Legal Update Article

Federal Trade Commission Workshop: Non-Competes in the Crosshairs?

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The use of non-competition agreements between employers and employees has raised concerns at the Federal Trade Commission (FTC). On January 9, 2020, the agency held a program "to examine whether there is a sufficient legal basis and empirical economic support to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts."

The program started with a push for the FTC to take some action against workplace non-competition agreements, but, by the end of the day, the consensus of many of the legal scholars presenting was that the agency's authority to do so in the near future may be limited.

The full-day workshop, attended by this author, included presentations by FTC Commissioners, legal scholars, and economists, among others, and a transcript is available.

The first half of the workshop addressed "why" the FTC should consider taking some action. Speakers highlighted their concerns over certain, potentially abusive practices. Several discussed certain employers requiring employees to sign non-competes in states where such agreements are not enforceable (such as California), not giving employees notice of a non-compete being a requirement of the job, and requiring hourly or low-level employees to sign overly restrictive agreements. Some panelists said that non-competes have no legitimate purpose in the labor market, despite decades of common law supporting the legality and need for such provisions in certain circumstances. Even as they focused on the potential negative effects of non-competes, some panelists conceded that non-competes can have benefits, as well, such as encouraging employers to invest in employee training, increasing the value of long-term employment relationships for both sides, and promoting higher valuation for companies utilizing such agreements.

A panel of economists discussed their respective studies on the use of non-competes and the impact on the workforce. Several pointed to evidence that non-competes depress wages, with citations to academic studies, but almost all of them admitted more research needed to be done. At least one expert, Kurt J. Lavetti of Ohio State University, questioned the connection between the use of non-competes and wage stagnation. Professor Lavetti stated that attributing general wage stagnation in the labor market to the use of non-competes is an "oversimplification."

The second half of the workshop was dedicated to "how" the FTC could, or should, act and there were vastly differing perspectives. A panel that included several former government attorneys and leading legal scholars on administrative law discussed several options, including rulemaking, publishing a general statement of policy or guidelines, and litigation. To the extent the FTC considers rulemaking, depending on the authority and standard, it may need to take several steps in advance, including a detailed and specific notice of any proposed rulemaking, the draft text of the rule, and the reason for the proposed rule. In

addition, at least one panelist confirmed that rulemaking is often a years-long process. Still, other panelists questioned whether Congress or another federal agency might be better suited to act on this issue.

Although the FTC is taking non-competes seriously as a policy issue, whether and how that may translate to enforcement action is unclear. At the end of the workshop, the FTC appeared unlikely to issue a rule banning non-competes completely for all levels of employees in all industries. Even the most zealous supporters of non-compete reform admitted that a complete ban may not make sense, and that employers should be able to use non-competes with executives, employees with access to high-level trade secrets, and highly compensated employees. At least initially, if the FTC does anything, it may choose a less aggressive approach, such as issuing an advisory statement, which would be less vulnerable to attacks, but still would not have the "teeth" of a potential rulemaking. The specifics of any advisory or rule, based on current data, may concentrate on the uncontroversial issues: limiting non-competes for hourly or non-exempt workers and requiring employers to give prospective (and existing) employees sufficient advance notice of any requirement to sign a non-compete as a condition of employment. Both of these have been addressed in many state legislative efforts (see our article, A Renewed Attempt in Congress to Eliminate Non-Compete Agreements), and have received little push back from employers or others on the employer side of this issue.

The FTC is seeking public comments regarding these issues. The deadline for submitting comments is February 10, 2020.

Jackson Lewis attorneys will continue to monitor these developments related to non-competes.