

Client Alert

January 2020

FTC Commissioners Advocate Restrictions on Non-Compete Agreements; Seek Comments on Potential Rulemaking

Restrictive covenants and noncompete agreements are increasingly under attack, this time by the Federal Trade Commission (FTC). Companies rely on these restrictions to protect investment in intellectual property, technology and employees. On January 9, the FTC suggested that employee freedom of mobility trumps all of these legitimate business reasons companies use restrictive covenants and noncompete agreements. The FTC has increased its attention to restrictive covenants, and noncompete agreements in particular, under the theory that these types of provisions unfairly limit employee mobility and have an adverse impact on competition among employers. Three of the five FTC commissioners oppose the current unregulated use of noncompete agreements and advocate the FTC's taking steps to curtail them.

During a January 9 workshop to explore the ongoing use of noncompete agreements in the US labor force, Commissioner Rebecca Slaughter, the most vocal critic of noncompetes among the FTC commissioners, stated in her remarks that “[w]hile it would be impossible to know how many workers have been prevented in practice from leaving or seeking to leave a job due to a non-compete, we know that all it takes to chill workers from seeking a better opportunity is a manager waiving a non-compete provision or threatening to sue them if they get a new job.”

The increased attention comes amid enhanced focus nationally on the perceived advantages and disadvantages of noncompete agreements and related covenants, such as [“no-poach” agreements](#) considered by some to implicate antitrust concerns. In November 2018, attorneys general in 18 states sent a letter to Commissioner Joe Simons urging him to restrict noncompetes. The historic use of noncompetes has “deprived [workers] of their freedom to use their labor as they choose,” the attorneys wrote. In October 2019, a bill was filed in the US Senate that would prohibit the enforcement of noncompetes except in just a few circumstances.

Slaughter further advocated the FTC's making use of its rulemaking authority to address the issue, which was a central point of discussion at the workshop: “We need not wait for legislation to tackle this issue head-on,” she remarked. Attendees at the workshop discussed multiple regulatory options the FTC could consider, such as requiring employers using restrictive covenants to educate workers about the extent and import of the restrictions. The FTC is collecting input about potential rulemaking on this point through February 10, 2020, at <https://www.regulations.gov/comment?D=FTC-2019-0093-0001>. Questions for consideration include:

- What impact do noncompete clauses have on labor market participants?
- What are the business justifications for noncompete clauses?
- Is state law insufficient to address harms associated with noncompete clauses?
- Do employers enforce noncompete agreements contained in standard employment contracts? How routine is such enforcement?
- Are there situations in which noncompete clauses constitute an unfair method of competition (UMC) or an unfair or deceptive act or practice (UDAP)? How prevalent are these situations?

- Should the FTC consider using its rulemaking authority to address the potential harms of noncompete clauses, applying either UMC or UDAP principles? What “gap” in existing state or federal law or regulation might such a rule fill? What should be the scope and terms of such a rule? What is the statutory authority for the commission to promulgate a rule?
- Should the FTC consider using other tools besides rulemaking to address the potential harms of noncompete clauses, such as law enforcement, advocacy or consumer/industry guidance?
- What additional economic research should be undertaken to evaluate the net effect of noncompete agreements? Should additional economic research on the empirical effects of noncompete agreements focus on a subset of the employee population? If so, which subset?

Employers that rely on noncompetes for the legitimate protection of company value, relationships and investments in training, among other things, should consider submitting comments and supportive documents or briefs through the website linked above. Any formal rulemaking necessarily will include a more formal period of comment, but the submission of preliminary comments at this stage can enhance the conversation by highlighting the legitimate and important use of noncompete agreements in many contexts and applications.

In addition, Hunton Andrews Kurth LLP is working with clients in various related areas, and is available to assist in drafting a comment, reviewing and evaluating current restrictive covenant agreements in light of recent changes (and potential changes) to the applicable laws, and providing insight as to state law variances which could help improve the efficacy of such restrictive covenant agreements. Hunton Andrews Kurth will continue to monitor the FTC’s activity in this area and report as appropriate.

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