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The Federal Trade Commission Targets M&A Non-Competes

Labor & Employment Workforce Watch

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As we discussed last year, on July 9, 2021, President Biden issued an "Executive Order on Promoting Competition in the American Economy" in which he encouraged the Federal Trade Commission ("FTC") to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." While the FTC is yet to exercise its rulemaking authority under the Federal Trade Commission Act to further the President's policy goals, the FTC has begun taking steps to curtail the enforcement of certain non-competition agreements related to company acquisitions.

Many courts, including those in Texas, do not scrutinize restrictive covenant agreements associated with the sale of a business as closely as those entered into in connection with an employment relationship. *Hill v. Mobile Auto Trim, Inc*., 725 S.W.2d 168, 177 (Tex. 1987) (Gonzales, J., dissenting). The general rationale for this position is that when a seller is compensated at market value for its business, there is less risk of undue hardship related to a non-compete agreement when compared to an employer who imposes such an agreement as a condition of employment.

However, this general rule did not stop the FTC from filing a complaint regarding a non-compete agreement associated with ARKO Corporation's recent $94 million acquisition of 60 retail gasoline retail and convenience stores. At the heart of the complaint and the ultimate decision of the FTC was the proposition that—even in the context of the sale of a business—the restrictions in terms of time, geography, and scope of activities restrained within a non-compete agreement should be no more restrictive than necessary to protect the business interest at issue. The issue with the ARKO transaction, according to the FTC, was that the non-competition agreement associated with the sale not only covered the 60 stores being sold, but also extended to nearly 200 additional locations, many of which were not located in or near the geographic areas covered by the transaction itself, and which the FTC found to be unrelated to the acquisition.

Because the non-compete was determined to be overbroad and the transaction was found to impose particular harm on five local Michigan markets, on June 14, 2022, the FTC announced it was requiring ARKO to further limit the scope of its restrictive covenants and also return the five anti-competitive retail fuel outlets to the seller. In doing so, the FTC narrowed the non-competes to three years in duration and to three miles from each of the 60 acquired locations. "This action," according to the FTC, "marks an important step forward in protecting the public from harm when rivals agree not to compete."

Importantly for buyers and sellers of businesses, the FTC stated that "[f]irms proposing mergers should take note that the Commission will scrutinize contract terms in merger agreements that impede fair competition." Of course,

every transaction is different, with some deals involving entire companies and others limited to specific locations, products or services lines. While these variations in context can have an effect on the reasonableness of restrictions in any given situation, when negotiating an asset purchase, buyers should take care to not only comply with ever-changing state laws governing non-compete agreements, but also make efforts to avoid scrutiny from the FTC by tailoring the restrictions to the business being acquired and avoiding the appearance of trying to use the acquisition-related non-compete to protect any unrelated portion of the pre-existing business of the buyer.

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