cover their own training costs above any "reasonably related to the costs the employer incurred for training the worker" if they choose to leave the employment before a certain amount of time has elapsed.[27] The FTC identifies a number of other potentially offensive agreements, including client or customer non-solicitation agreements, no-business agreements, no-recruit agreements, and liquidated damages provisions.[28] The FTC further references its concern with other "workplace policies similar to non-compete clauses" such as employee handbooks that "could potentially have negative effects similar to non-compete clauses if workers believe they are binding, even if they do not impose a contractual obligation."

*Business Sale Exception* – The current version of the proposed rule includes an exception for non-compete clauses "entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity's operating assets[.]"[29] The exception is limited to those with an ownership stake of at least 25 percent in the business entity.

*Penalties* – Although the proposed rule does not create any specific penalties, employers should keep in mind that Section 5 rule violations could result in various forms of conduct and monetary relief. For example, civil penalties are currently up to $50,120 *per day* of the violation.

## FTC Floats Potential Alternatives to Allow Certain Non-Competes

In its Notice of Proposed Rulemaking, the FTC requests public comment on a short list of alternative approaches to the rule. Given the relatively narrow scope of the alternatives on which the FTC is seeking comment (and the Commission's current 3-1 Democratic majority), significant changes to or narrowing of the NCCR beyond these alternatives seem unlikely.

- The FTC is seeking comment on a "softer" version of the rule for certain employees, where the rule could create a *presumption* that non-compete clauses for senior executives are unlawful, but allow employers to rebut the presumption with "clear and convincing evidence." Under this alternative, employers would need to show that the non-compete clause (1) would not harm competition, (2) offers a competitive benefit that would outweigh the anticipated harm, or (3) is essential to protecting legitimate business interests.[30]

- The FTC is also considering whether to narrow the application of the proposed rule to a subset of workers based on factors such as occupation, function, or wages. Such a narrowed prohibition, for example, might allow non-compete clauses for a limited number of high-wage workers, while banning non-competes for low-wage employees. Note that this approach is similar to the one taken in some states.[31]
- The FTC is also seeking comment on whether franchises should be included under the rule.[32] Currently, non-competes between franchisors and franchisees (not involving their respective employees) are excluded from the ban.
- Of course, employers and other interested persons may submit comments on additional issues, in part to inform the FTC regarding the proposed rule's likely effect on their operations and the economy in general.

## Commission Majority Arguments & Justifications for the Proposed Ban

In their majority Statement, available here, Chair Lina Khan and Commissioners Rebecca Slaughter and Alvaro Bedoya argue that the NCCR is both well-justified from a policy perspective and legally sound. The Commissioners assert that the proposed rule is supported by the existing literature and argue that initiatives by several states to limit the use of non-competes have demonstrated that their limitation benefits workers and consumers.[33] The majority estimates that the proposed ban on non-competes would increase workers' total earnings by close to $300 billion per year.[34] They arrived at this estimate by extrapolating from findings in some of the literature on non-competes, where certain analyses have found that restricting their use in certain professions and geographic areas tended to increase workers' wages.

In their majority Statement, the Commissioners also point to findings that non-compete clauses reduce innovation.[35] They explain that "by preventing workers from starting their own businesses and limiting the pool of talent available for startups to hire, non-competes also limit entrepreneurship and new business formation," citing to literature finding that a proposed ban would decrease consumer prices to the tune of $150 billion per year.[36]

The majority also argues that rulemaking is preferable to adjudication in this area, since there is no private right of action for workers under Section 5 of the FTC Act.[37] The Commissioners cite to their experience holding non-compete related workshops and reviewing available economic research, as well as public comments as evidence of their expertise in this area.[38]

The three majority Commissioners argue that the proposed rule is within the FTC's agency authority, since Section 6(g) enables the agency to "make rules and regulations for the purpose of carrying out the provisions" of the law. The majority points to a D.C. Circuit holding directly addressing the FTC's rulemaking authority, where the court determined that the FTC may "promulgate rules defining the meaning of the statutory standards of the illegality [the agency was] empowered to prevent," to argue that they are authorized to issue the proposed rule.[39] Finally, the majority argues that the proposed rule will survive scrutiny under the "major questions" doctrine recently applied in *West Virginia v. E.P.A.*[40] The major questions doctrine requires a court to ask whether Congress intended to give an agency the power it is trying to assert. The major questions doctrine is invoked when an administrative agency acts in a matter of political significance, attempts to regulate the U.S. economy in a significant way, or intrudes in state law.[41] Under that doctrine, a rulemaking by an agency is unconstitutional if it addresses a major question and if the agency is not operating under clear statutory authority from Congress.[42] The three Democratic Commissioners argue that, in this case, they are operating under clear statutory authority from Congress, since Congress vested the FTC with the authority to identify and address unfair methods of competition.[43]

## Dissenting Commissioner's Arguments & Opposition to the Proposed Ban

In her dissent, available here, Commissioner Wilson argues both that the rule is not well-informed from a policy perspective and the FTC does not have the necessary rulemaking authority to pass the new rule. Commissioner Wilson argues that it is inappropriate for "*three unelected technocrats*" to promulgate a rule wiping out over a hundred years of legal precedent, which evaluates non-compete clauses using a fact-intensive "rule of reason" analysis focused on justification, duration, and scope. Instead, the proposed NCCR applies a *per se* rule that has recently only been utilized in criminal antitrust enforcement. According to Wilson, a fact-specific inquiry is appropriate when evaluating non-competes since the competitive effect of such agreements may depend on the content of the non-compete, the worker it applies to, and the industry in question.

Wilson asserts that there is no clear evidence to support the conclusions and economic analysis of the majority. She notes that the agency has little experience in the realm of employee non-compete provisions, limited to the two consent orders obtained in the last week that fail to demonstrate harm to consumers and competition.[44] According to Wilson, "[l]acking enforcement experience, the commission turns to academic literature — but the current record shows that studies in this area are scant, contain mixed results and provide insufficient support for the scope of the proposed rule."[45] To support her view, Wilson points to a contrary study in the financial services sector that illustrates "the negative unintended consequences of suspending non-compete provisions, including higher fees and broker misconduct." Wilson continues, "[t]he suspension of non-competes across all industry sectors in the U.S. undoubtedly will impose a much larger raft of unintended consequences."[46]

Wilson notes that the proposed rule will open the Commission's competition rulemaking authority to challenges, including (1) whether the Commission has the authority to engage in Section 5 "unfair methods of competition" rulemaking, (2) that the Commission lacks Congressional authorization to pass the rule, as addressed in *West Virginia v. EPA*, and (3) the enforcement authority would constitute an impermissible delegation of legislative authority under the non-delegation doctrine. In particular:

(1) Wilson questions whether the FTC has the substantive competition rulemaking authority that it claims under Sections 5 and 6(g) of the FTC Act. Under the Magnuson-Moss Act, the FTC may be limited to *consumer protection* rulemaking power, and is not permitted to engage in substantive *competition* rulemaking. If this interpretation is correct, the FTC is not permitted to go past the boundaries of federal antitrust law to regulate broad competitive behavior in the way it attempts in the NCCR.[47]

(2) Wilson also predicts that the proposed rule will be challenged under the "major questions doctrine." As noted above, the major questions doctrine requires a court to ask whether Congress intended to give an agency the power it is trying to assert. In *West Virginia v. EPA,* Justice Gorsuch's concurrence noted that the major questions doctrine is invoked when an administrative agency acts in a matter of political significance, attempts to regulate the U.S. economy in a significant way, or intrudes on state law.[48] Wilson argues that the NCCR covers all three of those scenarios, and that the FTC would not be able to identify the source of its Congressional authority needed to answer the question in the affirmative.[49]

(3) Finally, Wilson expects that the proposed rule will be challenged under the non-delegation doctrine. Under the non-delegation doctrine, Congress is not permitted to delegate legislative power to one of the other non-legislative branches of government. In practice, Congress does not impermissibly delegate legislative authority as long as they establish an "intelligible principle" which an agency can follow. In Wilson's view, the FTC's authority to prohibit unfair methods of competition does not extend to sweeping policy changes such as the proposed rule.[50]

## When Will the Proposed Ban Go Into Effect?

Rulemaking Process

Before taking action in response to this proposed rule, it is important to understand the nature of the rulemaking process. It will take at least 8 months before a final rule is promulgated, and likely longer before the rule will be enforced.

After the FTC's vote of 3-1 to approve the NCCR, the Commission is now accepting public comments for a period of 60 days. The FTC is not obligated to make any changes to the proposed rule based on the feedback received during the public comment period, and no date has been set for a final vote, so it is unclear how long the FTC will take to vote on and issue a final rule after the public comment period closes. In theory, the FTC could move quickly and issue a final rule within two to three months of the original January 5th NCCR. The final rule would go into effect 60 days after being published in the Federal Register.

Under the current proposal, employers would have a "safe harbor" period of 180 days to comply with the new rule before the compliance date. In order to reduce the burden of compliance, the FTC has provided a proposed model notice that employers may use during the safe harbor period to notify current and former employees that non-compete provisions are no longer in effect and will not be enforced. During that safe harbor period, interested parties will likely bring credible legal challenges to the rule on multiple grounds, including whether the agency had the authority to issue the rule in the first place. Those parties are likely to seek an injunction to prevent the rule from going into effect, further delaying enforcement of the rule. In sum, employers will have a minimum of 8 months to prepare for the new rule even without accounting for the time the FTC will need to review and consider the comments or any delays that result from legal challenges to the final rule.

The FTC may also change the scope of the final rule based on comments received during the comment period. However, based on the FTC's aggressive enforcement stance during the current administration, Chair Lina Khan's previous position regarding the use of non-competes, the proposed rule's explanation of the benefits the NCRR would have for all types of employees, and the limited scope of issues on which the FTC has specifically requested comment, it seems unlikely that the FTC will make significant changes to the proposed rule, regardless of the feedback received.

Enforcement and Legal Challenges

We are at the beginning of the process, not the end. The FTC's NCCR has not changed the employment contract landscape overnight. Even if the FTC adopts the rule as-is, employers will have a safe harbor period of nearly six months to comply with the rule, and there will likely be a number of legal challenges. Workers will not have a private right of action against employers under the new rule (although they could resort to indirect challenges under state law as noted above), and the FTC has finite resources for enforcement actions.

Regardless of the outcome, the NCCR is part of a greater shift in enforcement priorities at the FTC (at least until the next administration potentially appoints less aggressive Commissioners) that must be taken seriously. Employers should consider a number of factors when evaluating the future impact of the rule:

- Although legal challenges to the rule are expected, litigation takes time and companies being investigated by the FTC are often exposed to related class action lawsuits. Sherman Act suits brought by the class action bar may be summarily dismissed, but still expose companies to the burdens of litigation.
- Alternatively, plaintiffs could bring derivative challenges under state unfair practices laws, alleging that because the non-compete is considered unfair under federal law it is also unfair under state law. The analysis would not be *per se*, as in an FTC enforcement action under the rule, but still poses a risk of litigation to employers, that may not be stayed during any challenge to the proposed rule.

- The impact of any legal challenges may be limited by the FTC's proposed severability clause. If the challenged regulatory provision is severable, a court may choose to strike down part of the provision and allow the other parts of the provision to stand.
- Even if the rule is eventually overturned, the FTC is already putting renewed energy into FTC Act Section 5 enforcement by seeking consent decrees against companies accused of utilizing "egregious" non-compete clauses. Section 5 enforcement in this form will continue during the public comment and safe harbor periods of the NCCR.

The ultimate outcome of the rule is not guaranteed. New administrative rules and potentially sweeping administrative rulings have faced years of litigation battles and other challenges before being ultimately replaced or rejected, as was the case in the Department of Labor's attempt to revise the overtime exemption regulations in 2016. (See Weil's Employer Update in March 2019). In 2016, many employers scrambled to implement changes needed to comply with the new rule, but the resulting litigation history and 2019 rule change suggest that employers should proceed with caution. There have been other attempts to implement new employment-related rules that have been halted by court challenges (e.g., pertaining to COVID mandates), as well as employment-related administrative rulings, such as the National Labor Relations Board's 2015 ruling in *Banner Health System d/b/a Banner Estrella Medical Center*, 362 NLRB No. 137 (June 26, 2015). That ruling effectively eviscerated an employer's right to instruct employees to maintain workplace investigations as confidential because it allegedly infringed on their rights to engage in protected concerted activity, but it was ultimately rejected in the courts and then rescinded by the NLRB when the composition of the Board changed in the next presidential administration.

## Concluding Thoughts

As discussed above, whether or not the FTC's effort to outlaw non-competes through a Section 5 rulemaking survives challenge, it certainly will have a deterrent value on the actions of employers. The final form of the rule will determine the exact steps employers should consider. However, employers should evaluate whether they currently comply with antitrust- and labor-related laws and regulations at both the federal and state levels:

- Companies should have at least 8 months before any version of the Rule goes into effect. However, the FTC will continue to stay active even before the proposed rule is finalized, so be sure to avoid overbroad non-compete clauses such as the ones in the consent agreements the FTC recently reached. The FTC will be looking to target particularly problematic non-compete clauses, such as clauses targeting low-wage employees, clauses with overly-broad geographic or temporal scope, or clauses with large liquidated damages provisions.
- Determine whether current non-compete agreements are in compliance with state law, as state laws in this area are actively changing and enforcement has been increasing by state AGs. Legislative actions making state laws more restrictive are often followed by private litigation claims. Keep in mind that private litigation could follow any enforcement by a state AG.
- Examine other customer non-solicitation, confidentiality and trade secret agreements to ensure that they are not drafted broadly enough to fall under the proposed rule's "de facto" provision before the date of compliance if the rule were issued in its current form.
- Working with counsel to conduct a non-compete "audit" is the best way to protect against legal risk and avoid either under- or over-reacting to the FTC's latest action.

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[1] 15 U.S.C. § 45.
[2] Non-Compete Clause NPRM pg. 1.
[3] *Id*. at 5.
[4] *Id*. at 116.
[5] *Id*. at 6.
[6] *Id*. at 72.
[7] *Id*. at 139.
[8] *See* 15 U.S.C. §§ 15, 26.
[9] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, November 2022.
[10] Decision and Order, Debes Corp., FTC Docket No. C-3390 (Consent Order), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-115/ftc_volume_decision_115_january_-_december_1992pages_670-773.pdf.
[11] Decision and Order, Debes Corp. FTC Docket No. C-3621 (Consent Order), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-120/ftc_volume_decision_120_july_-_december_1995pages_814_-_892.pdf.
[12] *United States v. Adobe Sys., Inc.*, No. 10 CV 1629, 2011 WL 10883994 (D.D.C. Mar. 18, 2011).
[13] Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements, Justice Department Office of Public Affairs (Sept, 24, 2010).
[14] *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1173 (N.D. Cal. 2013).
[15] Judge Koh OKs $415M Google, Apple Anti-Poaching Deal, Melissa Lipman (Sept. 3, 2015).
[16] Antitrust Guidance for Human Resources Professionals, Oct. 2016, https://www.justice.gov/atr/file/903511/.
[17] Although the DOJ ultimately lost those cases at trial, it received favorable rulings at the motion to dismiss stage establishing that both wage fixing and non-solicitation agreements can be *per se* illegal under the antitrust laws. DOJ continues to investigate and bring criminal labor cases.
[18] *See, e.g., Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247 (11th Cir. 2022); *DeSlandes v. McDonald's USA, LLC*, No. 17 C 4857, 2021 WL 3187668 (N.D. Ill. July 28, 2021), *appeal filed*, Case No. 22-2333 (7th Cir.).
[19] Executive Order on Promoting Competition in the American Economy, July 9, 2021.
[20] Request for Public Comment Regarding Contract Terms that May Harm Fair Competition, FTC-2021-0036.
[21] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, November 10, 2022.
[22] *See* "FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers," FTC, January 4, 2023.
[23] AG Report: Ferguson's initiative ends no-poach practices nationally at 237 corporate franchise chains, Washington State Office of the Attorney General, June 16, 2020.
[24] Attorney General Madigan Reaches Settlement with Wework to end use of overly broad non-competes, Illinois Attorney General, September 18, 2018; A.G. Schneiderman Announces Settlement with Major Legal News Website Law360 to Stop Using Non-Compete Agreements for Its Reporters, New York State Office of the Attorney General, June 15, 2016; AG Ferguson shuts down Tradesmen International's illegal use of non-compete agreements, wins restitution for impacted workers, Washington State Office of the Attorney General, July 14, 2022.
[25] *See, e.g., Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001).
[26] In addition to the jurisdictions mentioned above, other states have, over the years, enacted their own laws restricting or limiting the use of restrictive covenants including Illinois, Louisiana, Nevada, Maine, Maryland, New Hampshire, Rhode Island, Virginia and Colorado.
[27] Non-Compete Clause NPRM at p. 110.
[28] *Id*. at 11.
[29] *Id*. at 105.
[30] *Id*. at 141.
[31] *Id*. at 143.
[32] *Id*. at 153.
[33] NPRM for the Non-Compete Clause: Majority Statement of Chair Khan joined by Commr's Slaughter and Bedoya pgs. 1-2.
[34] *Id*. at 2.
[35] *Id*.
[36] *Id*.
[37] *Id*. at 4.
[38] *Id*.
[39] *Id*.
[40] *Id*.

[41] *West Virginia v. EPA*, 142 S. Ct. 2587, 2620-21 (2022).
[42] Although not a challenge to a federal agency regulation, there was a similar industry effort to oppose a California state law that sought to scrutinize on a national basis alleged "pay-for-delay" settlements of patent infringement lawsuits more strictly than federal antitrust law. Efforts to stop that law in the courts resulted in it being substantially narrowed to only those settlements entered into or negotiated in California. *See Association for Accessible Medicines v. Bonta*, No. 2:20-CV-01708-TLN-DB, 2022 WL 463313, at *24 (E.D. Cal. Feb. 14, 2022).
[43] *See* Majority Statement, at 5.
[44] "Remarkably, none of these cases provides evidence showing the anticompetitive effects of non-compete clauses beyond the conclusory allegations in the complaints. The complaints in the glass container industry assert that non-compete provisions may prevent entry or expansion by competitors, but contain no allegations regarding firms that have tried unsuccessfully to obtain personnel with industry-specific skills and experience. Regarding the effects on employees, the complaints make no allegations that the non-compete clauses were enforced by respondents and the Analysis to Aid Public Comment accompanying the consent agreements points only to studies not tied to the glass container industry. These cases provide no evidence that the non-compete provisions limited competition for employees with industry-specific expertise, thereby lowering wages or impacting job quality. Similarly, in the case against Prudential Security, Inc., the complaint alleges that individual former employees were limited in their ability to work for other firms in the security guard industry, but contain no allegations that the firm's non-compete provisions had market effects on wages or effects in a properly defined market for security guard services." NPRM for the Non-Compete Clause: Dissenting Statement of Commissioner Wilson, pgs. 6-7.
[45] *Id*. at 1.
[46] *Id.*
[47] *Id*. at 11.
[48] *West Virginia v. EPA*, 142 S. Ct. 2587, 2620-21 (2022).
[49] *Id*. at 12.
[50] *Id*. at 13.

If you have questions concerning the contents of this alert, or would like more information, please speak to your regular contact at Weil or to any of the following:

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