

FTC Noncompete Ban Signals Rising Labor Focus In Antitrust

By **Tara Reinhart, Annie Villanueva Jeffers and Justine Haimi** (April 24, 2024)

Labor markets have been a focus of antitrust regulators at the U.S. Department of Justice and the Federal Trade Commission since the Obama administration. Indications are that enforcers will be even more aggressive across the board, raising labor concerns in order to prevent mergers and change employers' behavior.

Under the Biden administration, the two agencies have pursued enforcement actions focused on protecting employees from alleged unfair methods of competition, both in the context of merger investigations and in criminal investigations.

Most notably, this week the FTC voted 3-2 to approve a rule prohibiting all future noncompete agreements, except those involving the sale of a business. This sweeping rule will affect the employment practices of many businesses seeking to protect their proprietary information without the benefit of noncompete agreements.

Noncompete Rulemaking and Enforcement

The FTC voted to approve a final rule banning noncompete agreements for all workers on April 23, with the two Republican commissioners dissenting. First proposed in January 2023, the rule as adopted introduces the following:

- The rule bans employers from entering into noncompete clauses with their employees and independent contractors, subject to limited exceptions, including the sale of a business.
- It requires employers to inform their employees in writing that existing noncompete clauses are void, with the exception of noncompete agreements involving senior executives. Under the rule, agreements with senior executives may be enforced until they terminate. The final rule defines "senior executive" as an employee earning more than \$151,164 who is in a "policy-making position," the definition of which is not entirely clear in practice and could lead to disputes.
- The rule prevents employers from representing that employees are subject to noncompete clauses.

The rule does not necessarily prevent employers from entering into other forms of restrictive covenants with employees — such as certain nondisclosure and nonsolicitation restrictions — as long as they are not written so broadly as to constitute de facto noncompete clauses that prohibit, penalize or function to prevent a worker from switching jobs or starting a new business.

Finally, the rule allows exemptions for noncompetes entered into in connection with a person selling a business, with no specific ownership threshold; causes of action that began



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prior to the rule's effective date; and attempts to enforce noncompete clauses where a person has a good faith basis to believe that the rule is inapplicable.

As implemented, the final rule will have far-reaching consequences on companies' efforts to protect trade secrets and other competitively sensitive information when employees leave a firm. The new rule almost certainly will face legal challenges, however.

The two dissenting commissioners, Andrew Ferguson and Melissa Holyoak, detailed numerous ways in which they believe the rule is outside the FTC's authority.

Both emphasized that Section 6(g) of the FTC Act does not grant the commission rulemaking authority, and, even if it did, Section 5 of the FTC Act does not permit the rule on its merits. Ferguson described several other legal grounds for challenging the rule and summed up his view why the FTC lacks authority, saying "we are not a legislature" and the FTC does not have the power to nullify 30 million contracts and preempt the laws of 46 states.

Importantly, the U.S. Chamber of Commerce on Wednesday filed suit against the FTC in the U.S. District Court for the Eastern District of Texas to block the final rule, which may delay the rule's implementation pending litigation. A tax services firm, Ryan LLC, filed another lawsuit in the U.S. District Court for the Northern District of Texas to similarly block the final rule.[1]

Labor and Merger Investigations

In December 2023, the DOJ and the FTC memorialized their focus on labor impacts as a theory of harm in merger enforcement. The agencies' recently revised merger guidelines for the first time identified possible effects on labor as a reason to challenge potential transactions.[2]

Going forward, the agencies will assess whether a merger will create dominance in buy-side labor markets by evaluating the merging companies' ability to cut or freeze wages, slow wage growth, exercise increased leverage in negotiations, or generally degrade benefits and working conditions without causing workers to quit.[3]

Consistent with the new guidelines, the DOJ and the FTC recently proposed major changes to the premerger filings required under the Hart-Scott-Rodino Act, which are expected to be finalized this year. To assist with screening for labor issues, a new labor markets section of the HSR form would be added, requiring merging parties to submit information about the largest categories of workers employed by each party and the geographic areas where these employees work, and to identify labor violations in the past five years.[4]

The final revisions to the HSR form are expected within weeks based on timing estimates provided by agency representatives at the American Bar Association's Antitrust Spring Meeting held earlier this month, where representatives from both the DOJ and the FTC reiterated labor as a high priority, and labor-related additions to the HSR form as necessary, to screen for labor issues during the initial HSR waiting period.

A high-profile example of the DOJ's focus on labor issues in challenging a merger was its successful blocking of Penguin Random House LLC's proposed acquisition of Simon & Schuster in October 2022.[5] The DOJ alleged negative effects on author compensation and stated that the decision "reaffirms that the antitrust laws protect competition for the acquisition of goods and services from workers."

State attorneys general have also been following suit in challenging mergers using labor-based theories of harm. For example, on Feb. 14, Colorado's attorney general sued to block the supermarket merger between Kroger Co. and Albertsons Companies Inc., citing "a history of collusion between Kroger and [Albertsons] in the form of unlawful no-poach and non-solicitation agreements" as "highly probative of likely harm from a merger." [6]

A similar complaint filed by Washington state on Jan. 15 notes the specialized, and unionized, workers employed by the parties and alleges that the merger would give the combined company an incentive to close unionized stores, but ultimately did not base any of its claims on labor market impacts. [7]

The issue came to a head on Feb. 26, when the FTC, eight states and the District of Columbia filed a complaint seeking a preliminary injunction to prevent the Kroger-Albertsons merger from closing. [8] The plaintiffs allege that the merger would harm competition for labor, and specifically union labor, as Kroger and Albertsons are the two largest employers of union grocery labor in the U.S.

The plaintiffs assert that, in local markets defined in a grocery labor union collective bargaining agreement, the merger would reduce the ability of unions to play Kroger and Albertsons against one another during CBA negotiations, including through credible strike threats. The plaintiffs cite real-world examples of unions securing more favorable salaries and benefits for workers by generating competition between the two grocery chains.

A parallel administrative proceeding filed by the FTC is set to go to trial in July this year.

Criminal Prosecution of No-Poach and Wage-Fixing Agreements

The DOJ continues to pursue labor-related criminal actions, with mixed success. In November 2023, the DOJ voluntarily dismissed with prejudice [9] a no-poach case ready for trial in the U.S. District Court for the Northern District of Texas, *U.S. v. Surgical Care Affiliates LLC*, after losing four prior no-poach cases — some that also included wage-fixing allegations — in the prior three years. [10]

However, in October 2022, the agency did secure a corporate plea agreement in a no-poach case in the U.S. District Court for the District of Nevada, *U.S. v. Hee*, that also involved wage-fixing allegations. [11] It has another wage-fixing case in the District of Nevada, *U.S. v. Lopez*, pending against an individual. [12]

Despite the DOJ's imperfect track record, Assistant Attorney General Jonathan Kanter, head of the Antitrust Division, stated in a Brookings Institution panel discussion in October 2023 that "protecting workers from criminal behavior that harms their ability to get better wages, to realize upward mobility in their lives by getting access to better jobs, better training, and opportunities to provide for their families is fundamental and foundational to the work we do as antitrust enforcers." [13]

Takeaways

In light of the continued and increasing focus on labor at the federal and state levels, companies must keep labor issues top of mind both in the ordinary course of business and when pursuing transactions, and prepare to comply with the FTC's final noncompete rule.

As preparation, companies can consider the following:

- Collect and review existing agreements with employees — who are not senior executives — that contain noncompetes and other restrictive covenants, and be prepared to make individualized communications required by the final rule.
- Prepare to comply with the FTC's noncompete rule as of its effective date, Aug. 21, 2024, unless the rule is challenged and the effective date vacated.
- Ensure that alternative safeguards are in place to protect trade secrets and other competitive information, especially in the event that a firm's noncompete or other restrictive covenants are deemed unenforceable. For example, consider protecting such information through carefully tailored nondisclosure agreements, and exploring means other than specific performance for enforcing such agreements. Potential options could include liquidated damages provisions that comply with applicable law and/or provisions designed to incentivize workers not to breach such agreements — e.g., paying severance only if a nondisclosure covenant is not violated or providing retention bonuses for employees who have knowledge of sensitive information.
- When considering transactions, analyze the effects of potential deals on workers, particularly where the merging parties' workforces are highly specialized and limited geographically.
- Continue to include training on and monitor no-poach and wage-fixing conduct in compliance programs. Enforcers are learning from past no-poach and wage-fixing cases, and prior jury losses will inform the DOJ's approach to criminal prosecutions in the future.

The FTC's final noncompete rule includes terms that leave room for interpretation, which, in turn, will likely lead to lawsuits should the final rule become enforceable. However, the fate of the FTC's final rule remains unclear, especially given the recent complaints filed against the FTC to block the transaction and pause its implementation while litigation is pending. What is clear is that state and federal agencies and courts have demonstrated an increased focus on competitive activity that companies should be mindful of going forward.

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[1] <https://www.nytimes.com/2024/04/24/business/lawsuit-ftc-noncompete-ban.html>; <https://www.ryan.com/about-ryan/press-room/2024/ryan-challenges-new-non-compete-rule/>.

[2] <https://www.skadden.com/insights/publications/2023/12/doj-and-ftc-release-final-2023-merger-guidelines>.

[3] <https://www.skadden.com/-/media/files/publications/2024/03/insights-special-edition/the-agencies-will-assess.pdf?rev=d8425fd9e49747e88691bb81a54bde3a&hash=E245C19D815F835B804F0F1E382E44E6>;
<https://www.skadden.com/insights/publications/2024/03/insights-special-edition/managing-deal-risks-in-a-challenging-regulatory-environment>.

[4] <https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements>.

[5] <https://www.justice.gov/opa/pr/justice-department-obtains-permanent-injunction-blockin>.

[6] <https://coag.gov/app/uploads/2024/02/2024-02-14-Complaint-Public.pdf>.

[7] https://agportal-s3bucket.s3.us-west-2.amazonaws.com/uploadedfiles/Another/News/Press_Releases/0093_Complaint_AmendRe-dactions_WA_021224%20%28002%29.pdf?VersionId=m0mkgZNBoms.m8h.qwHNHJVdEmXIVFR8.

[8] <https://www.skadden.com/insights/publications/2024/03/challenge-to-supermarket-merger>.

[9] <https://www.skadden.com/-/media/files/publications/2024/03/insights-special-edition/the-doj-voluntarily-dismissed-with-prejudice.pdf?rev=74d8f99470b9435cafb4a37014c29fa9&hash=7F2434397530797DD85AC935BD5B6C9>.

[10] See *United States v. Jindal*, Case No. 23-cr-358 (E.D. Tex. 2020) (jury acquitted defendants on no-poach and wage-fixing charges but found one defendant guilty of obstructing the FTC's investigation of the allegations); *United States v. DaVita Inc.*, Case No. 21-cr-00229 (D. Colo. 2021) (jury acquitted defendants on all charges); *United States v. Patel*, Case No. 21-c4-00220 (D. Conn. 2021) (court ordered acquittal of all defendants prior to jury deliberations); *United States v. Manahe*, Case No. 22-cr-00013 (D. Me. 2022) (jury acquitted defendants on all charges).

[11] See *United States v. Hee*, Case No. 21-cr-00098 (D. Nev. 2021).

[12] See *United States v. Lopez*, Case No. 23-cr-00055 (D. Nev. 2023).

[13] https://www.brookings.edu/wp-content/uploads/2023/08/gs_20231005_antitrust_transcript.pdf.