

FTC'S NEW TASK FORCE TO TARGET NONCOMPETES: 5 TOP ANSWERS FOR EMPLOYERS

Insights
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In a somewhat surprising development, the Federal Trade Commission just announced that it intends to continue scrutinizing noncompete agreements and other arrangements the FTC feels are unfair to workers. Last week, Federal Trade Commissioner Andrew Ferguson announced plans for a Joint Labor Task Force that will identify and prosecute labor-market practices the FTC deems to be “deceptive, unfair, and anticompetitive” and harmful to workers. Notably, the FTC continues to see a substantial role for itself in protecting workers as they participate in the labor market, with Commissioner Ferguson commenting that “the ability to command a reasonable wage on the labor market is an individual’s single most valuable commodity.” What does this development mean for employers and how can you plan accordingly? Here are the answers to your top five questions.

1. What Will the Task Force Do?

The FTC’s Task Force is charged with a specific list of responsibilities, including:

- **Prioritizing Labor Matters:** The Task Force will investigate and prosecute deceptive, unfair, or anticompetitive labor market conduct through the Bureaus of Competition and Consumer Protection with support from the Bureau of Economics.
- **Cooperating and Sharing Information:** The team will harmonize the Bureaus’ methods and procedures to uncover and investigate deceptive, unfair, or

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anticompetitive labor market conduct; create an “information-sharing protocol” across Bureaus to enhance effectiveness; and coordinate investigations and prosecutions across Bureaus.

- **Public Information Sharing and Outreach:** The Joint Labor Task Force will promote research on deceptive, unfair, or anticompetitive labor market conduct; disseminate those findings within the FTC and to the public; engage in public outreach to inform workers about the state of the law; and encourage workers to report labor market conduct concerns to the FTC.
- **Advocating for Legislative and Regulatory Changes:** The Task Force will also identify opportunities for advocacy on legislative or regulatory changes that would remove barriers to labor market participation, mobility, and competition.

With members from each Bureau and the Office of Policy Planning, the Task Force is directed to meet at least monthly, in part to “assess the status of all ongoing labor matters” and report to [Commissioner Ferguson](#) on all such matters at least quarterly.

2. What Practices Will the Joint Task Force Review?

- Topping the list are agreements between employers, meaning **agreements not to poach, hire, or solicit each other’s staff**, and agreements among employers to **fix wages** they pay to workers. Neither of these is surprising, and the memorandum comments that each are likely to be seen as automatic violations.
- Next up on the list are **noncompete agreements**. The FTC spent years engaged in rulemaking during the Biden administration, only to see the final rule blocked by multiple courts prior to its effective date. The current memo does not describe noncompetes as automatic violations, but rather as something employers “*can* use to impose unnecessary, onerous, and often lengthy restrictions on former employees’ ability to take new jobs in the same industry after they leave their employment.”
- The memo also calls out “**termination penalties**” in employment agreements, which it described as impeding workers from switching jobs by imposing “unjustified fees” when workers want to leave their jobs.

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- The memo also assigns the committee **eight other topics**, ranging from job scams to “misleading franchise offerings” and “collusion or unlawful coordination on DEI metrics.” [You can read more about them here.](#)

What Does This Mean as a Practical Matter?

- **Protecting Workers:** The press release and internal memo make a clear statement that the FTC is not going to step back from its evolving focus on protecting workers in the labor market. This poses an interesting contrast to the [National Labor Relations Board’s decision in February](#) to rescind two General Counsel memos that had been issued by President Biden’s NLRB General Counsel, which suggest the NLRB is stepping away from its focus on noncompetes.
- **Scrutinizing Noncompetes:** At the FTC, the Joint Task Force’s instructions from Commissioner Ferguson signal that the FTC will continue to scrutinize noncompete agreements it feels unfairly harm worker mobility. Unlike lateral agreements, such as no-poach or wage fixing agreements, which are seen as automatically illegal, it appears that the FTC views the use of noncompetes as requiring closer inspection regarding the nature of the restrictions and the type of worker signing them.

What About the FTC’s Noncompete Rule?

- **Broad Rule:** Last year, after lengthy consideration and public comment, the FTC issued a [final rule](#) to largely ban the use of noncompetes with nearly all workers across very broad swaths of the economy.
- **Halted By Courts:** The rule was quickly challenged in multiple court actions, resulting in the rule being blocked by courts in both [Texas](#) and [Florida](#). Because of these injunctions, the rule never took effect. The FTC appealed these decisions, and those appeals are still pending.
- **Impact of New Administration:** With the change of presidential administration and shift in priorities, many observers had expected the FTC to perhaps withdraw the rule, abandon the court challenges, and step away from its focus on noncompete agreements. While the FTC so far has been silent about the rule itself, the Joint Task Force memo signals that the FTC remains interested in

noncompetes and may make them a priority for investigation and enforcement activity.

- **Focus on Investigation and Enforcement:** Commissioner Ferguson's preference for investigation and enforcement may have been foreshadowed when he disagreed with the FTC's decision to issue the noncompete rule. He claimed that such rulemaking was beyond the scope of the FTC's authority. Combined with his creation of the Joint Task Force, this suggests that the new administration's FTC remains interested in noncompetes, but will address them through investigations and enforcement actions, not through rulemaking. Indeed, the Task Force is also charged with seeking opportunities to advocate for legislative or regulatory change on these topics, which may be an acknowledgment that the power to make such regulatory or legislative change lies with other bodies, not the FTC.

What Should Employers Do?

- **Prepare for Scrutiny:** Employers should recognize that their use of noncompetes could be scrutinized. But this doesn't mean employers must abandon them altogether.
- **Fine-Tune Your Practices:** The best approach is to analyze what restrictions are needed – and with which workers – and focus on noncompete agreements only with employees who pose unfairly competitive risks that would not be sufficiently prevented or mitigated through the use of less restrictive covenants, such as confidentiality clauses, non-solicitation of customer clauses, or agreements not to solicit company personnel.
- **Remember the Purpose:** Used judiciously, noncompetes remain an important tool that you can consider using in appropriate jurisdictions to protect your business against unfair competition.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates as warranted. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information, and check out [Blue Pencil Box](#) updates on restrictive covenant law. If you have any questions, please contact your Fisher Phillips attorney, the

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