April 18, 2023

Comments to the Federal Trade Commission (FTC)

Non-Compete Clause Rulemaking, Matter No. P201200

On behalf of the Insights Association (IA), the leading nonprofit trade association for the market research and data analytics industry, I am respectfully submitting comments on the FTC's proposed Non-Compete Clause Rule. IA agrees that there should be restrictions on noncompete agreements, but differs from the FTC on certain issues with respect to what such restrictions should look like and how they should be achieved.

Our more than 7,200 members are the world's leading producers of intelligence, analytics and insights defining the needs, attitudes and behaviors of consumers, organizations and their employees, students and citizens. With that essential understanding, leaders can make intelligent decisions and deploy strategies and tactics to build trust, inspire innovation, realize the full potential of individuals and teams, and successfully create and promote products, services and ideas.

Background

The Notice of Proposed Rulemaking (NPRM) would declare it "an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause."

Ostensibly, the NPRM would more or less cover all employees and independent contractors, regardless of compensation or severance terms. As it currently stands, the NPRM does not adequately address non-compete restrictions tied to non-disclosure and confidentiality obligations, or client non-solicitation restrictions. The FTC proposed rule would preempt comparable or weaker state laws/regulations. It would also be retroactive, covering past, present and future non-compete contract clauses.

Concerns with the Proposed Rules

IA has four primary concerns with the NPRM, and offers a series of recommendations for the rule.

1. The noncompete ban should not apply to the most senior staff

Part IV of the FTC proposal asks about "Alternatives to the Proposed Rules", including "whether the rule should apply uniformly to all workers or whether there should be exemptions or different standards for different categories of workers."

In contrast to the FTC's uniform approach, IA's position has been that noncompete agreements should only be utilized for the most senior staff.

The FTC should consider an income threshold, such as anyone earning above $150,000 (like in DC's law), or $100,00, as in the laws in Colorado, Oregon, and Washington. Part of the rationale for an income threshold limiting noncompetes to senior staff is that lower-level staff could rarely afford legal representation to contest the agreements. The FTC suggests in the NPRM that noncompetes for lower-level employees are "exploitive and coercive because they take advantage of unequal bargaining power" – a status that does not exist for senior staff.

2. Non-disclosure confidentiality obligations and certain situations regarding client non-solicitation, must be preserved

Since the FTC's proposed ban on noncompete agreements includes any contract provision that could functionally prevent a worker from going to work for a competitor, the NPRM would likely also prohibit many non-disclosure and confidentiality obligations along with certain client non-solicitations.

Most market research and data analytics professionals, both employers and employees, tend to agree that non-solicit agreements and non-disclosure agreements serve important purposes. Asking a departing employee to temporarily refrain from initiating contact with her/his clients to allow the employer adequate time to transfer client service is generally reasonable. Similarly, ensuring intellectual property (especially trade secret information) and confidential information are protected is both necessary and proper.

3. Involuntary, not for cause termination should require compensation, or else removal of a noncompete

IA first developed an industry position on noncompete agreements during the height of the COVID-19 pandemic,[1] worried that our workforce could be involuntarily teminated by layoffs and then prevented by noncompete agreements from finding further employment within the insights industry by noncompete agreements, which could have left them either unable to provide for themselves and their families in a time of crisis, or force them to seek options outside of our industry. In response, we urged that involuntary, not for cause termination should result either in compensation to the employee for the length of the applicable restricted covenant (similar to the European concept of "gardening leave"), or the removal of their noncompete agreements. Reasonable intellectually property protections and client non-solicitation restrictions would still apply.

[1] "INSIGHTS ASSOCIATION CALLS FOR SUSPENSION OF NON-COMPETE AGREEMENTS AMIDST COVID-19 PANDEMIC." April 7, 2020. https://www.insightsassociation.org/News-Updates/Articles/ArticleID/407/Insights-Association-Calls-for-Suspension-of-Non-Compete-Agreements-Amidst-COVID-19-Pandemic

4. Noncompetes directly relating to the sale of a business should be respected

Noncompete clauses entered into between the seller and buyer of a business (including divisions and subsidiaries) should not be restricted. Therefore, we appreciate that the proposed rule excepts such circumstances, as follows: "*§ 910.3 Exception. The requirements of this part 910 shall not apply to a non-compete clause that is entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity's operating assets, when the person restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause. Non-compete clauses covered by this exception would remain subject to Federal antitrust law as well as all other applicable law.*"

5. The proposed rule should not preempt state and local laws and regulations

While only California, North Dakota, and Oklahoma mostly void all noncompete agreements, more than half the states in the U.S. have some kind of restriction on noncompete agreements.

While preemption of state and local laws and regulations for certain issues may make sense, the FTC's proposed approach in this case will likely only cause confusion on the part of businesses seeking to comply. Which state laws and regulations would be considered more protective, and thus not preempted, and who would get to decide? Will the FTC make such a declaration in a timely fashion, or are businesses meant to fly somewhat blindly until it gets extensively litigated in court? The almost certain outcome is increased litigation, resulting in greater costs for businesses with little corresponding benefits for employees and independent contractors.

Further, the FTC's insistence on preemption on this issue diverges from the agency's usual tendency to avoid preemption and to claim it lacks the authority to preempt state and local laws.

6. Legally questionable

As explained by FTC Commissioner Christine Wilson in her dissent from the NPRM,[2] the FTC's legal basis for the rule is highly questionable, given the agency's lack of rulemaking authority on 'unfair methods of competition'" and lack of "clear Congressional authorization to undertake this initiative." She emphasized that second point again in announcing her resignation via an Op-ed in the Wall Street Journal: "This proposed rule defies the Supreme Court's decision in West Virginia v. EPA (2022), which held that an agency can't claim 'to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority.' "[3]

All these legal problems, and the likely resulting litigation, could be averted through good legislation approved by Congress. For example, the Freedom to Compete Act (S. 379)[4] would be a good starting

[2] https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf
[3] "Why I'm Resigning as an FTC Commissioner." Christine Wilson. The Wall Street Journal. February 14, 2023. https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d
[4] S.379 - Freedom To Compete Act of 2023, introduced by Sen. Marco Rubio (R-FL) https://www.congress.gov/bill/118th-congress/senate-bill/379

point, since it would prohibit noncompete clauses for any non-exempt employees under the Fair Labor Standards Act (FLSA), while specifically preserving trade secret protections.

Conclusion: Narrow the proposed rule, if it is to be pursued

Should the FTC insist on pursuing this regulation, instead of seeking Congressional authorization, the Insights Association urges the FTC to be as specific and measured as possible.

- Noncompete clauses should only be restricted for lower-level staff. IA recommends applying the ban only to employees earning under a certain income threshold (e.g., $100,000 or $150,000).
- Involuntary, not for cause termination should result either in (1) compensation for the length of the restricted covenant, or (2) the immediate removal of any non-competition covenants.
- Noncompete agreements should not apply to unpaid involuntary termination without cause, provided that confidentiality and client non-solicitation obligations, if any, are met.
- Reasonable non-solicitation agreements and non-disclosure agreements must be respected.
- Noncompete clauses entered into between the seller and buyer of a business (including divisions and subsidiaries) should not be restricted.
- The FTC should not preempt state and local laws and regulations regarding noncompete agreements.

Sincerely,

Howard Fienberg
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Insights Association