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BLOG

FTC Focuses on No-Poach and Non-Compete Provisions in Corporate Acquisitions and Employment Contracts

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At a public workshop in January, the Federal Trade Commission (FTC) evaluated whether it should issue new rules against non-compete agreements in the employment context. That event followed closely on the FTC's recent efforts to unwind an acquisition in part based on broad non-compete and non-solicitation provisions between the buyer and seller in the acquisition agreement.

Workshop on Non-Compete Agreements Between Employers and Employees

At the workshop, the FTC Commissioners and Director in attendance generally spoke out against non-competes, stating, for example, that they "strike fear into workers" and are known to "limit employee mobility and competition." They were unsure, however, about how best to exercise the FTC's authority to restrict their use. After urging presenters (a mix of legal scholars and economists) to address that concern, there was no consensus view—with some arguing that rulemaking was premature given the lack of unanimity as to the real-life economic effects; others urging the FTC to forgo the rulemaking process and to issue guidelines instead; others urging the FTC to "act aggressively" with a rule that non-competes are presumptively unenforceable, and still others asking for a targeted approach to specifically protect median and low-wage workers that are increasingly subject to non-competes sometimes "hidden" in a stack of employment contracts.

Parties may submit public comments concerning the FTC's potential promulgation of non-compete rules here through March 11, 2020.

The FTC's workshop was the second in a two-part series following a workshop hosted by the Department of Justice (DOJ) last September on competition in labor markets.

Focus on Non-Solicitation Agreements Between Employers in Merger Context

The FTC's recent administrative complaint seeking to unwind Axon Enterprise Inc.'s (Axon) consummated acquisition of its competitor VieVu, LLC (VieVu) demonstrates the continued focus of the antitrust agencies on restraints on labor. The FTC's complaint follows the joint DOJ/FTC Antitrust Guidance for Human Resources Professionals in which the agencies explained that naked no-poach and non-solicitation agreements between competitor employers are *per se* illegal, meaning "that if the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects."

On January 3, 2020, the FTC filed a complaint challenging the May 2018 transaction, which was not reportable under the Hart-Scott-Rodino Act. The FTC's complaint alleges that the acquisition reduced competition in the already concentrated market for the sale of body-worn cameras and digital evidence management systems to large, metropolitan police departments and led to increased prices and reduced innovation. As evidence that the acquisition "[s]ubstantially [l]essens [c]ompetition," the FTC claims that Axon and VieVu's prior owner, Safariland LLC, agreed, among other things, "not to hire or solicit any of [the other's] employees, or encourage any employees to leave [the other], or hire certain former employees of [the other], except pursuant to a general solicitation," for a period of at least 10 years. The FTC asserts that these non-solicitation provisions "eliminate a form of competition to attract skilled labor and deny employees and former employees . . . access to better job opportunities. They restrict workers' mobility, and deprive them of competitively significant information that they could use to negotiate better terms of employment." Finally, the FTC claims that the non-solicitation provisions—in addition to the other non-compete provisions—"are not reasonably limited in scope to protect a legitimate business interest . . . [or] if a legitimate interest existed, the lengths of the Non-Competes are longer than reasonably necessary."

In answering the FTC complaint, Axon stated that "it and Safariland informed Commission staff prior to this litigation that they were willing to amend the [acquisition agreement] to eliminate the [non-compete and non-solicitation] provisions . . . and in fact amended the agreements to eliminate those provisions on January 16, 2020." The FTC has not responded to the amendment, but the FTC not only seeks an order "to void all existing agreements between them that are found to be anticompetitive," but also that Axon and Safariland "obtain the prior approval from the Commission before entering into, enforcing, or soliciting any other agreement or understanding that restricts competition" between them.

Takeaway

While the FTC's focus in the Axon matter appears to be predominantly on harm to competition in the relevant product market, companies evaluating mergers or acquisitions should continue to also carefully consider the duration and scope of any proposed non-compete or non-solicitation provisions in transaction agreements.

Likewise, employers can follow a few risk-reducing guidelines with respect to non-competes:

1. Look at relevant state laws (statutes and common law). In some states, such as California, non-compete clauses are almost entirely unenforceable, while in other states, such as Arizona, they are generally permitted.
2. Consider the risks versus the benefits. A non-compete clause may be unadvisable if, for example, the employee does not have specialized skills or access to competitively sensitive information, or earns low wages.
3. If non-competes are being used:

- Document the important business justifications for the non-compete or non-solicit in internal memoranda.
- Limit the scope to ensure the agreement is reasonable and directly tied to important business justifications. For example:
  - Limit the period to a reasonable length under the circumstances.
  - Limit the type of work to which the restrictions apply.
  - Limit the geographic region to which the restrictions apply, *e.g.*, a limited number of miles from the business's location or customer base.

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