

Client Alert: Stakeholders Speak Out During Webinar on FTC's Proposed Rule Banning Noncompetes

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Recently, the Federal Trade Commission (FTC) hosted another public forum on its proposed rule to ban noncompetition agreements (noncompetes). While the public forum provided opportunity to those for and against noncompetes to comment, the FTC clearly downplayed the criticism of opponents to the rule and gave the most speaking time to those voicing their support. In public comments and forums to date, the FTC has done little to acknowledge criticisms of the proposed rule,^[1] which suggests that there is a significant likelihood that any revisions by the FTC to the proposed rule will likely be modest. The good news for employers is that a more scaled-back version of the rule, similar to what several states have adopted,^[2] may be more difficult to challenge, and the FTC's apparent hardline stance may increase the likelihood that the proposed rule is ultimately overturned by the courts. Notwithstanding all of this, both sides of the debate on noncompetes seem to agree that the strongest and most assured way to provide trade secrets and other confidential information is through tailored non-disclosure agreements focused on truly confidential information and binding only those individuals with access to such information.

The February 16 webinar included speakers from the FTC, six panelists, and nearly 50 members of the public. The FTC speakers were Chair Lina Khan, who gave introductory remarks; the Office of General Counsel's Marie Choi, who gave an overview of the rulemaking process and how to submit comments; Director of the Office of Planning Elizabeth Wilkins^[3], who walked through the details of the proposed rule; and Commissioners Rebecca Slaughter and Alvaro Bedoya, who offered reactions to the panelists and speakers. The panel comprised six panelists: three in various roles at large corporations, one physician, one attorney, and one former residential caretaker who was subject to a noncompete after his employment was terminated. The panelists spoke about their experiences with noncompetes and their positions on the proposed rule, with four in favor and two against the rule. The members of the public spoke on behalf of various trade associations and unions and were allotted two minutes to state and advocate for their positions. Twenty people spoke in favor of the proposed rule and 21 spoke against it, with five additional speakers addressing only the rule's franchisor/franchisee exception.^[4]

The forum displayed clear passion on both sides of the debate. Speakers in opposition to the proposed rule, including attorneys and members of industry, foreshadowed impending comments from their associations highlighting their disdain on the rule's wide scope and the belief that the FTC is the improper entity to impose such a change. Advocates supporting the rule, including members of the medical community, attorneys, and public policy analysts, emphasized their desire to protect vulnerable workers from harmful situations. This discourse is sure to continue in the comments throughout the duration of the rule's comment period, and interested employers should utilize this opportunity to guarantee their opinions are accounted for.

Supporters Aim to Protect Vulnerable Workers

Many panelists and members of the public who spoke in favor of the proposed rule expressed concerns about low-level employees becoming trapped in positions with noncompetitive pay and poor working conditions. These speakers argued that such workers are the least likely to be exposed to confidential information or trade secrets, which speakers on both sides largely recognized as legitimate assets for employers to protect. Even higher wage earners and professionals, like nurses and doctors, asserted that their noncompetes were inappropriate because they were not privy to any of their employer's confidential information. Further, many supporters opined that other types of contractual provisions, like non-solicitation or non-disclosure agreements, are sufficient to protect companies' confidential information and, therefore, maintained that noncompetes were not only harmful, but unnecessary.

This concern for low-wage employees, like retail and fast-food workers, mirrored President Biden's remarks in his July 2021 Executive Order on noncompetes.^[5] However, as speakers against the rule pointed out, there have been few instances of such noncompete abuses in the past, and these are not the noncompetes the legal system often grapples with, nor which it enforces. Courts uphold reasonably tailored noncompetes that are reasonably tailored via scope, time, and duration to protecting a legitimate business interest.^[6] Accordingly, speakers in opposition to the rule pointed out that the FTC is interfering in an area of law that was already being surgically addressed by well-trained and informed judges.

Opponents Fear Negative Ramifications from Rule's Broad Sweep.

Many panelists and members of the public in opposition to the rule agreed that a rule protecting low-wage workers would be acceptable, focusing their arguments instead on the problematic overbreadth of the rule. They raised concerns about the lack of distinction between employees of different wages and levels, especially as to executives and other high-level employees with access to the company's tricks of the trade. Voicing their doubt on the adequacy of alternatives to noncompetes, these speakers expressed that noncompetes were the only safeguard that addressed the well-meaning ex-employee who may not intend to utilize their prior company's confidential information at their new employer but is simply unable to excise the information from their brain. Thus, the speakers advocated for the "cooling-off" period that noncompetes create.

Many speakers in opposition to the proposed rule cited additional provisions of the rule that they believe reach too far. Some took issue with the 25% ownership requirement to exempt business sales, with one speaker pointing out that not even Jeff Bezos would qualify for a noncompete should he sell Amazon. Others requested that the rule be prospective instead of retroactive, arguing that the rule as drafted—which would invalidate all existing noncompetes—would interfere with privacy of contract and would deprive employers of the benefit of their often fairly-negotiated bargains.

Employers Should Remain Cautious about Noncompetes with Low-Wage Workers

While many speakers pressed the FTC to extend the comment period, it is currently set to close on March 20, at which point the FTC will decide whether to proceed with the rule as is, edit it, or abandon it altogether. While the FTC has represented that it is carefully considering public feedback, even a revised version of the rule is sure to target noncompetes with low-wage workers. Accordingly, employers should be cognizant of the concerns surrounding these agreements and carefully consider the necessity of noncompetes with low-level employees and employees who do not have access to confidential information or trade secrets.

Footnotes

[1] “This includes criticisms from within the FTC itself. Notably, Commissioner Christine Wilson, who strongly dissented from the proposed rule, has since resigned from the FTC. In her letter of resignation, Wilson accused FTC Chair Lina Khan of “ignor[ing] congressionally imposed limits on the agency’s authority and [defying] legal precedent through recently launched rulemakings and other policy decisions.” Matthew Perlman, *Department FTC Member Warns White House About Leadership*, LAW360 (March 2, 2023), https://www.law360.com/competition/articles/1581751?nl_pk=cf0430c5-9e28-4f44-be9d-7809592564a8&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-03-03&nlsidx=0&nlaidx=0.

[2] Many state laws include exceptions for high wage workers (e.g., Illinois (820 ILCS 90); Washington (RCW 49.62.020)). Others include an exception for non-competes accompanied by a garden leave provision (e.g., Massachusetts (Mass. Gen. Laws, ch. 149, § 24L)).

[3] Commissioner Wilkins is also the lead staffer on the proposed rule. See FTC Director’s Comments Continue the Concern and Confusion about Proposed Non-Compete Ban, (January 12, 2023), <https://www.jenner.com/en/news-insights/publications/client-alert-ftc-spokesperson-tries-to-offer-clarity-but-creates-some-confusion-in-qanda-on-proposed-rule-banning-non-competes>.

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

[5] Biden Administration Announces Plans to Curtail Non-compete Agreements for Workers (July 12, 2021), <https://jenner.com/library/publications/21119>.

[6] As recently as last week, a federal court in Florida granted a preliminary injunction enforcing a company’s nonsolicitation agreements—which are threatened by the proposed rule’s functional definition of noncompetes—with six of its former employees

who claimed the agreements violated state antitrust law. *Simmons v. USI Ins. Servs., LLC*, No. 8:23-cv-201-TPB-AAS, 2023 U.S. Dist. LEXIS 25884 (M.D. Fla. Feb. 15, 2023); Aaron Keller, *Fla. Judge Upholds Insurance Brokers' Nonsolicitation Deal*, LAW 360 (February 16, 2023), https://www.law360.com/competition/articles/1577201?nl_pk=cf0430c5-9e28-4f44-be9d-DID7809592564a8&utm_source=newsletter&utm_medium=email&utm_campaign=competition&utm_content=2023-02-17&read_more=1&nlsidx=0&nlaidx=9

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