

# DEFENDING WORKPLACE ANTITRUST INVESTIGATIONS: YOUR 7-STEP RESPONSE PLAN WHEN THE FTC SERVES YOUR COMPANY WITH A CID

Insights  
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Many in-house counsel and employment lawyers have not dealt with the Federal Trade Commission, which historically has focused on antitrust issues and product markets – but that is fast changing, and that means you need to adjust your knowledge and skillset, too. The agency has recently turned its attention to workplace issues such as non-compete and no-poach agreements, the coordination of wages and benefits, and the sharing of sensitive wage information among employers. And it is now issuing Civil Investigative Demands (CIDs) against employers related to these matters with increasing frequency, which means you need to develop a plan for responding. What do you need to know about this new focus, and what seven steps should you take if you find yourself on the receiving end of a CID?

## FTC Shifts Antitrust Focus to the Workplace

The FTC's focus on workplace issues first surfaced in the [Antitrust Guidance for Human Resource Professionals](#) that it jointly issued with Department of Justice in 2016. The Guidance took a strong stance against no-poach agreements, employers coordinating wages and benefits with each other, and businesses sharing compensation information.

This attention on workplace issues accelerated after President Biden issued an [Executive Order](#) condemning restraints in the labor market in 2021. The Order encouraged the FTC "to curtail the *unfair* use of non-compete clauses and other clauses or agreements that may *unfairly* limit worker mobility." It also encouraged the FTC and DOJ to

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revise the 2016 antitrust guidance to human resource professionals related to sharing wage and benefit information “to better protect workers from wage collusion.”

## Service Focus

### Employee Defection and Trade Secrets

The FTC responded by expanding its enforcement efforts and initiating investigations of employee non-competes. A year ago, it issued several CIDs to companies seeking extensive information about their non-competes. Late last year, [the DOJ completed the nation’s first-ever successful criminal prosecution of a workplace-related antitrust matter](#). And earlier this year, the FTC [announced](#) that it had reached settlement via consent orders with three companies and two individuals related to their use of non-competes with employees ranging from low-wage security personnel to engineers.

But all of that was just a prelude to the recent news of the FTC issuing a proposed [rule banning all non-competes for both employees and independent contractors](#). While the proposed rule is limited to non-competes, other common workplace provisions such as non-disclosure agreements could also be subject to the rule if so broadly drawn that they essentially function as a non-compete.

### **The CID: FTC’s Most Common Investigative Tool**

The FTC has multiple ways to investigate targeted workplace practices, but the CID is its most frequently used compulsory investigative tool. Through a CID, the agency can demand you produce documents, disclose information (akin to interrogatories), and submit to depositions. A CID helps the agency to gather information to determine whether it has reason to believe there was a violation of Section 5 of the FTC Act. However, the agency does not have to meet any type of evidentiary threshold to issue a CID.

Prior to issuing a CID, the FTC will likely conduct a preliminary investigation where it gathers information from other sources and through voluntary disclosures by the investigation target for internal agency review. It may reach out to the company suspected of wrongdoing during this informal investigative stage – or not.

If it determines a violation has occurred, the FTC may recommend enforcement proceedings and/or may offer a settlement deal that would involve the signing of an Agreement Containing Consent Order without admitting liability. There may be limited room to negotiate some of the

terms of this consent agreement and related Decision and Order. If the FTC accepts the consent agreement proposal, it will then publish its Complaint, the Agreement Containing Consent Order, and the Proposed Decision and Order in the Federal Register for a 30-day public comment period prior to making the order final.

## **You've Been Served With a CID – Here is Our Seven-Step Response Plan**

Being served with a CID is a harrowing event for any company, certainly for those who do not ever expect to find themselves in the federal government's crosshairs. However, we have developed a seven-step response plan if the FTC serves a CID on your company:

- 1. Do Not Panic – And Do Not Ignore It.** The CID does not mean the FTC will file a complaint or seek formal administrative proceedings against your company. It also does not mean the company has done anything wrong. And do not worry about adverse publicity arising from the CID because the FTC's investigative process is confidential and private at this point. And yes, while the scope of the CID is broad and appears incredibly burdensome at first glance, chances are you will be able to narrow the scope to some degree.

Nonetheless, you need to take this process seriously. Ignoring the CID will not make it go away – and it will definitely make the process more difficult and riskier. Failure to respond to the CID will result in an FTC formal enforcement process started by filing a petition in federal court, making a once confidential process into a public one. Contact legal counsel immediately for help in navigating the FTC's investigative and enforcement process.

- 2. Read the CID and Reread It.** There are four key points to examine when you receive the CID:

### *Subject of Investigation*

Determine the subject of the investigation, which should appear on the front cover page of the CID. It will provide you with some understanding of the FTC's investigative focus. This will also tell you the statute the FTC has reason to believe you may have violated and the underlying corporate actions under investigation – such as engaging in unfair methods of competition in violation

of Section 5 of the FTC Act by entering into and enforcing non-compete agreements. The subject of the investigation will inform your next steps, including conducting an internal corporate investigation of the alleged wrongdoing and preparing your advocacy strategy for later meet and confers with the FTC.

#### *Resolution Directing Use of Compulsory Process*

The CID will have a resolution from the FTC directing the use of the compulsory process, which will also identify the nature and scope of the investigation. If the investigation deviates from the resolution, there may be grounds for a petition to quash the CID.

#### *Relevant Time Frame*

The CID will specify a relevant time frame for the documents and information it is seeking (called Specifications). There may also be different time frames for certain Specifications. The temporal breadth of the CID may provide support for getting a formal modification from the FTC staff during future meet and confers. Relevant time frames will also help you identify the custodians of potentially relevant information and properly preserve that information.

#### *Important Deadlines*

The return date is the date by which you must produce the documents or information sought in the CID. This date will vary and appears on the cover page of the CID. The first meet-and-confer date is within 14 days from the date of service and the date to file a petition to quash or modify the CID is 20 days from service. If you cannot make the deadline for the return date or for filing your petition, which you probably cannot, ask for an extension from the FTC staff attorney identified in the CID and get the approval in writing.

- 3. Preserve All Potentially Relevant Information Sought by the CID:** Once you have a handle on what the CID is seeking in terms of documents and information, take immediate steps to identify potentially relevant information within your possession or control and to preserve that information. Preservation steps must include third parties such as agents and vendors. When in doubt, err on the side of preservation, and always include IT professionals to assist in preservation efforts. If you learned of the FTC's preliminary investigation prior to the

CID, your duty to preserve was likely triggered when you learned of it.

- 4. Conduct a Privileged Internal Investigation:** At the direction of legal counsel, you should conduct an internal investigation to determine how to proceed with the CID and whether you should take corrective measures. Legal counsel must direct the investigation in order to maintain the protection of the attorney-client privilege and the work-product doctrine. This investigation may also help in providing preliminary information to the FTC that would be beneficial in advocating against the investigative or enforcement proceedings or in limiting the scope of the CID.
- 5. Understand the Relative Burdens of Producing Relevant Information Sought by the CID:** Understand the burdens of compliance with each Specification in order to advocate for narrowing the scope of them. Identify low-hanging fruit that can be provided early on to satisfy the FTC's priorities and help to show cooperation and good faith on the part of the company. Producing documents that are relatively easier for the company to produce from a resource and burden standpoint, while addressing the FTC's production priorities, can go a long way in reducing compliance costs, getting deadline extensions from the FTC staff, and negotiating formal modifications to the CID. A showing of good faith compliance is essential in any future action to challenge the CID, either before the FTC or a federal district court.
- 6. Reach Out to FTC Staff:** As noted above, you must have your first meet and confer with the FTC staff attorney listed in the CID within 14 days of service. During the meet and confer and in all communications with the FTC, work to build a rapport despite your personal or professional views of the investigation. Use the initial meet and confer to get information from the agency, such as the focus of the investigation and production priorities. Also, use this time to educate the FTC staff attorney about your company and industry, including staffing or resource constraints that will adversely impact your ability to respond to the CID in timely fashion.

Understand the FTC's inclination to modify the CID's scope and approve deadline extensions and try to get a reasonable response schedule that alleviates some of the burdens and stress on your employees. FTC staff will

almost always agree to reasonable deadline extensions and will likely agree to the production of documents and information on a rolling basis. CIDs are generally incredibly broad in scope by design and the FTC staff will likely agree to some reasonable accommodation – such as a subset of company employees whose emails must be searched versus all company employees in all locations.

- 7. Negotiate, File a Petition to Quash, or Settle with the FTC:** These choices are not mutually exclusive. Chances are there will be some attempt at narrowing the scope of the CID prior to filing a petition to quash or modify the CID or deciding to settle with the FTC.

### *Negotiations*

Indeed, at least one meet-and-confer with the FTC is a procedural requirement to filing a petition to quash or modify a CID, and the agency will only consider issues in a petition that were previously raised in a meet and confer. And, when filing a petition, you must provide a meet and confer statement certifying your good faith effort to resolve the issues raised in the petition, including identifying the dates of each meet and confer with the FTC. Keep in mind that once a petition to quash is filed, the FTC's investigation will become public. Petitions and related decisions can be found on the agency's website.

### *Petitions to Quash*

The petition to quash is filed with the FTC and the Commissioners usually deny the petition. Nevertheless, if you want to challenge a CID, you must file the petition to quash so as to exhaust your administrative remedies. CIDs are not self-enforcing, and the FTC must file an enforcement action in federal district court if it seeks to compel compliance. Filing a petition to quash with the FTC is a necessary administrative action to preserve any objections that a company may want to raise in a subsequent CID enforcement action by the FTC in federal district court.

### *Settlement*

Deciding to settle with the FTC may have nothing to do with whether you have violated Section 5 of the FTC Act. Compliance with a CID, whether narrowed or not, takes considerable company resources, both human and capital, and will likely result in substantial business

interruption – particularly for smaller companies or those struggling with staffing limitations. So, for some, settling comes down to a business decision. It is akin to a Hobson’s Choice: face the heavy burdens of complying with the CID or agree to the FTC’s settlement terms.

Prior to actually settling with the FTC, however, you may consider ending the targeted corporate practice altogether in an attempt to show the FTC that there is no need for further investigation. Terms of settlement will often involve a prohibition against the targeted corporate practice, compliance reporting over a period of years, and retaining certain information for period of time.

## Conclusion

If the FTC has notified your company that you are the subject of a preliminary internal investigation or the FTC has served your company with a CID, please reach out to your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Employee Defection and Trade Secrets Practice Group](#). Make sure you are subscribed to [Fisher Phillips’ Insight system](#) to get the most up-to-date information on this and other workplace topics directly to your inbox.