

THE FTC IS (STILL) LOOKING AT YOUR NONCOMPETES: 5 STEPS FOR EMPLOYERS TO AVOID TROUBLE IN A NEW REGULATORY AREA

Insights
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A public workshop hosted by the Federal Trade Commission earlier this week signaled that the agency is still pursuing an aggressive enforcement agenda when it comes to noncompete agreements. While the Trump FTC takes the position that it does not have the authority to ban noncompetes outright, Tuesday's workshop made clear that it will take on "abusive" agreements on a case-by-case basis – on behalf of both workers and consumers. Read on for highlights from the workshop and steps employers can take to stay on the FTC's good side.

3 Biggest Takeaways From FTC Workshop

- **The message from the FTC under both the Biden and Trump administrations is the same: abusive noncompetes are a problem. The difference is in their approach.** Chairman Andrew Ferguson began the workshop by explaining how he views the FTC's role in regulating noncompete agreements between employers and employees. He reiterated his position that **the attempted Biden-era FTC noncompete ban** was unlawful and that any rule banning noncompetes must come from Congress, not the agency. However, he believes the FTC has authority to prosecute the unlawful abuse of noncompete agreements under federal antitrust laws on a case-by-case basis.
- **The FTC will assess the legality of noncompetes in much the same way as courts have been doing for centuries.** In applying the case-specific approach, the FTC will lean on common law principles to determine whether an

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employer's use of noncompete agreements is legal. It will first ask what protectable interests justify the restrictions, like protecting confidential information, trade secrets, and customer goodwill. Then, the FTC will examine whether the restriction is broader than necessary to protect those interests, and whether the interests can be protected through less restrictive means. Factors that inform the inquiry include the nature of the employer's industry, the employee's responsibilities, the temporal and geographic scope of the restriction, and the impact that enforcement would have on the public. Sound familiar? It should, because noncompetes rise or fall on essentially the same standard in most states throughout the country. Employers who have been using noncompetes appropriately under common law principles don't need to panic.

- **The FTC will focus its enforcement efforts on the healthcare industry and low-wage workers.** The FTC indicated it will focus its enforcement efforts on restrictions in the healthcare industry and on low-wage workers, who generally tend to have limited access confidential information and trade secrets. The healthcare industry is already a hotbed of state legislation limiting noncompetes and other restrictive covenants (read more about this [here](#), [here](#), and [here](#)), so employers in that space should add FTC scrutiny to the growing list of concerns. Employers who impose noncompete agreements indiscriminately on all workers without taking compensation, job responsibility, and access to confidential information into account are at increased risk of an FTC investigation.

Next Steps for Employers

Here are five steps you can take now to ensure you remain compliant.

1. Don't Abandon Your Restrictive Covenants Completely. While the FTC remains committed to rooting out abusive noncompete agreements, that is no reason to eliminate your restrictive covenants entirely. The FTC recognizes that the appropriate use of restrictive covenants remains a legitimate, lawful means of protecting your business against unfair competition.

2. Take Stock of How You Use Noncompetes Throughout the Workforce. The FTC is focusing on employers who use

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overbroad and non-individualized noncompetes, especially for employees whose duties do not justify such restrictions. Take stock of how you use these agreements. If you use noncompetes with all employees, regardless of job duties, contact your Fisher Phillips attorney to discuss ways you can tailor your covenants and reduce risk.

3. Reexamine the Scope of Your Noncompetes. Even if you only use noncompetes with employees whose duties justify them, you still need to ensure the substantive restrictions are no broader than necessary to protect a legitimate business interest. Work with your counsel to identify those interests and narrowly tailor the covenants to appropriate behavioral, temporal, and geographic scopes.

4. Don't Forget About State Law. Noncompete and nonsolicitation agreements are governed by a patchwork of state laws that change every year, with some states imposing steep civil penalties for noncompliance. Subscribe to [Blue Pencil Box](#) to stay up to date and discuss with your Fisher Phillips attorney how you can make your multistate contracts compliant wherever you have employees.

5. Take Advantage of Other Protections. Noncompete agreements are just one method when it comes to preventing unfair competition. Make sure you have a strong trade secrets protection program in place, along with appropriate company policies and confidentiality provisions for all levels of employees. Fisher Phillips attorneys can help you secure your trade secrets, confidential information, customer relationships, and other protectable interests, even if you choose not to use noncompete agreements.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates as warranted. Make sure you are subscribed to [Fisher Phillips's 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 authors of this insight, or any member of our [Employee Defection and Trade Secrets Practice Group](#).