FTC Workshop on Non-Compete Clauses Demonstrates New Interest—But Little Likelihood of Shift in Current Enforcement Approach

January 15, 2020

On January 9, 2020, the FTC held a workshop entitled "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues."[1] This workshop is part of a growing interest in addressing the competitive impacts of non-compete clauses in employment agreements, which have become fairly common in the marketplace but largely remain governed by a patchwork of inconsistent state laws. Despite the recent uptick in attention, the prospects for FTC action in the area remain murky and ambiguous, with an FTC rulemaking unlikely given the current lineup of Commissioners. State-by-state approaches will most likely continue to prevail.

The law around non-compete clauses is ambiguous and defined by a patchwork of varying laws at the state and federal level.

Non-compete clauses are a matter of both federal and state law. Federal courts typically apply a "rule of reason" approach in assessing non-compete clauses in employment agreements, determining their legitimacy based on their overall impacts on competition.[2] State law largely drives enforcement of non-competes, ranging from states where non-compete clauses are enforceable (e.g., Florida) to states where such clauses are un-enforceable (e.g., California), with many states having various restrictions and levels of enforceability in between.

The majority of states enforce non-compete clauses in employment contracts using a reasonableness standard, balancing the employer's legitimate interests with those of the employee and the public. In assessing whether a non-compete clause is reasonable, judges commonly assess the duration, geographic limitation, and scope of the provision, meaning these determinations are heavily fact-based. In most states, courts have held agreements lasting two, or sometimes even three years, as reasonable.[3] The duration of a "reasonable" agreement may be shorter or longer, however, depending upon statutory presumptions, or judicial considerations of other factors, such as the type of information gained or training required for a particular line of work. It is therefore important to consult individual state laws and cases when crafting these clauses.

[1] **FTC Workshop: Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues**.

[2] See e.g., ***Consultants & Designers, Inc. v. Butler Service Group, Inc.***, 720 F.2d 1553, 1560-1561 (11th Cir. 1983); ***Perceptron, Inc. v. Sensor Adaptive Machines, Inc.***, 221 F.3d 913, 919 (6th Cir. 2000).

[3] See e.g., ***7's Enters., Inc. v. Del Rosario***, 143 P.3d 23, 36-37 (Haw. 2006) (Hawaii Supreme Court highlighting that three years may be a reasonable duration for a non-compete); ***Phone Connection, Inc. v. Harbst***, 494 N.W.2d 445, 449 (Iowa Ct. App. 1992) (noting that Iowa typically finds restrictive covenants of two to three years in duration); ***Stryker v. Hi-Temp Specialty Metals, Inc.***, 2012 WL 715179, at *7 (D. N.J. Mar. 2, 2012) (applying New Jersey law, finding that two-year restrictive covenants are generally found reasonable in New Jersey).

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Non-compete clauses can also relate to the sale of a business. Such clauses are generally enforced more than those in employment contracts.[4] However, these agreements must be ancillary to the transaction to qualify as reasonable.

Recent guidance and enforcement demonstrates that non-compete clauses have become an increasing area of interest.

The recent focus on employment non-competes is an outgrowth of growing interest in whether antitrust has any relevance to sluggish wage growth, growing income disparities, and whether employers are engaging in conduct that is improperly increasing their "buyer power" or "monopsony power" in labor markets.[5]

An earlier area of focus was so-called "no poach" agreements between employers. In October of 2016, the DOJ Antitrust Division and FTC released joint guidance for human resources ("HR") professionals and those involved in hiring and compensation decisions to alert them to behavior that could violate the antitrust laws, most notably wage-fixing and no-poaching agreements.[6] Since releasing the guidance, the DOJ has expanded its enforcement against no-poach agreements, filing a civil antitrust lawsuit against rail companies alleging that the companies entered into no-poach agreements in violation of Section 1 of the Sherman Act.[7] This action spurred a series of private litigations and state investigations.

More recently, commentators and enforcement officials have turned their attention to non-compete clauses in employment agreements.[8] The January 9 FTC workshop on non-compete clauses recognized the growing sense among economists and policymakers that the now widespread use of non-compete clauses is something that needs to be studied and better understood. Speakers highlighted the widespread and expanding use of these clauses across the economy, often imposed uniformly on employees at every level of a company,[9] raising concerns about the impacts of these tools on competition, innovation, wages, and other factors.

The debate at the center of the workshop focused on whether or not non-compete clauses should be enforceable, as opposed to whether these clauses should give rise to remedies such as fines or disgorgement. Inconsistencies in the law and lack of precedent make it difficult to support any action for finding antitrust harm. The majority of the panelists noted that this idea was speculative and that there would be little justification for finding harm.

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[4] See e.g., **C.R.S. § 8-2-113(2)** (Colorado); ***Tristate Courier and Carriage, Inc. v. Berryman***, C.A. No. 20574-NC (Del. Ch. Apr. 15, 2004) (citing *Faw, Casson & Co. v. Cranston*, 374 A.2d 463, 465 (Del. Ch. 1977) ("Because the Covenant is part of a contract for the sale of stock, this inquiry is less searching than if the Covenant had been obtained in an employment contract.").

[5] See e.g., Suresh Naidu, Eric A. Posner, and E. Glen Weyl, ***Antitrust Remedies for Labor Market Power***, 132 HARV. L. REV. 536 (2018); RANDY M. STUTZ, **THE EVOLVING ANTITRUST TREATMENT OF LABOR-MARKET RESTRAINTS: FROM THEORY TO PRACTICE**, AMERICAN ANTITRUST INSTITUTE (July 31, 2018); THE BROOKINGS INSTITUTION, **REVITALIZING WAGE GROWTH: POLICIES TO GET AMERICAN WORKERS A RAISE** (Jay Shambaugh & Ryan Nunn eds., February 2018).

[6] U.S. DEP'T OF JUSTICE, ANTITRUST DIV. & U.S. FED. TRADE COMM'N: **Antitrust Guidance for Human Resource Professionals** (October 2016).

[7] **Complaint**, *United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation* (April 3, 2018).

[8] See e.g., WHITE HOUSE, **NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES** (2016); OFFICE OF ECON. POLICY, U.S. DEP'T OF THE TREASURY, **NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS** (2016); Press Release, New York State Office of the Attorney General, **Attorney General Schneiderman announces settlement with Jimmy John's to stop including Non-Compete Agreements in Hiring Packets** (June 22, 2016).

[9] See ECONOMIC POLICY INSTITUTE, **"NONCOMPETE AGREEMENTS"** (2019) (report showing that roughly half of responding establishments required at least some employees to enter into a non-compete agreement, while one-third responded that all employees were required to enter into such an agreement, regardless of job pay or duties).

There is also significant debate about how the FTC should—or could—intervene in this space.

The question of what role the FTC could play to address the anti-competitive effects of non-compete clauses took center stage during the FTC workshop. At one end, Commissioner Rebecca Kelly Slaughter advocated for a broad rule that would find all or nearly all non-compete clauses unlawful. At the other end, Commissioner Noah Phillips expressed hesitancy on whether the FTC should tackle the issue, citing a weak legal basis in federal law and a lack of a history of rulemaking at the FTC.

In between the two extremes of presumptive illegality and de facto legality, the commentators suggested several more moderate possibilities:

- *First*, the FTC could pursue a more narrowly-tailored rulemaking governing only some sub-segment of workers, such as a ban on non-competes for low-wage workers. Critics noted that such a rule might face significant line drawing problems (such as how to define "low-wage").
- *Second*, the FTC could initiate a narrow rulemaking focused only on consumer protection issues such as failing to provide sufficient notice or enforcing non-competes in circumstances of termination without cause. While there might be a sufficient basis for such a rulemaking, some suggested that they would not be an efficient use of the FTC's limited resources.
- *Third*, the FTC could issue a policy statement and/or pursue a series of enforcement actions. Commentators noted that such a course of action still would face significant evidentiary and legal issues and might suffer from a lack of public engagement.

Takeaways

- The FTC's workshop is further evidence of the FTC's interest in employer conduct that could adversely affect competition in labor markets and suppress wages.
- This workshop appears to be signaling that non-compete clauses are an enforcement priority, but there are no identifiable actions pending on the topic. Nonetheless, companies and counsel should be prepared to engage if and when the agency does take action. Often, an FTC workshop will precede the initiation of enforcement actions.
- The prospect for FTC rulemaking this year is relatively low, given the lack of federal legal precedent and FTC experience in the space, as well as the divergent views on the proper role of the agency. Nevertheless, changes to the FTC as a result of a new administration next year could cause the agency to make regulation in this area a priority.
- While this is an area of interest for the antitrust agencies and some states, we expect the status quo, which is one of ambiguous and flexible state standards, to remain largely unchanged.

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