

FTC's Unprecedented Move Against Non-Competition Agreements Remains Center Stage (and a Mess) As More People, Organizations and Congress Join the Fray, But The Real Fight Is Not Yet Here

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As previously highlighted by Benesch, the Federal Trade Commission ("FTC") kicked off 2023 by proposing an unprecedented, sweeping "crack-down" on non-competition agreements. The FTC's proposed rule ("Rule") would ban companies from imposing non-competition agreements on employees and independent contractors. This move, which would impact millions of Americans, raised eyebrows in the business, political and legal worlds.

Compared to most seemingly granular, esoteric FTC actions, the FTC's move against non-competition agreements has been positioned in the public spotlight. In fact, during his February 7th State of the Union Address, President Joe Biden advocated for, among other employee-friendly initiatives, freedom from non-competition agreements. Criticizing non-competition agreements, President Biden remarked, "...a cashier at a burger place can't walk across town and take the same job at another burger place and make a few bucks more...But not anymore. We're banning those agreements so companies have to compete for workers and pay them what they are worth."

The FTC followed up President Biden's State of the Union comments by hosting a [public forum](#) to examine the Rule. The forum involved a panel discussion of six individuals. If there was any doubt as to where the FTC is going with the Rule (there is not, the FTC will enact the Rule), the panel consisted of four individuals who supported banning non-competition agreements and two individuals who opposed it. After the panel, the forum was open to public comment. As expected, the business community came out strong against the Rule, arguing that non-competition agreements are already subject to reasonableness requirements and that the FTC lacks jurisdiction to even make such rules. Proponents of the Rule, on the other hand, largely focused on non-compete "abuses" and the importance of "employee mobility" in the workplace.

Several parties also requested that the FTC extend the comment period another 60 days. Currently, the comment period is set to end on March 20, 2023 so the extension would extend the comment period to May 19, 2023. Although many (including these authors) expect/expected the FTC to extend the comment period since an extension is routinely done, the fact that the FTC has yet to do so may indicate that, not surprisingly, the FTC has made up its mind on moving forward with the Rule in its current form. The FTC's apparent insistence on moving forward with the Rule without any outside input is not surprising but is disturbing since the Rule has already received more than 13,000 comments, of which over 6,000 have come from companies.

The FTC's aggressiveness with respect to the Rule and other activities has also led to discourse within the FTC. On February 14th, the FTC's sole Republican Commissioner, Christine Wilson, issued a [scathing op-ed in the Wall Street Journal](#) in which she criticized FTC Chair Lina Khan and announced her intention to resign. In her op-ed, Wilson accuses Khan of having a "disregard for the rule of law and due process." Continuing, Wilson wrote "I refuse to give their endeavor any further hint of legitimacy by remaining" and that, accordingly, "I will soon resign as an FTC commissioner." Senators Ted Cruz (R-Tex.) and Rick Scott (R-Fla.) lamented Wilson's departure and blamed what they identify as the Biden Administration's overreliance on rules and regulations rather than legislation. Not to be outdone, Democratic senators Dick Durbin (D-Ill.) and Elizabeth Warren (D-Mass.) reiterated their support for FTC Chair Khan and the Rule.

In yet *another* [Wall Street Journal op-ed](#), Suzanne Clark, the CEO of the U.S. Chamber of Commerce, announced plans to sue the FTC in response to its proposed ban on non-competition agreements. "If the FTC can regulate noncompete agreements without authorization from Congress," Clark wrote, "[then] there is no aspect of employment or commercial arrangements that it doesn't have the authority to regulate or ban arbitrarily." The showdown between the FTC and the Chamber of Commerce will be one to watch, and it will certainly keep the FTC's endeavors in the public eye. Senator Warren and Senator Sheldon Whitehouse (D-RI), not the FTC, responded to the Chamber's op-ed and position by demanding, among other things, that the Chamber explain why it is against the Rule and identify the members who "donated" to the Chamber's efforts to oppose the Rule. The Chamber is to respond to Senators Warren and Whitehouse by March 13th.

Not to be left out, the House Committee on the Judiciary, led by Congressmen Jim Jordan (Chair R-OH), Darrell Issa (R-CA), Thomas Massie (R-KY), and Scott Fitzgerald (R-WI) issued a letter to the FTC challenging the FTC's authority to issue the Rule and claiming that the Rule is another "power grab" by "the Biden FTC ... to meet a preferred social agenda." The letter also demanded that the FTC provide "documents and information" relating to the Rule. As of today, there has been no public response by the FTC or the Biden Administration to the House Judiciary Committee's demands.

What is next or, put another way, when/where is the real fight?

In the wake of these developments, it is important to remain up-to-date on the news surrounding the FTC, the Rule, and non-competition agreements in general. Importantly though, the FTC has clearly signaled that it is moving forward with the Rule in its current form or with extremely minor alterations. Accordingly, the real fight will be in the courthouse when the U.S. Chamber of Commerce and possibly other business organizations file lawsuits challenging the Rule. Any lawsuit against the Rule will likely include a motion for a Temporary Restraining Order or Preliminary Injunction blocking enactment of the Rule. If the trial court blocks enactment of the Rule, then the FTC's actions, and all the heartburn caused by the FTC's actions, will largely be nothing more than noise since, as we noted in our earlier article on the [Rule](#), the United States Supreme Court will likely strike down the Rule. Conversely, if the trial court does not block enactment of the Rule, then this mess will continue and companies will need to take action with respect to any agreement that contains a non-competition clause. Fortunately, companies will have 180 days to comply with the Rule if the trial court decides to not block enactment of the Rule.

Thus, and for now, companies should follow the advice of Winston Churchill, "stay calm and carry on," with two exceptions. One, companies may wish to consider filing a comment to the Rule and/or

an amicus brief when litigation is initiated against the Rule. In certain circumstances, a company or organization may also want to file its own lawsuit against the Rule. Benesch can help you evaluate these options and, if requested, assist in drafting a comment, amicus brief or litigation.

Two, companies should examine their restrictive covenant agreements regardless of whether the Rule is enacted. 27 states have made changes to their restrictive covenant laws in the last five years. 14 states have made changes to their restrictive covenant laws in the last two years. As such, your restrictive covenant agreements, especially those that have not been reviewed and/or revised in the last five years, may be outdated. In addition, 44 restrictive covenant bills in 19 state legislatures have been introduced in the first two months of 2023. Given all of these changes and likely future changes, a review of your restrictive covenant agreements now (as opposed to when you need to go to court to enforce the restrictive covenants) makes practical, legal, business and economic sense.

Benesch is currently offering a flat fee review of restrictive covenant agreements that provides both an analysis of the enforceability of the agreements and recommendations that a company can make to its agreements in order to obtain the maximum amount of protection. If you are interested in the flat fee offering, or would like assistance with responding to the FTC Rule, please contact Scott Humphrey.

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