FTC Proposes to Regulate Virtually Every Labor Relationship in the United States

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Last week, the Federal Trade Commission revealed what it meant when it vowed to be more than an antitrust and consumer protection agency. It announced a proposal to regulate virtually every labor and service relationship in the United States and make it more lucrative for people to quit.

The new rule is predicted to boost wages and salaries for millions of Americans at every income level, with CEOs getting some of the largest raises. According to the FTC's analysis, the rule is likely to reduce on-the-job training, shorten job tenure, and generate more resignations. It might also spur litigation if employees spill trade secrets in their new posts.

In measures both simple and sweeping, the rule would ban certain terms of service and regulate others. Categorically banned would be non-compete clauses (or NCCs) in agreements between companies and workers or contractors. Any agreement that prevents a person from quitting a job and working for a competitor or starting a competing business would be illegal, no matter how important it might be to protect trade secrets and competitive strategies of the employer.

Potentially prohibited would be non-disclosure, non-solicitation, and non-recruitment agreements. These would be deemed functional NCCs if they effectively preclude someone from quitting a job and joining a competitor. Agreements requiring workers to pay employers for training would also be deemed functional NCCs if the payments not reasonably related to the cost of the training prevent workers from quitting.

The rule would cover every job and gig in any trade or profession. Guards, cooks, coders, accountants, doctors, and lawyers - whether they make minimum wages or millions of dollars, whether they are employees or contractors, whether they belong to unions or work alone - would be protected. The only proposed exceptions are restrictions in connection with business sales and franchise agreements. State laws and court decisions permitting NCCs would be preempted.

Compliance would be mandatory within 180 days of the final adoption of the rule. By then, employers would have to notify all workers who had NCCs that the clauses no longer applied, that the workers could seek or accept a job with any company in competition with the employer, and that they could open their own businesses in competition with their current employer.

Could a rule this sweeping become final?

Yes, and it could happen soon. The FTC has already addressed the pros and cons of NCCs and found the benefits inadequate to justify the agreements. Acknowledging that the provisions encourage

investment in employee training and prevent competitors from acquiring proprietary information, the Commission nonetheless concluded that they do more harm than good. Less restrictive alternatives, like NDAs and trade-secret litigation, could deliver the benefits without the costs, according to the analysis.

Would the rule survive in proposed form?

That depends on the comments the FTC receives and the decisions of the courts if (almost certainly when) the rule is appealed. The rule could stand or fall on the record, and it will depend on the comments the Commission receives.

Can the agency change course?

Interested parties have 60 days to persuade the agency to take a different course. Both the Commission and a dissenting Commissioner have posed fundamental questions and requested additional information. Should the rule impose a presumption of illegality rather than a ban? Should it mandate more prominent disclosures of NCCs rather than banning them outright? Would a requirement that NCCs be reported to the FTC sufficiently discourage their use? Should restrictions apply only to certain occupations or levels of compensation? Should inconsistent state rules be preempted? Do executives, who often retain lawyers to negotiate employment contracts, need protection from the rule? The comment period, which closes March 10, 2023, will likely be the only chance for stakeholders to weigh in.

What is the thinking behind the agency's proposal?

The proposal draws heavily on research published in academic journals and other published sources. According to studies cited by the FTC, roughly one in five workers, or about 30 million, have contracts with NCCs. Skilled workers are more likely to have these agreements, according to various surveys. About a third of hairdressers, almost half of electrical engineers, and about two thirds of executives, reportedly have signed them. The full extent and effects of NCCs have not been studied in all sectors, acknowledges the agency, but it is prepared to proceed anyway. It regards the right to quit as inalienable for workers and important to competition.

The proposal provoked a vigorous dissent from Commissioner Christine Wilson, who found the academic literature inconclusive and criticized the Commission for rushing to a rulemaking without developing adequate evidence to support it. She recalled testimony at a 2020 FTC workshop that the economic literature is "[s]till far from reaching a scientific standard for concluding **[**NCCs**]** are bad for overall welfare." She also noted a study finding that NCCs in the brokerage sector were associated with lower prices and higher customer satisfaction. As for alternatives like NDAs and trade-secret lawsuits, she found scant evidence that they offered sufficient protection to proprietary information and intellectual property.

The inconsistent evidence prompted Commissioner Wilson to ask stakeholders to submit more research and address whether existing studies support the proposed ban. That request (along with the Commission's invitations) will likely elicit important additions to the record, for example an article published by one of FTC's own economists who concluded that the literature had not yet established NCCs' effects on mobility, wages, entrepreneurship, and innovation.

What will happen if a final rule emerges?

If a final rule emerges from this proposal, questions about its scope and the evidence supporting it may elevate a more fundamental issue: whether the FTC has authority to promulgate rules

prohibiting unfair methods of competition (UMC), and whether the agency has properly distinguished illegitimate from legitimate activity.

Commissioner Wilson argued at length in her dissent that Congress never granted the Commission competition rulemaking authority. This author has argued the same, here and here. In addition to testing the FTC's general authority, the NCC ban will face other challenges, for example whether the agency can preempt state laws and regulate labor relations, both of which are generally beyond the reach of the antitrust laws.

Will the FTC stop here?

The NCC ban is the first of a host of competition rules the FTC has planned. Others include surveillance, the right to repair, pay-for-delay pharmaceutical agreements, unfair competition in online marketplaces, occupational licensing, real-estate listing and brokerage, and unspecified industry-specific practices that substantially inhibit competition. The list appears in a December 2021 filing with OMB (citing the President's Executive Order on Competition).

The breadth of these rules may not rival the NCC proposal, but their consequences will be difficult to predict in light of the Policy Statement on Unfair Methods of Competition that the FTC issued in November 2022 (which also prompted a dissent from Commissioner Wilson). According to its new policy, the FTC need not apply the cost-benefit analysis that the antitrust laws require before condemning a method of competition. Illegal under Section 5 can be any practice that is:

- coercive, exploitative, collusive, abusive, deceptive, predatory, or involves similar abuse of economic power; or is otherwise restrictive or exclusionary, depending on the circumstances;
- and tends to negatively affect competitive conditions/generate negative consequences (e.g., raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants, reducing likelihood of potential or nascent competition).

If an abusive, coercive, and deceptive nature of practice is obvious, the FTC will not dwell on its tendency to affect competitive conditions. The agency will use a sliding scale to decide how much weight to accord to the consequences. Abuse, coercion, and deception are concepts that typically arise under the consumer protection laws. Which authority the Commission will assert and when remains to be seen. Indeed, while the Commission included surveillance as a potential competition rule, in August it released a proposal for a rulemaking on Commercial Surveillance and Data Security using its authority under Section 18 of the FTC Act to issue consumer protection rules. Kelley Drye's synopsis of that ANPR can be found here.

The NCC proposal puts the Commission's jurisdiction, policy, and analysis all at stake. A successful assertion of this authority would herald the ascension of an agency with greater power and broader reach than any regulator in the federal government. Companies should heed the Commission's and Commissioner Wilson's calls for help in this proceeding.

More to come from Kelley Drye

If a final rule emerges from this proposal, virtually every employer in the United States will be impacted. As such, Kelley Drye attorneys from our Antitrust and Competition, Advertising Law, and Labor and Employment practice groups are working together to provide practical guidance and information to our clients. This post is the first of several on this topic. Our next post offers a practical guide for employers to prepare.