

Benesch Healthcare+ Nephrology & Dialysis Conference Panel Key Take Aways – Impact of FTC Proposed Rulemaking: The Future of Non-Competition Covenants

JULY 6, 2023

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Non-competition agreements are currently in a volatile state, and the future of their enforceability has been called into question by the current administration, and several state legislatures enacting limitations (and in some cases outright bans) on non-competition agreements.

At the Benesch's Healthcare+ Third Annual Nephrology and Dialysis Conference, held in Chicago on June 15, 2023, we spoke to a panel of experienced attorneys on the future of non-competition agreements for healthcare employers and what steps employers should take given the current landscape of noncompete law. The panel included J. Scott Humphrey, Chair of Benesch's Trade Secrets, Restrictive Covenant and Unfair Competition Group, and Margo Wolf O'Donnell, Co-Chair of Benesch's Labor and Employment Law Group.

Key Takeaways from Panel Discussion:

How We Got Here - After a failed attempt to gain Congress' support, President Joe Biden issued an executive order directing the Federal Trade Commission ("FTC") to "consider" exercising its rule making authority "to curtail the unfair use of non-competes". Following President Biden's Order, the FTC proposed a rule that essentially bans non-competition covenants. The ban is not limited to a select group, rather anyone who is an employer is subject to this new rule. In addition to being a blanket ban, the FTC's definition of a Non-Compete Clause is incredibly broad. It reads:

"A contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."

With such a broad definition, this clause could include not only traditional non-competes but also non-solicit agreements, severance agreements, non-disclosure agreements, and contracts that require the repayment of education costs.

Initial Reactions - Unsurprisingly, there is a divide among party lines in government to this new rule. One specific concern is whether or not the Chair of the FTC has the power to make a nationwide policy decision.

Next Steps - Procedurally, there are rules the FTC must follow before enacting the ban. Specifically, the FTC will consider comments and make potential changes to the language of the rule before enactment. The rule will then go into effect 60 days after it becomes final. Companies will then have 180 days to comply with the rule. However, the Chamber of Commerce has bluntly stated that it will

sue to block the ban as soon as the rule is published. The Chamber is seeking to block the ban not only because it favors noncompetition agreements but also because the Chamber is concerned that the FTC will use the rule as a steppingstone into other areas of company business.

The case will likely make its way to the United States Supreme Court. Following the Court's decision in *West Virginia v. EPA*, many believe the Court will strike down the FTC's ban under the "Non-Delegation" or "Major Questions Doctrine," which essentially state that the FTC needs a clear Congressional mandate in order to author and implement a nationwide ban. There is also the chance that, because 2024 is an election year, if a Republican president were to take office, then the makeup of the Commissioners on the FTC will change, and the rule will no longer be pursued.

NLRB's Role - In addition to the FTC, the National Labor Relations Board ("NLRB") has been active lately in the noncompete space. The NLRB's General Counsel recently issued a guidance memorandum stating that the proffer, maintenance, and enforcement of non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act (the Act applies to non-managerial and lower-level employees). According to the General Counsel of the NLRB, non-competes have a chilling effect on employees in terms of threatening to resign, to demand better working conditions, from seeking new employment from employers with better working conditions, and from seeking employment to engage in protected activity with other workers. Although the General Counsel's memorandum is nonbinding and lacks any direct authority, the panelists advised employers to consider limiting the use of non-compete agreements to managers or other high-level employees and narrowing non-solicit or non-disclosure agreements where appropriate for lower-level employees.

Employer's Response - The panelists assured the audience of the conference to remain calm as there is a long way to go before the FTC's rule has any major impact. However, there are still factors employers should consider. They encouraged the employers in the audience to take an inventory of their current restrictive covenant agreements. They also noted that there is a lot of activity occurring at the state level - 27 states have made changes to their Restrictive Covenant Statutes in the last seven years, 14 states have made changes to their Restrictive Covenant Statutes in the last two years, 44 Restrictive Covenant Statutes have been introduced in 19 state legislatures in the first two months of 2023 (in addition to the four Federal Bills) - and advised employers to remain aware of the changes occurring in their applicable states.

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