



FTC Moves Against Non-Competes Ahead of Proposed Ban

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Much ink has been spilled since the Federal Trade Commission (FTC) announced its intent to adopt a nationwide rule banning non-compete agreements. However, the adoption of such a rule, if it does happen, is likely a ways off. And if the rule is adopted, it will immediately be challenged in court by opponents who see non-compete agreements as an important tool to help protect their legitimate business interests. For example, the US Chamber of Commerce has stated that it will pursue a number of options to stop the rule from taking effect, including both lobbying Congress and litigation.

However, it appears that the FTC does not feel the need to wait for the rulemaking process to play itself out before it moves forward with its efforts to limit the use of non-compete agreements, which the agency views as being anti-competitive. And because these agreements are anti-competitive, the FTC sees its efforts to oppose their use as fitting squarely within its Congressional mandate.

So far this year, the FTC has brought four separate actions seeking to bar companies from continuing to use non-compete agreements. This article will focus on the latest of these cases, the action the agency pursued against Anchor Glass Container Corp and its owners.

FTC Complaint

According to the FTC complaint, Anchor manufactures and sells glass containers used for food and beverage packaging. The FTC alleged that the company imposed non-compete agreements on over 300 of its employees at all levels of the company. These non-compete agreements prohibited the employees from working for companies operating in the same type of business anywhere in the US for one year.

The FTC also asserted in its complaint that Anchor's use of non-compete agreements was unfair and had the potential to harm competition, consumers, and workers by impeding the entry and expansion of rival glass container manufacturers; reducing employee mobility; and causing lower pay, reduced benefits, less favorable working conditions, and personal hardship to employees subject to the agreements. As a result, the FTC alleged that Anchor's use of these non-compete agreements was in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45).

In bringing this action against Anchor, the FTC relied on its authority under Section 5 of the FTC Act which it maintains gives the agency the broad authority to take action against companies engaged in unfair competition. Similar to the reasoning it gave for its proposed rule banning non-competes outright, the FTC asserts that non-compete agreements harm both workers and competing businesses by leading to lower wages and salaries, reduced benefits, and less favorable working conditions for workers; and blocking companies from entering the market or expanding their existing businesses.

Anchor and the FTC were able to agree to a consent agreement to resolve the charges brought against the company. The proposed order bans Anchor from entering into, maintaining, enforcing, or attempting to enforce, or threatening to enforce non-competition agreements on relevant workers. The proposed order would also prohibit Anchor from telling employees that they are subject to a non-compete and for the next 10 years, and the company would be required to provide a clear and conspicuous notice to any new employees that "they may freely seek or accept a job with any company or person, run their own competing business, or compete with Anchor at any time following their employment."

Source of FTC Authority

This is not the first such action the FTC has pursued. In fact, the Anchor litigation came two months after the agency sued three other companies and two individuals seeking to force them to abandon their use of non-compete agreements. This ongoing

campaign against the use of non-compete agreements can be traced back to at least November 2022 when the agency issued a policy statement regarding the use of Section 5 of the FTC Act to challenge anti-competitive activity, including the use of non-compete agreements.

In its Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act issued on Nov. 10, 2022, the agency states that it is committed to faithfully discharging what it sees as its statutory duty to fight against activity that it determines constitutes “unfair methods of competition.” And the agency has determined that non-compete agreements fit squarely in this category of anti-competitive activity.

15 U.S.C.A. § 4 gives the FTC the power to prevent, with specified limitations, persons and entities from “using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices affecting commerce.” This authority has traditionally been used by the FTC to stop companies from engaging in such unfair acts—such as violations of the Sherman Act or the Clayton Act. However, beginning in November 2022, the agency took a more expansive interpretation of its powers under the Act, including focusing its attention to the widespread use of non-competes across a variety of industries.

FTC Targets

It is unclear how aggressive the FTC will be in bringing additional enforcement actions similar to the one brought against Anchor. However, looking at the facts in *Anchor* and the other similar actions the agency has brought to date, there are some commonalities that may provide insight into the types of situations that are most likely to draw increased agency scrutiny.

First, in *Anchor*, the FTC pointed out that the non-competes at issue applied to hundreds of workers across a variety of positions. Similarly, in one of the other actions the agency has brought this year, the FTC explained that the non-compete agreements, in that case, were being used to prevent security guards, who were earning close to minimum wage, from taking similar positions with other

companies under the threat of a six-figure liquidated damages provision.

So, this may be the first clue, forcing low-level, low paid workers with little or no exposure to trade secrets or other confidential information to enter into non-compete agreements may put your company in the agency's sites. The lesson here is that companies should be careful not to indiscriminately use non-compete agreements with all of their employees with little or no regard for the job being performed—head of R&D, yes; custodian, no.

In *Anchor*, the agency also was concerned with the fact that the glass food and beverage container industry in the US was highly concentrated with a number of substantial barriers to entry for new competitors attempting to enter the market including finding and hiring skilled and experienced workers. This may provide the second clue. These industries that need highly skilled workers may face additional scrutiny since non-compete agreements may be seen as a barrier to entry by new competing businesses. Industries such as health care, information technology, and industrial manufacturing immediately come to mind.

It should also be noted that the agency did not appear to be particularly concerned with whether or not the company actually tried to enforce its non-compete agreements. In fact, in her dissent, outgoing Commissioner Christine Wilson cited the fact that there was no evidence that *Anchor* had any history of enforcing its non-compete agreements as one of the reasons for her dissent.

Companies who are only implementing non-competes to scare employees from going to work for competitors, but do not plan to enforce them are not off the hook. It appears that the FTC has taken the position that just having such agreements in place has a chilling effect and represents the type of anti-competitive behavior it is duty-bound to prevent.

Next Steps for Companies

Based on these recent cases, it appears that the FTC may not be willing to wait on its proposed nationwide ban on non-competes to take effect. Instead, it looks like the agency intends to aggressively

stop the use of non-compete agreements by any legal means necessary, including pursuing actions against companies using non-compete agreements that the agency deems as being anti-competitive. This comes on top of a multitude of states adopting laws to bar or severely restrict the use of non-compete agreements.

More recently, the National Labor Relations Board (“NLRB”) has opened up another front on the federal government’s attack on non-compete agreements. Specifically, on May 30, 2023, the NLRB’s General Counsel issued an opinion concluding that non-compete agreements “interfere with employee’s exercise of rights under Section 7 of the National Labor Relations Act.” The memorandum instructed the various NLRB regions across the country to be on the lookout for cases involving non-compete provisions that may run afoul of the NLRA.

At bottom, it appears the tide has turned against non-compete agreements at both the state and now the federal levels. Companies concerned with protecting their trade secrets and other legitimate business interests should face the reality of this changing landscape and reevaluate their reliance on non-compete agreements to protect their interests. Alternatives like non-solicit and non-disclosure agreements may be viable alternatives to both protect the company’s legitimate business interest while avoiding the scrutiny of the FTC.

For more information please contact any attorney in Frost Brown Todd’s [Labor & Employment](#) practice group.

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