

Client Alert: FTC Director's Comments Continue the Concern and Confusion about Proposed Non-Compete Ban

Publications

January 12, 2023

By: Debbie Berman, Jason M. Bradford, Joseph Torres, Andrew W. Vail, Casey L.M. Carlson

Yesterday, January 11, 2023, Elizabeth Wilkins, the Federal Trade Commission's Director of the Office of Planning and lead staffer for the FTC's newly proposed ban on non-competes, provided comments and answered questions about the Commission's proposed rule during a public call.

As discussed in Jenner & Block's January 6th, 2023 Client Alert and analysis, the proposed rule would ban virtually all non-competes (other than in some circumstances related to the sale of a business), including those already in effect, and would forbid any workaround that achieves a similar effect.

While the call with Director Wilkins was promoted as an opportunity to offer clarity about the proposed rule, Director Wilkins' comments and answers to questions raised additional questions and concerns.

The conference call was largely a PR effort to sell the Rule

Much of the call focused on attempts to justify the rule and the FTC's authority to promulgate it. We can expect to see similar rhetoric in response to comments against the rule and legal challenges that may be brought if the rule is enacted. For example, Director Wilkins tried to justify the rule by explaining that the rule was, in part, inspired by studies that compared wages in states with strict limitations on non-competes to wages in states with more lax regulations on non-competes. According to Director Wilkins, the studies illustrated that employees enjoyed higher and more equitable wages in states where non-competes were more restricted. Director Wilkins also noted that the proposed rule has received a significant amount of positive, informal feedback from workers and consumers discussing the changes on social media and in the news. As to the legal authority of the FTC to pass such an expansive rule, Director Wilkins believes that the FTC has not only the legal authority, but the obligation to do so, because Congress has empowered the FTC to address "unfair methods of competition."^[1] There is a strong basis to question, and potentially

challenge, her view on the FTC's authority, similar to the successful challenge to the CDC's authority to impose the COVID eviction moratorium.

Wilkins's responses to questions raised new concerns and uncertainty

While the FTC may have wanted to use this call to quell concerns and provide guidance, the Director's comments also created confusion. For example, in response to a question of how businesses could protect their legitimate confidential and proprietary information, Director Wilkins suggested that employers utilize non-disclosure agreements as an alternative to non-competes, opining that non-competes were overbroad instruments to protect these interests. The text of the proposed rule, however, identifies non-disclosure agreements as the type of contractual clauses that could potentially fall within the rule's broad scope if they "effectively preclude[] the worker from working in the same field after the conclusion of the worker's employment with the employer." But whether an NDA effectively precludes a worker from working in a particular field will often depend on how broadly the "field" is defined. Director Wilkins also stated that the rule could also cover certain non-solicits. The FTC's proposal thus becomes even broader and vaguer (ironically, this is a leading complaint made about poorly drafted and overly limiting restrictive covenants) and ignores that many courts and state legislatures recognize that appropriate non-solicits, like appropriate non-competes, have reasonable bases and provide market value. At the same time, she seemed to suggest that in the agency's view, non-solicits do not necessarily have the same potential negative effect on employee mobility as some non-competes might. Indeed, the functional test proposed by the FTC would ban any restrictive covenant "that has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."^[2] If used literally, this would invalidate any non-solicit agreement where the primary motivation of a new potential employer was to have the employee solicit the customers of its former employer in violation of an otherwise legitimate non-solicitation agreement.

Next Steps for Employers

Jenner & Block's skilled Trade Secrets and Restrictive Covenants practice can help employers determine how best to respond, or challenge, the proposed rule so that they are not caught flat footed. The comment period will continue for 60 days from the announcement of the proposed rule, until March 6, 2023. It is important for businesses (or the associations of which they are members) to explain to the FTC the potential damage to the market that its proposed ban on virtually all non-competes would create. Indeed, it even includes restrictions on senior leadership who receive consideration in connection with the sale of a business (but where that leadership does not meet the 25% owner criteria set by the FTC) or for senior executives who have agreed to non-competes (often with generous consideration) where the nature of their role necessarily threatens the confidentiality of company's most closely held proprietary information (e.g., a manager with detailed information about a company's unannounced product launches). Those same players should consider potential legal challenges to the agency's authority and actions if the rule goes into effect.

And, significantly, although there is hope that comments and/or legal challenges may correct the FTC's misguided path, businesses need to understand both the restrictions and obligations that will rather quickly be imposed (e.g., providing a notice to current and past employees under a non-compete), and should make a plan for how to use the available legal tools to continue to protect business information.

Footnotes

[1] See [14] 15 U.S.C.A. § 45.

[2] Non-Compete Clause Rulemaking, Federal Trade Commission (Jan. 5, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking>.

Related Attorneys



Debbie Berman

Partner

dberman@jenner.com

+1 312 923 2764



Jason M. Bradford

Partner

jbradford@jenner.com

+1 312 840 7225



Joseph Torres

Partner

jtorres@jenner.com

+1 312 840 8685



Andrew W. Vail

Partner

avail@jenner.com

+1 312 840 8688



Casey L.M. Carlson

Associate

ccarlson@jenner.com

+1 312 982 4839

Related Capabilities

Antitrust and Competition Law

Trade Secrets and Restrictive Covenants

on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact dataprotection@jenner.com.

Stay Informed

