The Non-Compete Landscape in 2023: What Employers Should Know About Changes in Non-Compete Law from the FTC, NLRB, Antitrust Claims and New State Laws (US)

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Perhaps no area of employment law has changed more recently than the law surrounding employee non-competition agreements. Two federal agencies are actively working to regulate most non-competes out of existence. More states have joined the list of jurisdictions that prohibit or limit non-competes (including many non-solicitation agreements) by enacting broad bans. Other states, although not barring all non-competes, have created new restrictions, all while courts are recognizing new legal theories for challenging them.

Nonetheless, many situations remain where employers can use non-competes to protect their proprietary information and defend against unfair competition. But there are major new hurdles to overcome, and the landscape could change even more soon.

Parts 1-4 below discuss the status of key recent changes. Readers primarily interested in the high points should turn to Part 5 for key takeaways and practical suggestions to help navigate this new landscape.
1. The FTC Has Not Yet Issued Its Final Non-Compete Ban, And That Rule Will Face Strong Legal Challenges

In January, the Federal Trade Commission proposed a rule that would ban most non-competes in the U.S. The rule was not immediately binding, and the FTC gave the general public 60 days to comment. Nine months later, the FTC still has not issued any final rule or signaled when it will do so. Bloomberg Law reports, per an undisclosed source, that the FTC will not vote on its final rule until April 2024.

Once the FTC issues the final rule (if it does), private parties will challenge it in court. The U.S. Chamber of Commerce already has signaled that it will do so, as have others. There is a good chance that the U.S. Supreme Court ultimately will decide those challenges, as it has with several other recent challenges to federal agency rules.

Will the FTC’s proposed rule survive in court? There are good reasons to believe it will not. The FTC Act itself arguably refutes the FTC’s position. The FTC is seeking to ban non-competes on the basis that they constitute “unfair methods of competition.” But the FTC Act limits the FTC’s authority to address unfair competition more than other areas, and there is significant authority refuting an argument that non-competes categorically constitute unfair competition.

Perhaps more importantly, the current Supreme Court has been particularly averse to upholding federal agency rules. The Court likely would scrutinize the rule under the exacting “major questions” doctrine. Under this doctrine, the Court should “hesitate” before upholding the rule and refrain from doing so unless the Court determines Congress “clearly” authorized the
The FTC has applied the major questions doctrine to block several other agency rules recently, including OSHA’s COVID-19 Emergency Temporary Standard.

Of course, political developments could change all of this. After the 2024 federal elections, a new Congress could pass its own prohibition, which already has some support in Congress. If Congress passed the “Workforce Mobility Act,” that law would not face the same challenges as the proposed FTC rule. Interested parties should watch as states continue to enact and enforce their own new laws (discussed below), because public reaction to new state laws could shed light on what will occur at the federal level. Even if the FTC ban is unlikely to become effective within the next few months, this is a key area to watch.

2. Anti-Trust Law Creates New Pitfalls and Challenges

The FTC and antitrust law are creating other new risks for employers that seek to use non-competes. For years, when a party challenged a non-compete, those challenges typically invoked state law. However, the FTC and private parties recently have used federal antitrust law more effectively than in the past as a way to contest non-competes. Initially, this uptick in antitrust claims focused primarily on “no-poach” agreements, i.e., where one employer agrees not to hire another employer’s workers (and which effectively bar the underlying employees from competing in certain respects).

Recently, however, more antitrust claims have targeted traditional non-competes, i.e., those between employers and employees. Earlier this year, the FTC issued complaints against three employers, alleging that they violated antitrust law via non-
competes with hourly employees. The employees at issue included manufacturing employees and private security guards and, in this way, these FTC complaints departed somewhat from prior actions challenging particularly low wage workers. State attorneys general also have brought such claims recently, primarily targeting agreements with low wage workers. This is a key shift for several reasons, including because antitrust violations often create criminal liability, and because government enforcement creates several other risks and pitfalls that do not exist for private litigation.

Antitrust claims challenging restrictive covenants have gained traction in court. For example, at least one federal court of appeals has recognized that no-poach agreements can constitute “naked restraints on trade” and, thus, be illegal per se. The prospect of having to defend against expensive antitrust litigation constitutes a significant pitfall that courts had been rare to recognize in the past. There have been several other recent cases where antitrust challenges to non-competes have prompted multi-million dollar settlements from businesses.

There are good reasons to believe that antitrust challenges will become more prominent in the future. As these claims draw more attention and receive greater consideration from courts, private parties will become more likely to raise them. Likewise, state attorneys general seem to recognize that these claims often generate favorable publicity and public reaction.

Further, federal agencies are expanding their toolkit for bringing antitrust claims against non-competes. On September 21, the FTC announced a new cooperation agreement between itself and the U.S. Department of Labor, through which these agencies will share additional information to help police non-competes. The FTC already entered into such an agreement with the National Labor
Relations Board. These cooperation agreements increase the risk that an agency investigation into non-compete law compliance will arise from a prior investigation into an unrelated topic.

3. The NLRB Is Targeting Non-Competes, And May Deem Them to Violate the NLRA

Other federal agencies are joining in on the action. The General Counsel of the National Labor Relations Board recently announced her position that most non-competes and non-solicitation agreements unlawfully interfere with employees’ protected rights under the National Labor Relations Act. At least two NLRB regional offices have issued complaints challenging traditional non-competition and non-solicitation agreements between employers and employees. (This blog previously discussed here and here the NLRB’s new position that confidentiality and non-disparagement covenants violate the NLRA in many situations.)

NLRB General Counsel Jennifer Abruzzo has issued guidance elaborating on when her office will deem non-competes and non-solicits to violate the NLRA. The General Counsel takes the position that, in most instances, these types of agreements will unlawfully interfere with employees’ right to engage in protected concerted activity. Although the General Counsel has recognized that there may be “special circumstances” that permit non-competes and non-solicits, those circumstances are limited. The General Counsel even has implied that non-competes with supervisors could violate the NLRA per her office’s current position. That said, the NLRA protects true supervisors in just very limited ways, and the General Counsel has said that the focus will fall on non-competes with “low-wage or middle-wage workers,” particularly those who lack access to their employer’s trade secrets.
The NLRB itself has not yet ruled on the General Counsel’s position. Nevertheless, the NLRB has accepted the General Counsel’s interpretation of protected concerted activity in several other key ways recently that departed from existing precedent. At least one complaint remains pending before the NLRB that contests non-compete and non-solicit provisions as violating the NLRA. Thus, the NLRB could issue a ruling in the near future that broadly bans most non-competes (and non-solicits) in the U.S. That decision would be subject to review from a federal court of appeals, but it would create significant additional risks for employers.

4. New State Laws Impose Additional Limits

New state laws also have changed the landscape. There are now five states that outright ban virtually all non-competes, i.e., California, Colorado, Minnesota, North Dakota and Oklahoma. These laws have just very narrow exceptions, such as for certain sales of businesses. In fact, earlier this month, California bolstered its preexisting ban on non-competes, including by expanding an employee’s ability to obtain attorney’s fees for a successful challenge. Several other states are seriously considering similar laws, including New York, where the legislature has passed such a law and it waits on the desk of Governor Hochul.

Even states that allow some non-competes have enacted broader restrictions. As of now, more than 20 states bar several categories of non-competes, such as laws that ban all no-poach agreements and all traditional non-competes with employees who earn less than $100,000 annually. Of course, even in states without these types of laws, an employer generally must satisfy a common law test in order to enforce a non-compete, such as by showing that the non-compete is necessary and narrowly tailored to protect an important business interest, usually in terms of both the geographic
5. Key Takeaways for Employers

What does all of this mean for employers? Here are the key takeaways and options for navigating this new arena:

If you use non-competes, reevaluate your current approach and prepare a backup plan for a scenario where non-competes become unlawful. It could be months before any broad non-compete ban becomes effective, but any FTC rule or NLRB decision is highly unlikely to “grandfather” or otherwise exempt pre-existing non-competes. So, any non-compete that you enter into now could become invalid. If that happens, you will want other safeguards in place to protect your proprietary information and defend against unfair competition.

Consider these other options for protecting your interests. Fortunately, there remain several options that are legal and effective. Employers should:

Consider bolstering confidentiality agreements – where lawful – to fill any gaps created by non-compete bans. Most of the developments above affect non-competition and non-solicitation agreements, but not agreements that simply require maintaining the confidentiality of trade secrets and other nonpublic business information. In many (but not all) cases, a strong and well drafted confidentiality agreement can sufficiently protect an employer’s interests. That is particularly true where confidentiality restrictions are coupled with lawful provisions for remedying violations, such as appropriate provisions for liquidated damages, inspection rights to ensure compliance, forum selection provisions providing for favorable locations and tribunals to litigate any alleged breach and
Leverage the protection available under trade secret protection laws. The developments above do not diminish rights existing under the federal Defend Trade Secrets Act or similar state laws. These laws also can substitute for some of the protection that would be available from non-competes regarding the misappropriation of trade secrets, and they sometimes can help a harmed party obtain injunctive relief and money damages. Because these laws focus on protecting actual trade secrets, any employer who seeks to invoke them should take steps now to ensure that it is treating key proprietary information as trade secrets under the law. Employers also could consider agreements requiring employees to arbitrate these claims, and which include other appropriate provisions for securing relief.

Consider alternative compensation structures that can deter unfair competition. There are several ways employers can adjust employee compensation to deter problematic behavior. For example, revising annual bonus programs to condition receipt of a bonus on a departing employee taking specifically defined steps to help transition key relationships, return company property and provide sufficient notice prior to leaving can help mitigate the adverse impact of an employee’s abrupt departure. (Before changing any bonus or pay structure, remember to consult applicable law, which may require you to take certain steps first, particularly in unionized workplaces.) Employers also can implement longevity bonuses and seniority-based pay raises to help deter unwanted departures of more senior employees who may have greater access to proprietary information and relationships, and thereby who pose more of a competitive threat. If you operate in a jurisdiction that allows non-competes only for employees who earn certain amounts annually, consider raising
Improve training in key areas. There are several ways that training can help fill any gaps. Consider training managers to ensure that multiple employees have strong relationships with any key customers and business partners, to reduce the downside if one of them leaves. Ensure that managers regularly conduct exit interviews (and thoroughly understand beforehand the departing employee’s role and types of access), which can deter bad actors, retain proprietary information and ensure that key relationships get transitioned. As another example, if you improve and expand your training on your information security systems, that can create further deterrence and help fill any gaps that might otherwise impede enforcement.

Err away from no-poach agreements with other organizations. No-poach agreements between two organizations are far more likely to experience challenges than traditional non-competes and are far more likely to violate antitrust law. They also face a greater chance of prompting criminal liability, class or collective actions and litigation that is particularly expensive and onerous. Consult with counsel before entering into any type of no-poach agreement (or if you wish to keep an existing one in place).

Avoid non-competes with low wage workers except in extraordinary circumstances. The FTC and NLRB are targeting these types of agreements perhaps more than any others. Further, employees in these positions are far less likely to have access to proprietary information or other duties that would be necessary to justify a non-compete in any state. If you are requiring non-competes from large numbers of employees in lower wage or lower ranking positions, you should reevaluate your approach as soon as
Consider this new landscape when pursuing mergers, acquisitions and other deals. Many deals rely on one party having peace of mind that the other party will not become a competitor after closing. Most of the restrictions discussed above create some exceptions for sales of business interests, but those exceptions are limited. For example, if the FTC’s proposed rule becomes effective, a buyer could not impose a non-compete against a seller’s key salesperson even if they previously owned 20% of the business. Dealmakers should note the current landscape as they are considering new deals. They also should ensure that any agreement gives them sufficient protection if a non-compete ban or further restriction becomes effective.

If you use non-competes, focus on where you really need them. A one-size-fits-all strategy – under which all employees are required to sign non-competes – typically is not a wise approach. An overbroad approach can tie your hands in the places where it really matters. An organization that requires non-competes from broad ranges of employees may draw additional scrutiny, which can threaten its truly important agreements. Likewise, if you require a non-compete from one employee but then decline to enforce it, that can impede you from enforcing another non-compete that you truly consider necessary. You do not want to jeopardize your non-compete with a key salesperson because you unnecessarily required one from their assistant. If the developments above show anything, it is that employers should treat non-competes as a scalpel, not a blunt instrument.