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FTC Stakes Out Its Position on Worker Noncompetes

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Three nearly simultaneous actions of the Federal Trade Commission (FTC) confirmed its intentions with respect to employee noncompetes. In the first two related actions, the FTC indicated it will not defend its 2024 rule banning virtually all worker noncompetes and will instead focus on efforts to rein in the use of "unfair and anticompetitive" noncompetes. The FTC's third action notified the public of its intent to accomplish its goals, at least in part, through a wide-ranging request for the public to identify employers using noncompetes, followed by targeted enforcement actions.

Specifically, on September 4, 2025, the FTC voted 3-1 along party lines to approve a complaint against the largest pet crematorium in the U.S. and a settlement of that action that bans the company from using noncompete clauses in many of its employment agreements. The complaint alleges that, in 2019, the pet cremation company and its subsidiary adopted a policy requiring noncompete agreements for all newly hired employees, which typically barred the employees from working in the pet cremation industry anywhere in the U.S. for one year after their departure. According to the FTC's complaint, the only employees not subject to noncompetes are those working in California, which has a statutory prohibition on such restrictions.

The complaint emphasized the fact that the noncompetes were imposed on employees regardless of (1) their responsibilities, compensation levels, or skills, and (2) even in the absence of a nearby operational facility. The FTC also pointed out that, in one instance, employees were required to enter into noncompetes only to have the facility at which they worked closed and their employment terminated within weeks. Commissioner Slaughter, who was briefly reseated pursuant to a court order, dissented: "one-off enforcement is no substitute for the FTC's meaningful, market-wide noncompete rule that will protect workers across the country."

The settlement with the FTC bars noncompete agreements except in limited circumstances. Specifically excluded from the noncompete prohibition are those entered into by directors, officers, or senior employees, in conjunction with the grant of equity or equity interests. Further, the settlement does not prohibit noncompete agreements in conjunction with the sale of a business, provided that individuals subject to restriction have a pre-existing equity interest in the business being sold. Notably, the settlement also bars employee agreements restricting employees from soliciting customers, except those current or prospective customers with whom the employee had "direct contact or personally provided service" in the last 12 months.

FTC's second action was to issue a Request for Information Regarding Employer Noncompete Agreements in an effort to identify "which specific employers continue to impose noncompete agreements." The request is not aimed at studying the use of worker restrictions and does not seek information from employers wanting to justify their use of noncompetes; instead, it is focused solely on gathering information about employers that are currently using noncompete agreements. For example, it seeks the employer names, job functions, and salaries of those

workers covered, scope of restrictions (*e.g.*, geography, duration), enforcement practices, harm to employee mobility (*e.g.*, moving and legal costs, lost higher wages, etc.), lost opportunity to start new businesses, harm to rival employers, and loss of innovation. The request specifically calls for information about instances where noncompetes have harmed health care workers. Among the most interesting is a request for the names of employers that use nonsolicitation or nonrecruitment agreements limiting former workers from working with former customers or former employees.

The third action, filed the following day, was the FTC's unopposed motions to dismiss both its Fifth and Eleventh Circuit appeals of the two district decisions holding that the agency's rule banning worker noncompetes exceeded the FTC's authority.[1] By dismissing these appeals, the agency has acceded to the vacatur of the final Non-Compete Clause Rule. The vote to abandon the defense of the rule was 3-1 along party lines. Commissioner Slaughter dissented on the basis that the rule received overwhelming support in the form of 25,000 supportive comments out of the approximately 26,000 total comments received. She was also critical of the majority's decision to simply drop the defense of the rule instead of allowing for a public notice and comment period:

> The law does not permit the agency to void this popular rule under cover of darkness by simply withdrawing from litigations. The law requires that we hear from the American people. In absence of that legally required process, the action the commission takes today should not hamper the agency in the future.

Whether or not the FTC followed the correct process, this administration will not defend the 2024 noncompete ban. This means the Northern District of Texas decision, which universally vacated the FTC's noncompete rule, and the Middle District of Florida decision, which preliminarily enjoined the FTC's enforcement of its rule against the named plaintiff there, as well as the conflicting Eastern District of Pennsylvania decision, which refused to enjoin the FTC rule, all remain on the books without appellate court review.

Although the FTC acknowledges that noncompetes can serve "valid purposes in some circumstances," it is also concerned with the impact on workers of the often knee-jerk reliance on the clauses. These FTC actions and the agency leadership's statements make clear that the agency intends to discourage the blanket use of worker noncompetes, hopes to use the public to relatively quickly identify such employers, and intends to take action against "the worst offenders [to] restore fairness to the American labor market." The FTC could issue cease-and-desist letters or it could go so far as to launch burdensome investigations and pursue administrative or federal court lawsuits under the FTC Act. However, the FTC has been consistent in its stance that the validity of noncompetes in the context of sale of business agreements are subjected to substantially less scrutiny.

Employers considering use or the continued use of noncompetes should evaluate all potentially applicable state laws. These state laws have changed rapidly and may include minimum compensation thresholds, notice periods, garden leave requirements, maximum time limitations, and other similar requirements. In addition, to mitigate the FTC Act risks, firms should, at a minimum:

- Document the justifications for their noncompetes;
- Limit their use to employees with job responsibilities relevant to those justifications;
- Narrow the restrictions in terms of geography, timeframe, and types of later employment;
- Consider the use of less restrictive options, such as nondisclosure and nonsolicitation agreements and, where possible, use less restrictive alternatives; and
- Where less restrictive alternatives are not sufficient, document why they are not adequate.

Firms should also be aware that the Department of Justice and the FTC remain concerned with agreements among companies not to solicit or poach each other's employees. Companies using no-poach agreements should consider the same factors above.

We will continue to monitor closely the enforcement and other actions of the federal and state authorities.

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[1] *Ryan, LLC v. FTC*, No. 24-10951 (5th Cir.), and *Properties of the Villages v. FTC*, No. 24-13102 (11th Cir.).

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