FTC Strikes Down Non-Competition Agreements and Proposes Ban on Non-Competition Agreements that Could Impact the Healthcare Industry

The Federal Trade Commission's ("FTC") threats of "cracking down" on non-competition agreements transformed into actual action with two dramatic moves this week. First, on January 4, the FTC ordered three companies, Prudential Security, O-I Glass, Inc., and Ardagh Group SA, to **not** enforce their non-competition agreements based upon the FTC's finding that the non-competition agreements were illegal restraints on the companies' employees. Second, and even more striking, on January 5, the FTC proposed an outright ban on non-competition clauses in employment contracts. The proposed ban would prohibit employers from entering into or enforcing such clauses and would require employers to nullify any existing non-competition clauses within six months.

As readers of Benesch's prior client alerts and updates regarding restrictive covenants know, the Democratic majority of the FTC has previously made clear its opposition to the use of non-competition agreements. In November 2022, for example, the FTC issued a policy statement regarding the scope of unfair methods of competition under Section 5 of the Federal Trade Commission Act. This policy statement broadened the FTC's enforcement powers beyond anti-trust laws. According to FTC Chairwoman Lina Khan, a staunch critic of non-competition agreements, this enforcement power allows the FTC to engage in "more legal challenges against businesses engaging in alleged coercive or deceptive conduct that undermines competition." Chairwoman Khan's statement could be translated to "this power gives the FTC the ability to strike down non-competition agreements and I/FTC intend to use this power."

Enforcement Action Against Three Companies

The FTC's legal action against Prudential Security, O-I Glass, Inc., and Ardagh Group SA, prohibits the companies from enforcing, threatening to enforce, or imposing non-competition agreements against any employees. In reaching its decision, the FTC argued that Prudential Security "exploited" its "superior bargaining power against low-wage security guards" by requiring them to sign contracts containing non-competition agreements that prohibited the guards from working for a competing business within a 100-mile radius of their Prudential job site for two years after leaving Prudential. The non-competition clause also required Prudential employees to pay $100,000 as a penalty for any alleged violations of the clause.

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The FTC also took issue with O-I Glass, Inc.'s non-competition restrictions that prohibited employees, for one year after leaving O-I Glass, from working for, owning, or being involved in any other way with any business in the United States selling similar products and/or services without the prior written consent of O-I Glass. For Ardagh Group SA, the FTC took issue with Ardagh's non-competition restrictions prohibiting employees, for two years after leaving Ardagh, from directly or indirectly performing "the same or substantially similar services" to those the employee performed for Ardagh to any business in the United States, Canada, or Mexico that is involved in the sale, design, development, manufacture, or production of glass containers in competition with Ardagh.

The FTC determined that all of the above restrictions were unfair restraints on competition and issued orders against the three companies. These orders:

- Prohibit the companies from enforcing, threatening to enforce, or imposing non-competition agreements against employees;
- Ban the companies from communicating to any employee or other employer that the employee is subject to a non-competition agreement;
- Require the companies to void and nullify the challenged non-competition agreements without penalizing employees;
- Require the companies to provide a copy of the complaint and order to current and future directors, officers, and employees of the companies who are responsible for hiring and recruiting; and
- Require the companies, for the next 10 years, to provide a clear and conspicuous notice to any new employees that the new employees may freely seek or accept a job with any company or person, run their own business, or compete with them at any time following their employment.

In a press release issued by the FTC, Chairwoman Khan said, "[t]hese cases highlight how noncompetes can block workers from securing higher wages and prevent businesses from being able to compete…I'm grateful to our talented staff for their efforts to vigorously enforce the law to protect workers and fair competition."

Although the FTC's action against these three companies is unprecedented, it is worth noting that the FTC did not pursue such action against larger companies. It is also worth noting that a court would have likely struck down the restrictions contained in Prudential Security's, O-I Glass' and Ardagh's agreements due to the restrictions being overly broad and not tailored to protect a legitimate business interest. Put another way, a court would have likely reached the same conclusion as the FTC with respect to these restrictions.

The FTC's decision to go after comparatively small companies and restrictions that a court would likely declare unenforceable is telling as it may indicate that the FTC is aiming to establish a track record of such actions before pursuing larger companies and restrictions that have previously been enforced by state and federal courts. Given the FTC's actions here and its comments over the last two years, it is only a matter of time before the FTC sets its sights on larger companies.

Proposed Rule to Ban Non-Competition Clauses

As (un)surprising as the FTC's enforcement actions against the companies may have been, yesterday's activity is striking. On January 5, the FTC proposed a new rule that would ban companies from imposing non-competition agreements on their employees and independent contractors. A rule of such magnitude would impact millions of Americans.

The text of the rule is as follows:

It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

In simpler terms, the proposed rule prohibits employers from entering into or enforcing non-competition clauses with employees or independent contractors. It also requires companies nullify any existing non-competition agreements within six months. The proposed rule, if enacted, could have far-reaching effects on a wide variety of industries, including healthcare, where non-

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competition covenants are widely used by hospitals and health systems, physician practices, surgery centers, dialysis providers and private equity-backed companies, among others, when employing and engaging healthcare providers. A new rule requiring companies to nullify existing non-competition agreements could fundamentally change not only how and where healthcare providers practice, but also could impact some employers' willingness to invest in their workforce or engage in strategic acquisitions of companies owned or controlled by healthcare providers. Although the proposed rule does not appear to challenge the legitimacy of non-competition covenants entered into among business owners or in the context of the sale of a business, employment non-competes can be a key component in strategic healthcare transactions and are generally believed to provide support for higher purchase prices. The FTC will accept public comment on the proposed rule for 60 days and will consider those submissions before issuing a final version of the rule.

The FTC's proposed rule is striking not only due to its scope but also because it raises questions implicating the *nondelegation doctrine*. Generally, the nondelegation doctrine is the theory that Congress cannot delegate its lawmaking power to any other entity or person. The FTC's actions also implicate the *major questions doctrine*, which, generally, provides that when a governmental agency seeks to decide an issue of particular economic or political significance, a vague or general delegation of authority from Congress is insufficient. Instead, the agency must have clear statutory authorization to decide the issue. The Supreme Court recently recognized the major questions doctrine in the 2022 case *West Virginia v. Environmental Protection Agency*. In that case, the Supreme Court held that the EPA's requirement that energy producers shift from fossil fuels to renewable sources was not authorized by the Clean Air Act.

Finally, laws governing non-competition agreements—and restrictive covenants more generally—have always been under the purview of state law. A federal agency suddenly issuing rules governing non-competition agreements will likely be met with resistance.

Not surprisingly then, many companies, restrictive covenant trial lawyers, law professors and trade associations believe the FTC's actions are outside of the agency's charge. Indeed, the lone Republican on the FTC, Commissioner Christine Wilson, stated that the proposed rule is outside of the FTC's authority and makes the FTC "vulnerable to meritorious challenges on several fronts." Similarly, the US Chamber of Commerce has called the proposal "blatantly unlawful" and promised to initiate a court challenge "when the time comes."

Conclusion

The FTC's actions this week are unprecedented, but not wholly surprising. Indeed, Chairwoman Khan has voiced her opposition to non-competition agreements for some time, and the FTC appeared poised to make these moves at some point in 2023. Benesch attorneys will continue to monitor these developing situations and invites readers to register for its January 13 webinar, "2022 Trade Secret and Restrictive Covenant Year in Review," to learn more about what to expect in light of these developments.

In addition, Benesch lawyers were part of a group of approximately 50 trade secret and restrictive covenant lawyers who issued letters to the FTC and White House on July 14, 2021 and December 21, 2021 in response to the FTC's and White House's request for comments on the impact of restrictive covenants. This group is planning to issue comments to the FTC regarding the proposed rule in the next 30 days. If you or your company would like to participate with the comment, or prepare your own comment to the proposal with assistance from Benesch, please contact Alex Ehler, Scott Humphrey, Margo Wolf O'Donnell, Jason Greis, or Nesko Radovic.

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