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By Jaclyn Phillips, Kathryn Mims, & Katya El Tayeb | White & Case

Edited by Justin Stewart-Teitelbaum & Angela Landry

Non-Competes: If You Can't Use Them There, Can You Use Them Anywhere? What New York's Potential Non-Compete Ban Adds to the Labor and Antitrust Conversation

By Jaclyn Phillips, Kathryn Mims, & Katya El Tayeb[1]

Employee non-compete agreements, by eponymous definition, are covenants that restrict trade. These common terms in employment agreements limit or restrict an employee's ability to work for a competitor once the employee leaves the company. Employers rely on non-competes for a variety of reasons, but principal justifications include protecting intellectual property ("IP"), investment in training, and other proprietary operations.

Traditionally, the legality or enforceability of employee non-competes was an issue of state common law (was the non-compete reasonable in duration, scope, and geographic reach?) and contract law (was there offer, acceptance, and consideration?).[2] When challenged, the question has generally been whether such provisions were enforceable, and employee non-competes were rarely—if ever—analyzed for their impact on competition more generally.

Still, as employee non-competes drew increasing attention, states began to pass legislation to impose specific limitations on non-competes. Today, thirty states and the District of Columbia have statutes that limit non-competes in some fashion: some are based on salary, industry, and/or duration, while others impose a near-total ban.[3]

Against that backdrop, and as part of a wider discourse about labor and competition, in January of this year, the Federal Trade Commission ("FTC") waded into largely uncharted waters by explicitly bringing non-competes into the ambit of antitrust law. As part of this initiative, the FTC announced it had brought its first-ever antitrust enforcement actions against three companies for allegedly anticompetitive use of employee non-compete provisions.[4] The next day, the FTC doubled down and announced the proposal of a new rule that would ban virtually all employee non-compete agreements as violations of Section 5 of the FTC Act.[5] The FTC's actions and accompanying analysis abruptly changed the conversation about the role and viability of non-competes in the United States.

Expressly inspired by the FTC, on June 20, 2023, the New York State Legislature passed a

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[1] Kathryn Mims is a partner and Jaclyn Phillips and Katya El Tayeb are associates in White & Case LLP's global antitrust practice. All are based in Washington, DC. Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

[2] *See, e.g.*, *Brown v. Best Home Health & Hospice, LLC*, 491 P.3d 1021, 1027 (Wyo. 2021) ("An agreement not to compete is valid and enforceable only if it is: (1) in writing; (2) part of a contract of employment; (3) based on reasonable consideration; (4) reasonable in duration and geographical limitations; and (5) not against public policy.") (quoting *Hopper v. All Animal Pet Clinic*, 861 P.2d 531, 540 (Wyo. 1993)); *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 771 (Tex. 2011) ("A noncompetition agreement is enforceable if it is reasonable in time, scope and geography and, as a threshold matter, if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made") (quoting TEX. BUS. & COM. CODE § 15.50(a)).

[3] *See, e.g.*, ARK. CODE § 4-75-101(a) (requiring that non-competes are "limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer"); CAL. BUS. & PROF. CODE § 16600 ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful, profession, trade, or business of any kind to is to that extent void."); N.H. REV. STAT. ANN. § 275:70-a(II)(a) ("No employer shall require a low-wage employee to enter into a non-compete agreement"); COLO. REV. STAT. § 8-2-113(5)(a) ("Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians that restricts the right of a physician to practice medicine . . . upon termination of the agreement, is void.").

[4] Agreement Containing Consent Order, Ardagh Group et al., FTC Docket No. C-4785 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghacco.pdf; Agreement Containing Consent Order, O-I Glass Inc., FTC Docket No. C-4786 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2110182_c4786-o-i-glass-inc-decision-and-order.pdf; Agreement Containing Consent Order, Prudential Security et al., FTC Docket No. C-4787 (Jan. 4, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecurityacco.pdf.

[5] Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

bill that if enacted would broadly ban the use of employee non-compete provisions in New York state, with very limited exceptions.[6] It also contains a rare liquidated damages clause that makes individual employees who have to bring suit to nullify their non-compete eligible for special damages.[7] While the New York bill would amend the state labor law and not New York's competition law, legislators justified the bill due to non-compete agreements' "negative effect on the labor market and economy of New York State" and "detrimental impact on consumers."[8]

The discussion about competition and labor markets is not new but has recently expanded to bring employee non-competes to the forefront. As a result, the U.S. has entered a period of upheaval and uncertainty in this area—with significant risk to the viability of non-competes as federal and state enforcers continue to up the ante.

I. Antitrust Interest in Labor Markets Brings Non-Competes Under the Competition Umbrella

Legislation banning non-compete agreements is the current antitrust topic of interest in a broader discussion about competition in labor markets that began nearly seven years ago.

In October 2016, the FTC and Department of Justice Antitrust Division ("Antitrust Division") issued "Antitrust Guidance for Human Resource Professionals," which made clear that the U.S. antitrust laws apply in full force to "firms that compete to hire or retain employees . . . regardless of whether the firms make the same products or compete to provide the same services."[9] That guidance focused on agreements among businesses competing for workers that limit or fix the terms of employment for potential hires, "if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities."[10] The guidance also stated that Antitrust Division could treat such agreements criminally.[11]

In January 2021, the Antitrust Division followed through on its warning about criminal treatment, bringing its first criminal indictment for no-poach agreements.[12] But this prosecution was unsuccessful, as were the Antitrust Division's three subsequent jury trials on wage-fixing and no-poach agreements.[13] While the Antitrust Division has failed thus far to convince juries that criminal treatment is appropriate in these types of cases, states attorneys general have seen success in their initiatives to eliminate no-poach agreements in their respective states. For instance, the Washington State Attorney General launched an initiative to eliminate all no-poach agreements at chain restaurants and stores operating in the state. After two years, over 200 companies have settled with Washington in part by agreeing to eliminate no-poach agreements nationally.[14]

The federal government's labor focus has not been limited to criminal prosecution. In 2021, Acting Assistant Attorney General for Antitrust Richard Powers noted that "[t]he Division is

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[6] Memorandum in Support of Legislation, A1278b, 2023–2024 Leg., Reg. Sess. (N.Y. 2023), https://www.assembly.state.ny.us/leg/?bn=A01278&term=&Summary=Y&Actions=Y&Memo=Y&Text=Y ("Recently, the federal government has announced an interest in banning such agreements nationwide via an FTC regulation. This bill would codify such a ban in state law.").

[7] A1278b, 2023–2024 Leg., Reg. Sess., § 191-d(4)(B) (N.Y. 2023).

[8] Memorandum in Support of Legislation, *supra* note 6.

[9] FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 2 (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

[10] *Id*. at 1.

[11] *Id*. at 4.

[12] Press Release, Off. of Pub. Aff's, U.S. Dep't of Just., *Health Care Company Indicted for Labor Market Collusion* (Jan. 7, 2021), https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion.

[13] *See United States v. Neeraj Jindal and John Rodgers*, No. 4:20-cr-00358 (E.D. Tex. Apr. 14, 2022); *United States v. Manahe et al.*, No. 2:22-cr-00013 (D. Me Mar. 22, 2023); *United States v. Patel et al.*, No. 3:21-cr-00220 (D. Conn Apr. 28, 2023).

[14] Press Release, Off. of the Att'y Gen. of Wash. State, *Lasting Impact: Study Finds AG Ferguson's No-Poach Initiative Boosted Income for Low-Wage Workers Nationwide* (July 26, 2022), https://www.atg.wa.gov/news/news-releases/lasting-impact-study-finds-ag-ferguson-s-no-poach-initiative-boosted-income-low#:~:text=Ferguson's%20No%2DPoach%20Initiative%20was,Anytime%20Fitness%20and%20Jiffy%20Lube.

committed to using its civil authority to detect, investigate, and challenge anticompetitive non-compete agreements."[15] And President Biden's July 2021 Executive Order on Promoting Competition in the American Economy stated, "To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the [FTC] Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[16]

In January 2023, the FTC undertook the directive from the executive order by announcing a Notice of Proposed Rulemaking that would ban all non-compete clauses in employer-employee contracts, subject to limited exceptions, including for non-competes entered as part of the sale of a business for a person holding 25% or more of the company.[17] The FTC justified the proposed rule, and the enforcement actions announced in parallel, by deeming non-compete agreements a violation of Section 5 of the FTC Act, which prohibits "unfair methods of competition."[18]

Clarity on the extent of the FTC's non-compete rule is unlikely to come in the near term. The final scope of the rule is still unknown, and agreement with such a wide-reaching ban is far from unanimous. Many commentators believe that the FTC lacks authority to promulgate this rule altogether, regardless of how otherwise reasonable it may seem.[19] But even on the substance of the rule itself there is no consensus. When the public comment period closed on April 19, 2023, 21,125 comments had been submitted, including leading themes such as (1) the adverse impact on the protection of IP such as trade secrets and the absence of any IP-related exception to the proposed non-compete ban, (2) the proposed rule's tendency to disincentivize investments in worker training, and (3) concerns that non-profit healthcare providers would be unfairly advantaged by the proposed rule because they are exempt from it. Although it would be impossible to do a full-scale review of the opposition here, it is clear that when evaluating non-competes as an aspect of "competition," there are, as always, two sides to the coin.

II. New York Enters the Non-Compete Fray

More than half of the states have codified limitations on non-competes. These statutes vary from large-scale bans (California[20] and North Dakota[21]), to bans on non-competes for workers paid below a certain salary (D.C.[22] and Colorado[23]), to bans based on duration (Utah[24]).

In June 2023, not to be outdone by other states or the FTC, the New York State Legislature

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[15] Richard A. Powers, Acting Assistant Att'y Gen., Remarks as Prepared for Fordham's 48th Annual Conference on International Antitrust Law and Policy (Oct. 1, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-antitrust-division-delivers-remarks.

[16] Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[17] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3483 (to be codified at 19 C.F.R. pt. 910) (Jan. 5, 2023).

[18] Press Release, Fed. Trade Comm'n, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

[19] *See, e.g.*, United States Council of International Business, Comment Letter on Non-Compete Clause Rule 2–3 (Apr. 19, 2023), https://downloads.regulations.gov/FTC-2023-0007-20978/attachment_1.pdf.

[20] CAL. BUS. & PROF. CODE § 16600 ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful, profession, trade, or business of any kind to is to that extent void").

[21] N.D. CENT. CODE § 9-08-06 ("A contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void.").

[22] D.C. CODE § 32-581.01(6) (exempting highly compensated employees from the definition of a "covered employee").

[23] COLO. REV. STAT. § 8-2-113(2)(a)–(b) (stating that the statute "does not apply to a covenant not to compete governing a person who, at the time the covenant not to compete is entered into and at the time it is enforced, earns an amount of annualized cash compensation equivalent to or greater than the threshold amount for highly compensated workers, if the covenant not to compete is for the protection of trade secrets and is no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets.").

[24] UTAH CODE § 34-51-201(1) ("[A]n employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer.").

passed a bill that, if enacted, would prohibit employers from seeking, requiring, demanding, or accepting non-compete agreements from virtually any New Yorker.[25] The bill would also void any other contracts "by which anyone is restrained in engaging in a lawful profession, trade, or business of any kind."[26] While the bill explicitly leaves certain agreements beyond its reach, provided they do not otherwise restrict competition, it would be the most restrictive non-compete legislation in the nation.[27]

A key provision of the New York bill is its private right of action, which enables workers to sue their employers within two years of signing or learning of their non-compete, the termination of their employment or contractual relationship, or the date their employer acts to enforce the agreement, whichever is latest.[28] Courts hearing these claims are authorized not only to void these provisions, but also to award up to $10,000 in liquidated damages in addition to lost compensation, damages, and reasonable attorneys' fees and costs.[29] The FTC's proposed rule does not provide for a similar private right of action. Colorado, the District of Columbia, and Washington are the only other jurisdictions where plaintiffs can receive actual damages or a statutory penalty and attorneys' fees.[30]

The New York bill differs from the FTC's proposed rule in a few key additional respects. First, the FTC's proposal provides an exception allowing for non-competes in certain "sale-of-business" agreements, recognizing that they are necessary to "protect the value of a business acquired by a buyer."[31] Even California's well-known broad ban on non-competes also exempts sales of businesses from its law.[32] New York's proposal seemingly does not contain a similar exception. Second, the FTC's proposed rule is retroactive and would require employers to rescind existing non-competes, while the New York bill appears to apply only to contracts entered into or modified on or after its effective date.[33]

[25] A1278b, 2023-2024 Leg., Reg. Sess., § 191-d(2) (N.Y. 2023).

[26] *Id.* at § 191-d(3).

[27] *Id.* at § 191-d(5). The law would exclude (1) agreements establishing a "fixed term of service;" (2) non-disclosures governing trade secrets or confidential and proprietary client information; and (3) non-solicitation provisions related to clients a worker learned about during employment.

[28] *Id.* at § 191-d(4)(A).

[29] *Id.* at § 191-d(4)(B).

[30] COLO. REV. STAT. § 8-2-113(8)(b) (An employer that enters into, presents to a worker, or attempts to enforce a prohibited non-compete is liable for actual damages and a penalty of five thousand dollars per worker or prospective worker harmed by the conduct."); D.C. CODE § 32-581.04(d)(1)(A) (providing that an employer that requires or requests that an employee sign a prohibited non-compete is liable to that employee for monetary relief between $500 and $1,000); REV. CODE WASH. 49.62.080(1)–(2) (providing that "[a] person aggrieved by a noncompetition covenant to which the person is a party may bring a cause of action" to pursue "the greater of his or her actual damages or a statutory penalty of five thousand dollars, plus reasonable attorneys' fees, expenses, and costs incurred in the proceeding.").

[31] Non-Compete Clause Rule, *supra* note 17, at 3509.

[32] *See* CAL. BUS. & PROF. CODE § 16601.

[33] *Compare* A1278b, *supra* note 25, § 3 ("This act shall take effect on the thirtieth day after it shall have become a law and shall be applicable to contracts entered into or modified on or after such effective date") *with* Non-Compete Clause Rule, *supra* note 17, at 3513 ("Proposed § 910.2(b)(1) would state that, to comply with proposed § 910.2(a) . . . an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date.").

If signed into law as is by Governor Hochul (which is not a certainty),[34] the bill would make New York the most hostile state to non-competes and just the fifth state with a near-total ban on non-competes, joining California, North Dakota, Oklahoma, and Minnesota. Moreover, violators may be subject to the steepest financial penalties of any non-compete restrictions across the country.[35] In proposing such broad legislation, New York's legislators stated their intention to implement in New York what the FTC proposed rule means to do federally. Even without the FTC rule, a New York law could very well have national effect as interstate employers will have to consider the legal feasibility of having non-competes outside of New York.

III. The Changing Conversation on Non-Competes

The FTC's Notice of Proposed Rulemaking contains lengthy justifications for the proposed rule; the provided justification for the New York bill, while much more truncated, is grounded in similar principles—how non-competes impact not just individual workers, but competition more generally.[36] But regardless of the competition-law justification, the broadening of the labor and antitrust discourse to non-competes is novel. The impact of a large-scale ban, whether put in place by the FTC or a large state like New York, is unknown. And the consequence could be large—potentially incentivizing national and international employers to implement consistent agreements throughout the United States or the world.

[34] In 2022, Governor Hochul announced a seven-pronged plan aimed at strengthening New York's workforce. As part of that plan, the Governor stated that she supported legislation to "eliminate non-compete agreements for workers *making below the median wage* in New York State." Press Release, New York State, Governor Hochul Announces Comprehensive Plan to Strengthen New York's Workforce and Help Grow the Economy (Jan. 5, 2022) (emphasis added), https://www.governor.ny.gov/news/governor-hochul-announces-comprehensive-plan-strengthen-new-yorks-workforce-and-help-grow. Commentators speculate that the Governor may call for an amendment adding a wage threshold based on her public statements supporting a non-compete ban for workers earning below the state minimum wage. *See* Erik W. Weibust et al., *An Update on the New York Noncompete Ban: It Is Unlikely the Governor Will Sign It Anytime Soon*, NAT'L L. REV. (July 6, 2023), *https://www.natlawreview.com/article/update-new-york-noncompete-ban-it-unlikely-governor-will-sign-it-anytime-soon*.

[35] *See, e.g.*, COLO. REV. STAT. § 8-2-113(8)(b) (violating employer is "liable for actual damages and a penalty of five thousand dollars per worker or prospective worker harmed by the conduct"); 820 ILL. COMP. STAT. 90/30(d)(1) ("the Attorney General may request and the court may impose a civil penalty not to exceed $5,000 for each violation or $10,000 for each repeat violation within a 5-year period"); 26 ME. REV. STAT. § 599-A(6) (violating employer subject to "a fine of not less than $5,000"); NEV. REV. STAT. § 613.200(1) (violating employer "is guilty of a gross misdemeanor and shall be punished by a fine of not more than $5,000."); D.C. CODE § 32-581.04(d)(1)(A) (violating employer "shall be liable for each violation to each employee subjected to the violation for monetary relief in an amount not less than $500 and not greater than $1,000.").

[36] *Compare* Memorandum in Support of Legislation, *supra* note 6 (noting employee non-competes' "negative effect on the labor market and economy of New York State" and "detrimental impact on consumers"), *with* Non-Compete Clause Rule, *supra* note 17, at 3482 (noting that studies on the impact of noncompete clauses shows their use has negatively affected "competition in labor markets, resulting in reduced wages for workers across the labor force" as well as "competition in product and service markets").