The FTC's Proposed Ban On Noncompetes – Predictions

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Following his election, President Biden issued "The Biden Plan for Strengthening Worker Organizing, Collective Bargaining and Unions," in which he promised to work with Congress to "eliminate all non-compete agreements" with very limited exceptions. While a bipartisan bill, the Workforce Mobility Act of 2021, was introduced in Congress, it died in committee.

On a parallel track, President Biden issued his Executive Order on Promoting Competition in the American Economy, one point of which was to "encourage" the Federal Trade Commission (FTC) to "exercise the FTC's statutory rulemaking authority … to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

That "encouragement" has now resulted in action. On January 5, 2023, the FTC published a proposed rule that would effectively ban the use of nearly all non-compete agreements.

The FTC's Proposed Rule.

The FTC's proposed rule, if finally adopted, is far-reaching. It bans the use or attempted use of non-compete agreements with only the limited exception for non-competes associated with the sale of a business. Aside from banning non-competes prospectively, it also goes further, invalidating all existing non-competes. The proposed rule accomplishes this goal by requiring employers to rescind any non-competes as of the



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effective date of the rule. It must then notify its employees of this rescission within 45 days. This rescission and notice requirement applies both to a company's existing employees as well as any former employees who signed a non-compete.

One may recall that this issue was quite the political football in Massachusetts for over ten years before the Noncompetition Agreements Act passed in 2018. Leading up to its passage, there was spirited legislative debate. In its final form, the Act was a clear compromise between the two sides of this issue, preserving an employer's right to seek a non-compete from its employees in narrow circumstances, but then attaching a number of conditions and restrictions to that use. *See Massachusetts Legislature Passes Long-Anticipated Act Limiting Noncompetition Agreements, Off-the-Clock Blog Post, August 2018.* This iterative process and subsequent enactment has resulted in a significant decline in the use of non-competes in Massachusetts without the necessity of an outright ban. Indicative of this same policy tug-and-pull within the FTC, one member issued a strenuous written dissent to the proposed rule.

The Rule Making Process Ahead.

Consistent with regulatory protocol, the proposed rule is currently in a short comment period. Once the comment period closes on March 4, 2023, the FTC will assess the comments and make such modifications to the proposed rule as it deems appropriate. Once the final rule is published, it will take effect 180 days later. The anticipated effective date of the modified rule is therefore projected to be sometime in the fall of 2023.

Rather than elaborating on the pros and cons of this proposed rule, let me offer some predictions:

Anticipated Comments To The Rule.

Do Nothing. No doubt, many comments are likely to join the dissent and encourage the FTC to withdraw the proposed rule as being unnecessary, unwarranted or harmful. Assuming the FTC does not back down, I anticipate three other likely subjects for comments.

Senior Executives. Citing overwrought fast food and camp counselor examples, proponents of a ban on noncompetes have justified it as

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necessary to address the unequal power dynamic between sophisticated, well-heeled corporations on one side and unsophisticated, exploited and mostly powerless non-union low wage workers on the other. Arguing that this rationale is inapplicable to senior executives and other highly paid employees, the most prevalent comment is likely to be directed at adding an exemption for those for whom the bargaining playing field is seen as already level.

Severance Agreements. As with senior executives, the power dynamic is very different if the employee is already departing. The employer offers a financial parachute to the soon-to-be former employee in return for an agreement not to compete. The analysis for the departing employee is much simpler than if it occurs at the start of or during continuing employment. Should that employee bet on herself and her likely ability to find another job and reject the severance offer coupled with a non-compete? Or should she make the decision to accept the golden parachute and non-compete as a hedge against her employability in the short term? Either way, the disparate power dynamic is neutralized and comments urging adding this exception are also likely.

State's Rights. The last several years have seen an explosion of efforts by legislators at the state level to address the real or perceived unfairness of non-competes. Dozens of states have passed a potpourri of reform statutes, allowing that legislative process to distill constituent sentiment and arrive at a solution palatable to legislators and voters in a given state. Preserving that local authority, there may be some comment presented to let unique state reforms to stand and apply the federal solution only in those states where there has been no legislative action.

Prediction 1: No Substantive Changes Will Be Made In The Final Rule.

I strongly doubt the FTC will back down entirely. But will it be responsive to comments? Of the possible modifications articulated above, I think that exempting agreements for senior executives and severance payments are the only two that have any chance of making their way into the final rule. Even the prospects of those two changes, however, fly in the face of the FTC's argument for why it has authority to issue the rule in the first place. Specifically, the FTC focused on the rationale of "combatting unfair competition" and positing that banning non-competes "would increase American workers' earnings between $250

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billion and $296 billion per year." Given that its stated justification for the rule focused on the economic impact of non-competes rather than employer-employee power dynamics, comments designed to negate the power dynamic concern may not gain any traction. Instead, I think it likely that the final rule will not vary much from its original iteration.

Prediction 2: The Rule Will Be Met With A Spirited Judicial Challenge … And Lose.

As indicated, once finalized, the rule will become effective 180 days after final publication. If left unchallenged, the rule would then take effect in the fall of 2023.

"If left unchallenged," however, appears highly unlikely. The United States Chamber of Commerce has already made it known that it intends to mount a judicial challenge to the rule. Given the uncertainty and potential upheaval that will result if the rule takes effect, such a challenge is likely to include a request for an injunction to prevent the rule from taking effect before its effective date.

While there may be other legal arguments offered, it is likely that the primary point of emphasis will be the "major questions doctrine." In its 2022 decision in *West Virginia v. EPA*, the United States Supreme Court ruled that the EPA could not issue regulations relative to "major questions" without an express delegation of the authority to do so by Congress. In striking down the EPA's greenhouse gas emission regulations, the Court held that Congress had not provided such authority and rejected the EPA's argument that there was broad Congressional authority under the Clean Air Act.

Without oversimplifying the issue, it seems likely that the same Supreme Court majority would follow its prior ruling and reject the FTC's attempt to shoehorn this rulemaking into broad Congressional authority to combat unfair competition. If so, the ball will bounce back to the halls of Congress to see if its two divided houses (and then the President) can agree on a solution … or even agree on whether there is a problem in need of a solution. If that happens, stay tuned and I will look into my crystal ball again to handicap that race.

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