Writer's Direct:

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To: Federal Trade Commission
From: David Fish
Re: Non-Compete Clause Rule (Comment in Favor and Requesting Rule Expand to Non-Solicitation Agreements)
Date: January 17, 2023

I respectfully submit this comment as a partner at a Chicago law firm, Fish Potter Bolaños, P.C., that represents workers in non-compete and other restrictive covenant litigation. I also am an adjunct professor teaching employment law, including addressing non-competes, at Northern Illinois University College of Law. I appreciate the Federal Trade Commission's careful attention to the various perspectives provided throughout the process that led to the proposed rule and thank it for the opportunity to offer my impressions.

The FTC's proposed rule banning non-competes, while a good start, must go one step further to protect workers against restrictive covenants typically contained in employment agreements. The FTC should expand the rule to also prohibit, in the employment relationship, agreements not to solicit customers ("non-solicit" agreements) unless necessary for a legally-protected interest as defined below.

The FTC rule banning non-competes is necessary to stop worker abuse; a compromise rule is not appropriate.

As an employment lawyer who represents workers, non-compete bound workers regularly come to by law firm with a question along the lines of: "I signed a stack of onboarding paperwork on my first day on the job that had a noncompete. It isn't enforceable, is it?" They are shocked to learn how much it will cost to "get out" of their noncompete when they are sued.

The cost of defending employees against restrictive covenant litigation typically ranges from $15,000 on the low side (coming to a quick resolution) to hundreds of thousands of dollars (and sometimes more). Very few employees can afford financing litigation or dealing with the uncertainty of losing not only their case but their job. As a result, few employees ever challenge non-competes and, instead, reluctantly comply with them while giving up better job opportunities, resulting in less money for them and their families.

Equally troubling, even if an employee is willing to take the risk of getting sued, many prospective employers simply will not hire a candidate subject to a noncompete. Enforceable or not, prospective employers today rarely perceive hiring a worker as being worth the risk of getting dragged into a lawsuit (as they regularly are under a tortious interference with contract or other theory). Therefore, we regularly see employers send "cease and desist" letters to new employers right when an employee is in the process of transitioning to a job.

In many instances, this results in the withdrawal of a job offer leaving the employee without the job (and without any job because they quit their original position).

Many business groups argue that non-competes may be inappropriate for low-level employees but argue that a categorical ban goes too far. I disagree and believe that the FTC's categorical ban on non-competes in the workplace is appropriate. Of course, there are many examples of egregious non-compete overreaching: *i.e.*, I defended non-English speaking cleaning ladies who were sued after having the audacity to switch jobs in violation of their restrictive covenants and my state's Attorney General once sued a sandwich company who had had its sandwich makers sign non-competes.

While these and other low-level employee non-compete stories make for good headlines of non-compete abuse, my experience is that the real gut-wrenching and sleepless nights comes from higher-level employees subject to non-competes:

Consider the single parent earning $250,000 per year in her executive level position that has little room for advancement. She gets an offer from a competitor for $350,000 (with less travel) but she cannot take the position because 10 years ago she signed a non-compete the day she started her original job. $250,000 may seem like a lot of money, but it really isn't to many single parents (or heads of a family) who are supporting children, saving for college, and living in an expensive city.

The FTC should not get drawn into artificial line-drawing by exempting highly compensated individuals. Should someone making $1 million per year be banned from leaving a job they hate? Of course not. Highly compensated people leaving jobs will leave open a position for another person to advance into, potentially more taxes when they get their new job, and bring innovation and progress to a new company.

Equally problematic, a bright-line rule will avoid the inevitable litigation that ensues when there are exceptions. For example, in my state (Illinois), our courts and the legislature tried to limit exceptions to non-competes. This only increased litigation as litigants squabbled over whether these exemptions apply, companies tried to draft contracts around the exceptions, and employees are left uncertain of whether they can take a new job that will help their family.

The FTC economists estimated that non-competes suppress American workers' income by $250 to $296 billion per year. But, this does not even begin to rub the surface of the impact on workers' emotional wellbeing and future generations who will benefit when their parents get better jobs.

A compromise allowing non-competes for higher-level employees would have another problem. We have repeatedly seen agreements with egregiously overbroad restrictions coupled with a provision allowing a court to "blue pencil" the restrictions if it deems them to go too far. In doing so, the employer benefits by getting the benefit of having employees or ex-employees abide by provisions that clearly overreach. Employees should not have to wait for a court ruling to escape these kinds of excessive provisions.

Another issue that we have repeatedly seen is that, all too often, the business interest that an employer claims is being protected by a non-compete is illusory. My firm recently defended a hair dresser in a non-compete suit brought by the salon where she used to work – which asserted that the non-compete was necessary to protect its purported "confidential information." Of course, the hair salon had no true confidential information needing protection, but courts regularly ignore this aspect of the employer's claim in non-compete suits.

Some companies, particularly those businesses that have their employees locked up with non-competes, are wary of doing away with noncompete clauses. It is important to recognize that the FTC is not proposing to ban nondisclosure agreements, confidentiality, or trade secret laws. Therefore, businesses will continue to have ample protection for their business interests. These companies, however, will need to rely on courting their talent, instead of threatening to take their talent to court.

Prohibiting these contracts is an important step to assure we still have access to the American Dream. It will help businesses innovate in our tight labor market, will assure workers are not stuck in dead-end jobs, and will make the United States more competitive vis-a-vis our foreign counterparts.

Non-Competes discourage workers from starting new businesses and this hurts the American economy.

Employees regularly come to me and want to use their trade to start a new business and seek advice if their non-compete prohibits them from doing so. Almost without exception, the answer is "yes".

Launching a business with a lawsuit on their back from a well-funded company is typically too much to handle for a small entrepreneur with limited resources. These lawsuits, even when they do not have merit, often have the intended and actual effect to sue a start-up out of business.

What this means for our economy is that there is less competition and consumers (often businesses) end up paying more for goods and services. Sometimes, and often, these cases settle with the employee agreeing, confidentially, to not solicit a long list of customers within the industry. For example, the employee will agree not to solicit the prior employer's hundreds of customers (even though it is those very customers with whom the employee is most familiar). This agreement among competitors cuts up the marketplace and leaves those customers with fewer choices, raises antitrust concerns, and is anti-competitive.

Entrepreneurship and start-ups are historically a driver of job creation and technological advancement. However, noncompete clauses prevent people with good ideas from being able to interact with others, killing innovation at the start. On top of that, new companies and start-ups have a harder time finding qualified talent because prospective employees are tied up with non-competes. Likewise, many entrepreneurs cannot start a new business which results in fewer marketplace options for consumers. Non-competes also hurt innovation by preventing competitors, particularly start-ups, from hiring talented workers.

The proof is in the Golden State: in California--which has long banned noncompete agreements--worker mobility has helped launch that state's roster of high-tech companies such as Apple, Google, Facebook, and Uber. Innovation and hard work, in other words our human resources, are always what have made America competitive against our foreign competitors.

The FTC should expand the rule to also ban employment agreements that forbid customer non-solicitation agreements unless necessary for a legally protected interest.

The FTC's rule does not go far enough and will allow employers to "get around" the rule by simply prohibiting customer solicitation.

Consider this fairly typical fact pattern: A salesperson joins a company with a book of business. The employer mandate that the salesperson sign a "non-solicitation" (but not a "non-compete") agreement that prohibits her from soliciting the customers she brought to the company--or that were developed by her on the job. While perhaps not a "non-compete", by prohibiting this employee from "non-soliciting" customers. The end effect is the same: the employee will be stuck working at her job with her established customer base unless she wants to start over creating a new book of business. The same societal impact results: lack of competition for these customers, higher prices for customers, and the employee likely never leaves her job or starts a new company.

To address employers getting around the rule, the FTC should expand the rule to also ban employment agreements that forbid customer non-solicitation agreements unless necessary for a legally protected interest, namely one that is not designed to prevent competition. This exception is recognition that in some cases an employer does have a legitimate interest in protecting its workforce from walking away with established customers and to prevent abuse by employees

I propose a four (4) part test to determine whether customers have a legally protected interest in customers from which they can properly be subject to a non-compete: The employee must show (a) the non-solicitation agreement is necessary to protect trade secret information, (b) the restricted employee did not introduce the subject of the non-solicitation agreement to the employer, (c) the customers has a near-permanent relationship with the employer, and (d) the employee had a material role in maintaining the relationship with employer that is the subject of the non-solicitation agreement. Many courts have adopted these, or similar factors to determine the enforceability of restrictive covenants. *See, e.g,* § 14:23. Covenants not to compete, 8 Ill. Prac., Business Organizations § 14:23 (2d ed.)

It does little good for the FTC to ban non-compete agreements, but have them effectively still tied to a job by allowing non-solicitation agreements to still bar worker mobility.

I once again thank the FTC for its hard work in developing the non-compete rule, and its attention to the various perspectives provided, including my own.

Sincerely,

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