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FTC Changes Strategy on Noncompete Enforcement

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The Trump administration's FTC has abandoned the rule banning noncompete agreements nationwide, but is encouraging antitrust enforcers to bring challenges in court. Whereas Biden-era officials had concluded that only broad rulemaking could meaningfully address non-competes affecting tens of millions of workers. This FTC is instead urging government enforcers at the federal and state level to challenge anticompetitive non-competes under the Sherman Act on a case-by-case basis.

FTC officials are encouraging enforcers to use Section 1 of the Sherman Act to challenge unreasonable noncompete agreements. The case-by-case approach advocated by the FTC faces significant obstacles. Non-competes are vertical agreements between an employee selling labor and employer purchasing it. Vertical agreements are treated far more leniently under US antitrust law than horizontal agreements between competitors. Rather than being deemed illegal *per se*, these noncompete agreements will be subject to a rule of reason analysis, which requires a balancing of anticompetitive effects against procompetitive rationale. This will make these cases resource-intensive to litigate.

Meanwhile, several states are pursuing their own noncompete restrictions through legislation rather than enforcement. New York's legislature passed a narrowed ban bill awaiting the governor's decision, while New Jersey considers similar proposals. Choice-of-law disputes between states are emerging as a contentious issue, highlighted by litigation over California's prohibition on enforcing out-of-state noncompete clauses.

Given the shifting policy and enforcement posture regarding non-competes, companies with employees in the United States should consult with an antitrust attorney when deciding whether to impose such restrictions in their employment agreements.

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