

Publications

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FTC Emphasizes Case-By-Case Approach in Workshop on Noncompete Agreements

Key Takeaways

- The FTC indicated it is not pursuing a national rule to ban noncompetition agreements but will continue bringing targeted enforcement actions against agreements it deems overly broad or unjustified.
- The agency emphasized it views certain noncompetition agreements, particularly those involving lower-wage or non-specialized roles, as anticompetitive and legally suspect, especially when they lack a clear business justification.
- Employers should review existing noncompete agreements to ensure they are narrowly tailored, reasonable in scope and duration and grounded in a legitimate business interest.

The Federal Trade Commission (FTC) has reaffirmed that it will pursue noncompete enforcement through individual cases rather than sweeping rulemaking. In a recent public workshop featuring each of the sitting commissioners and panels of economists and current and former agency attorneys, the FTC stopped short of signaling that it will pursue a new national rule to govern all noncompetition agreements. Instead, the FTC emphasized it will continue to pursue enforcement on a case-by-case basis,¹ with a focus on agreements that are overly broad in scope or duration and not narrowly tailored to protect legitimate business purposes.

This alert highlights the FTC's enforcement posture and offers practical considerations for employers.

Commissioners Emphasize Tailored Enforcement

Commissioner Ferguson agreed with the district court's decision that the FTC lacked statutory authority to issue a rule banning noncompetition agreements, but voiced plans to pursue enforcement actions where warranted. He noted the agency would focus on areas where they received public tips, continuing a common law and "common sense" tradition of assessing different noncompetition agreements based on the particular facts and circumstances in each case. In assessing which noncompetition agreements are legally problematic, Commissioner Ferguson emphasized a reasonableness test in which

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companies will need to show a legitimate interest and sufficient justification for their use. Commissioner Ferguson made it clear that the FTC will view noncompetition agreements that are simply used to prevent competition as illegal restraints.

Commissioner Meador did not speak to the legality of a categorical rule but rather, he expressed concern that noncompetition agreements are being used as scare tactics even when unenforceable, particularly in certain professions like nursing, bartending and internships. To determine whether a noncompetition agreement is legal, Commissioner Meador said to consider the employee's wage and skill level, specialty and whether they received dedicated resources or training. He echoed Commissioner Ferguson's focus on a contextual balancing test that considers the scope and duration of noncompetition agreements. Both commissioners encouraged companies to be thoughtful about their use of noncompetition agreements and suggested that other tools, like non-solicitation agreements and robust intellectual property protections, are often better tailored than noncompetition agreements.

Panelists Urge Expanded Enforcement Efforts

Many of the panelists encouraged the FTC to push forward in bringing enforcement actions against illegal noncompetition agreements and called on the agency to consider issuing national guidance on enforcement. However, several also recognized that local and state legislatures remain key regulators in this area. One current FTC attorney opined that noncompetition agreements are especially problematic in the healthcare industry, where justifications such as training and confidentiality are less applicable. Panelists also pointed to the FTC's ongoing case against U.S. Anesthesia Partners in Texas as an example of noncompetition agreements leading to rollups and consolidation of industries, as alleged in the complaint.

Takeaways for Employers

The workshop demonstrated a continued focus by the FTC on noncompetition agreements even in the absence of a national rule banning them categorically. The FTC will continue to pursue "education through enforcement" and will bring targeted cases to demonstrate the kinds of noncompetition agreements it views as illegal. In light of this workshop, employers should ensure that existing agreements are narrowly tailored and aligned with a legitimate business interest, particularly in jurisdictions with restrictive state laws.

If you have questions about whether certain noncompetition agreements are enforceable or how best to structure employment agreements, reach out to Polsinelli's Antitrust and Labor and Employment counsel.

[1] For a brief history of the FTC's attempts to promulgate a national, Final Rule regarding noncompetition agreements, read this blog.