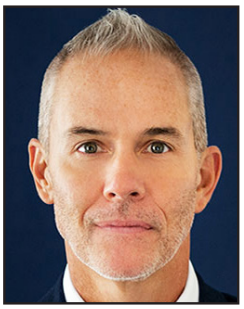
As Congress and the FTC Both Move Forward with Plans to End the Use of Noncompetes, What Can Employers Do Now to Prepare?

Joseph Borchelt, Esq.
Reminger Co., L.P.A.

Thomas Spyker, Esq.
Reminger Co., L.P.A.



Joseph Borchelt, Esq.

Thomas Spyker, Esq.

Noncompete agreements are frequently used by employers in a variety of industries and settings. They come in many shapes and sizes. Employers have used noncompete agreements to protect their business interests when prospective employees come into contact with sensitive information regarding business processes, clients, vendors, customers, and a variety of other protected information sources. Traditionally, noncompete agreements prohibit departing employees from engaging in activities such as: working for a competitor, disclosing confidential company information, or siphoning the employer's clients and customers. These agreements have become a staple of the current employment law landscape. The fairness and legality of such agreements have been left to state courts to evaluate whether the restrictions imposed by such agreements unfairly disadvantage employees, while at the same time protecting the employer's legitimate business interests. As we will evaluate in this article, employers must now reconsider the use of these noncompete agreements as they are under attack by proposals in both Congress and the FTC.

Over the past two years, the Biden Administration has taken a firm stance against the use of noncompete agreements in the workplace. The Administration's efforts to limit the use of these agreements began with a January 2021 Executive Order that proclaimed noncompete agreements "may unduly limit workers' ability to change jobs" and encouraged the Federal Trade Commission (FTC) to use its rulemaking authority to restrict the use of noncompetes. In January 2023, the FTC executed on that request, proposing a wide-ranging rule that would practically eliminate the use of noncompete agreements.

On the heels of the FTC's proposal, Congress introduced its own proposal to ban the use of these agreements in most circumstances. The Workforce Mobility Act of 2023, a bipartisan effort introduced by Senators Chris Murphy (D-CT) and Todd Young (R-IN), is a sweeping piece of legislation that is also armed with significant exposure risk to employers who continue to use noncompetes.

Although similar in many ways, the proposed FTC rule and Workforce Mobility Act are independent proposals to address the use of noncompetes. They were not designed in contemplation of the other nor intended to create a larger scheme. One might even be tempted to argue Congress and the FTC are "competing" to ban noncompetes. Regardless, employers are faced with an uncertain future and confusing landscape to navigate on this issue.

Below, we explore the newly proposed legislation, its interplay with the FTC's proposed rule, and what employers can do now to prepare for a possible ban.

Continued

The 2023 Workforce Mobility Act: What's in It?

The Workforce Mobility Act is actually a beefed-up version of a bill previously introduced in both 2019 and 2021. Neither prior version made it out of committee. However, the 2023 Act is significantly more restrictive than the earlier versions. While the 2019 and 2021 versions significantly restricted the use of noncompete agreements, the 2023 Act completely prohibits them with two narrow exceptions relating to: (1) the sale of a business's goodwill or an ownership interest in a business; and (2) the dissolution or disassociation of a partnership.

Initially, it appears that the legislation is not intended to be retroactive, as it defines noncompete agreements as "agreements entered into after the date of the enactment of [the] Act…". This contrasts with the FTC's proposed rule, which, if adopted, would explicitly invalidate existing noncompete agreements.

In addition to the restrictions, the 2023 Workforce Mobility Act also requires employers to post notices of the provisions of the Act in prominent, conspicuous places, such as notice requirements for minimum wage and other federal employment laws.

Finally, the 2023 version comes with a full set of teeth to enforce its provisions. The Act vests both the FTC and Department of Labor with enforcement authority. It also provides State attorneys general to bring enforcement actions. Most significantly, the Act provides employees with a private right of action to sue employers for violations of the Act. A successful employee can recover actual damages and attorney's fees.

How Does the Workforce Mobility Act Interplay with the FTC Proposed Rule?

Prior to the Act's introduction, on January 5, 2023, the FTC proposed a rule banning noncompetition clauses in employment agreements. Unlike the Workforce Mobility Act, the FTC's proposed rule goes a step further and instantly invalidates existing noncompetition clauses. But the FTC's ban has met significant resistance during the public comment period. On February 16, 2023, the FTC hosted a public forum on the proposed rule and received significant pushback. The main critique is the sheer scope of the rule, which raises questions as to whether such broad action is actually within the FTC's rulemaking authority.

In response to public feedback, the FTC has extended the public comment period for the rule until May 19, 2023. Observers believe the proposed rule is likely to be scaled back, if implemented at all. A legal challenge to any rule implemented by the FTC is all but guaranteed.

Although the 2023 version of the Workforce Mobility Act is not a direct response to backlash against the FTC's rule, many observers see it as the more palatable option and better suited to sustain inevitable legal challenges.

What's Next and What Can Employers Do Now?

Although the Workforce Mobility Act is bipartisan on its face, it is not projected to leave committee any time soon. While the law has some support in both political parties, it is not a legislative priority for either in the current divided Congress. Meanwhile, while the FTC's proposed rule is technically close to implantation, it faces its own hurdles before employers see it enacted and enforced. Most significantly, the FTC's ban faces an uphill legal battle. If enacted, enforcement is likely to be suspended until those legal challenges are resolved.

In short, employers have time before seeing either ban. But given the bipartisan focus on this issue, employers should not find security in the present uncertainty. The tides are trending toward some type of federal level of ban, even if it is not on the immediate horizon.

And it is difficult to predict the exact provisions of a future ban if successfully enacted. However, the current proposals give us a good indication of the political priorities of any eventual ban. Here are a few steps employers can take now:

1. Review and accelerate any plans to implement noncompete agreements. The Workforce Mobility Act, as currently written, would not invalidate agreements entered before the enactment of the law.

CONTINUED

2. Create a tracking mechanism for employees subject to noncompete agreements. If enacted, the FTC's proposed rule requires employers notify current and former employees and inform them of the rule's implementation.

3. Separate and strengthen agreements regarding the protection of confidential information and the solicitation of clients. Both enactments have exceptions allowing an employer to protect these interests. But often employers rely on the noncompete agreement to protect them in these areas.

4. Enact policies and procedures to restrict access to and protect the portability of confidential information outside any individual agreements with your employees.

5. Proactively keep up with the current efforts to ban noncompetes so you are not caught off guard if and when one of these proposals is enacted. Employers are encouraged to work with their counsel to obtain updates regarding the future implementation of this prospective legislation.

At the end of the day, noncompete agreements have long been a contentious issue. Critics argue they stifle competition and disadvantage workers, while and employers argue they are a necessary tool to protect their legitimate business interest. With the Biden administration and the FTC taking an aggressive stance against their use, employers should prepare for the possibility of significant changes in this area of employment law.

Joseph Borchelt, Esq., is a partner in Reminger's Cincinnati office where he focuses his practice in two primary areas: Employment Practices Liability defense and Professional Liability defense. He serves as the chair of Reminger's Employment Practices Group.

Thomas Spyker, Esq., is based in Reminger's Columbus office. His practice focuses on governmental/public entity liability, employment litigation, professional liability as well as a broad range of pre-suit investigative work and general litigation matters.

Visit the OACTA website for information on OACTA seminars and activities...

WWW.OACTA.org