

Legal News Reach S3E2: Everyone Should Be Paying Attention to the FTC's Proposed Non-compete Ban [PODCAST]

Article By:

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[National Law Review](#) Web Content Specialist [Shelby Garrett](#) speaks with [Katz Banks Kumin](#) Associate [Rachel Green](#) about the one topic on every employer's mind: the FTC's proposed ban on non-compete agreements.

This radical---and controversial---proposal could lead to a complete overhaul of employment relationships, expanding protections for all types of workers, including independent contractors, volunteers, apprentices, and others previously left vulnerable. But at what cost to employers? Rachel breaks down the stakes of the potential ban, the status of state level noncompete laws, and developments to watch out for in the rulemaking process.

We've included a transcript of the conversation below, transcribed by artificial intelligence. The transcript has been lightly edited for clarity and readability.

This episode was recorded before the FTC's non-compete banned comment period closed on April 26. For the latest updates on the status of the proposed non-compete ban and other employment law news, click [here](#).

Shelby Garrett

Thank you for tuning into the Legal News Reach podcast. My name is Shelby Garrett, Web Publication Specialist with the National Law Review, and in this episode I will be speaking with Rachel Green, an employment and whistleblower attorney at Katz Banks Kumin. Rachel, can you tell us a little bit about your background in legal and what led you to pursue a career in law?

Rachel Green

Sure, and thanks so much for having me. I'm very excited to be here. I actually decided to be an attorney back in college, I was an activist and I was involved with survivors of sexual violence. And I started to get frustrated with the limitations in activism and recognize that being an attorney would offer me an opportunity to help them in a different way. After law school, I worked in San Francisco

doing class action tort litigation. Then I clerked for Judge David Hamilton on the Seventh Circuit. And now I'm an associate at Katz Banks Kumin in Washington, DC. And here I represent primarily survivors of sexual violence and of workplace sexual harassment, as well as folks who have experienced discrimination, harassment, retaliation in the workplace, whistleblowers, and we also represent people when we're negotiating severance agreements, non-competes, and other similar employment agreements.

Shelby Garrett

Awesome. Today, we're going to be talking about the FTC proposal to ban non-competes. So when we're looking at this proposal, could you give us an idea of the restrictions that currently exist at this moment on a federal level?

Rachel Green

Sure. And maybe if I can provide a little bit of background on what a non-compete is?

Shelby Garrett

Yeah, that'd be great.

Rachel Green

So a non-compete is a widespread, often exploitative practice through which an employer limits an employee's ability to compete with their former employer, during or after employment. And studies have shown that non-competes suppress wages, hamper innovation, block entrepreneurs from starting new businesses, and most recognizably, they restrict workers from moving to a new job. And this can be devastating. Workers that are bound by non-competes might not be able to move to a better paying job. But they also might not be able to get a new job to escape from an abusive boss or from illegal harassment, they might even be prevented from finding employment after being retaliated against for reporting illegal activity. So that's sort of what a non-compete is, and why a lot of folks are excited about this announcement that the FTC made in January. And to answer your question, currently there are no federally applicable restrictions on non-competes. And so this area of law is governed state by state, which is complicated. Of course, many employers have offices and employees in multiple states, and some employees themselves work in multiple states for the same employer. So this patchwork system is really difficult for both employees and employers.

Shelby Garrett

That's awesome. Thank you for providing that additional context too, going into this that'll be very helpful. You mentioned that right now it's on the state level. Looking at states, what is the range of restrictions? Are there some states that have no restrictions on non-competes? Can you give us a little bit of information about that?

Rachel Green

Yeah, there's quite a range. To start with the strictest state, some examples of some of the states with the strictest laws that do ban non-competes include California, Oklahoma, both of those states and a few others ban non-compete clauses with a few narrow exceptions. So for example, California, the exceptions in California are non-competes are enforceable when they involve a sale of a

business. So if a seller is preventing someone from opening a competing business in the same area as the original business, or like a sale of shares of an LLC, or dissolution of a partnership, so not really affecting your typical worker, so therefore, the California and Oklahoma bans are pretty strict and robust.

And then I would say the next tier is a non-compete ban that has some sort of carve out for categories of workers who can still be subject to non-competes, or a carve out with like, a salary threshold, so folks above a certain salary can still be subject to non-competes. Examples of those include Colorado. There's a salary threshold there of about \$100,000 annual compensation. If you make more than that, you could still have to sign a non-compete. Illinois also has a salary threshold, I think it's about \$75,000. Maryland has a threshold about \$31,000. Virginia defines a "low-wage employee" as basically making less than the average weekly wage in Virginia. And then DC, where I live and practice, recently passed a non-compete ban that also has a salary threshold and carves out particular types of employees. So I would say that's sort of the next category.

Then along the scale, there are some states like Massachusetts that permit non-competes for a limited period of time, like 12 months. And some, Massachusetts also does this, require what's called a "garden leave" clause, which requires that the employer pay the worker, for the time of the non-compete, a certain salary. You know, in Massachusetts, it's at least half of the worker's highest salary for the last two years, or some other consideration that benefits the worker. So those states, they're basically paying the employee for having to be restricted by the non-compete.

And then in many other states, though, there is no statutory ban or, you know, statutory codified limitation prohibiting non-competes or categories of non-competes. But even in those states, courts have increasingly disfavored them. So, in Tennessee, for example, just to have an example, courts in Tennessee have held that a non-compete has to be supported by some sort of consideration that the employer has to have a business interest that can only be protected by the non-compete. And courts often consider reasonableness in the duration of the non-compete and in the scope. But again, it's not codified, it's common law. So ultimately, as you can tell, we have this patchwork of laws, this mix of statutory and common law across the states, which as I said before can be really complicated given that so many employers and employees work and live across multiple states. So it's hard to determine what applies and it becomes complicated, especially for your lay employee who's not probably paying that much attention to what they can be subject to.

Shelby Garrett

Right. Are there states that have like, no time limit at all for non-compete restrictions post-employment?

Rachel Green

Yeah, so the states that don't have a particular codification, like some of the ones that I listed that do, like DC specifically says only in certain circumstances, can there be a noncompete, if there's no codified law limiting it, most courts do analyze whether or not it's reasonable. And so if someone had no time limit in their non-compete, and they wanted to dispute that, depending on what state they're in, they probably could. And a court would probably look at whether or not the terms' lack of time limit, lack of geographic limit, things like that are typically found to be unreasonable? But obviously, it depends. And with this patchwork set of laws, it'll be quite variable state to state.

Shelby Garrett

Right. And not everybody has access to the funds to afford an attorney. So with the DC non-compete ban, or restrictions, how has the reception been?

Rachel Green

That's a great question. So a little bit of background on the DC noncompete ban. The law that recently went into effect is sort of a walk back from the original law that was passed, the DC Council passed a more restrictive ban that did not include a salary threshold and did not exclude as many types of employees as the one that has ultimately been passed. And there was a lot of pushback from employers and other interest groups. And there were several amendments that were proposed. And ultimately, what I would view as this walk back version of the ban was passed. So given that employers largely feel that this new version is a little bit more responsive to their interests, and protective of employers, particularly again, those who have employees who make above the salary threshold, I think employers in general have been pretty happy--comparatively happy, I'll put it that way--to where they were before, but folks who represent employees and employees themselves in DC see that as a loss. By definition, there are fewer people who are protected by the ban than there were under the original language. And so the feedback is mixed because folks who support the walk back, I'll call it that, are more pleased than they were previously, but it is a loss to employees, in particular those above that threshold, and in the categories of employees that are excluded under the new language.

Shelby Garrett

That absolutely makes sense. When we're looking at the proposed ban from the FTC, what would that involve? How much do we know? I know we're still working on it.

Rachel Green

Yeah. So all we have right now is the proposed rulemaking, the language that the FTC released. And that doesn't necessarily mean that will be what the final rule is. But we can talk about that more in a little bit. But according to the language in the FTC's proposed rulemaking, this rule would ban almost all non-compete clauses, and it has a pretty broad definition of a non-compete clause. So it just says it's a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment after their employment with the employer. So it's pretty broad. Again, similar to the California, Oklahoma type of state, non-compete bans, this FTC rule has a very narrow exception. The ban doesn't apply to selling businesses or business entities under limited circumstances. So there are some exceptions, but quite narrow, and again, they would not affect the vast majority of individual workers. And so this national non-compete ban would therefore be broader than almost any existing state non-compete ban, which, of course, is great news for employees and workers.

Shelby Garrett

I know this is a really hot topic right now because we have been publishing so many articles about it. What would the impact be like for employers and employees? Along with that question, is there an expected timeframe for compliance?

Rachel Green

As for why it is such a hot topic? I mean, again, this rule would be just a nationwide sea change in

employment relationships, it could potentially affect every employer and employee as written, there's no limitation. There's no exception of categories of workers. There's no salary threshold. So it could be I mean, it could be huge. It could affect millions and millions of people.

And as far as timeline? That's a great question. So the proposed rule says that after the final rule is published, I believe it says 180 days until compliance is required. And so you know, about half a year until compliance is required. But it's not clear. And it's really hard to estimate how long from now until a final rule, and that's because right now, the notice and comment period that the FTC has to participate in as an agency is open until April 19. And they have extended that a few times already. So they might extend it again. And during that period, anybody, you, me, organizations, employers, employees can submit a comment to the Federal Register supporting or opposing or commenting in general about this proposed rulemaking, and then the FTC after the conclusion of that notice and comment period--which again, is currently set to end April 19--after that, the FTC reviews all of the comments, makes potentially edits to the language and then issues a final rule, but it's sort of a black box in terms of how long that review and editing process takes. So the 180 days doesn't start until after the issuing of a final rule, but we don't really know how long it will be until then.

Shelby Garrett

Awesome. So big TBD. So are there any sectors where this change could be more impactful than others?

Rachel Green

So yes, and as a little bit of preliminary background, the FTC in its proposed rulemaking estimates that one in five American workers, which is about 30 million workers are bound by a non-compete clause right now. And the research cited by the FTC states that both high and low wage workers alike are subject to these restrictions. And so given that this rules, language is arguably broader than any existing state, non-compete ban or partial ban, this language could reach the broadest possible swath of workers. So it affects everybody. But again, the one important difference from existing state bans, those states that we discussed earlier that do have bans or partial bans, a lot of them carve out specific types of employees or even employers. For example, some states carve out governments as employers. There's no carve out in the FTC proposed rule. And it also defines "worker" very broadly and explicitly includes folks like independent contractors, external interns, volunteers, apprentices, and again, many of those state bans exclude one or more of those types of workers. So they stand to really win from this type of rule.

And for an example, I guess, the recent non-compete ban in DC excludes specifically volunteers, babysitters, broadcast employees, again that has the salary threshold. So this national ban has none of those exclusions and provides for no exemptions. It's just a flat out ban of all non-compete clauses regardless of their compensation or their profession. So again, compared to this existing patchwork of state laws, it will impact workers of all kinds at all levels of impact reaching this broadest possible swath of workers. But I think the folks that stand to win the most from this are those that are currently excluded from even the protections provided in those states that do provide protections.

Shelby Garrett

That's interesting. I hadn't considered volunteers being impacted by non-competes. Yeah, that's really interesting. Is this going to have any impact on any other employment agreements?

Rachel Green

So this is where we will have to watch what happens after the close of the notice period, I'm going to be very interested to see what the final rule language is. The FTC has been receiving feedback from employers and their lobbyists expressing concern about the potential impact of this rule and its broad language on other types of employment agreements. And the FTC might amend its proposed rule to clarify its intended application, but we just don't know yet. So I'll talk a little bit about how the rule as written might affect them. But I'm really going to be interested to see what the final rule says.

So the FTC knew that this rule might be applied to other types of agreements, and it included in the language of the rule, what it called a “functional test.” And the language says that this functional test should be used to determine whether a contractual term is a non-compete clause. And it says that a term in a different contract might be a de facto non-compete, if it has what the rule states as “an effect of prohibiting the worker from seeking or accepting employment after working for the employer.” And it provides a couple of examples. So one that might be helpful is it says, as an example, “a non-disclosure agreement, written so broadly, that it effectively precludes the worker from working in the same field.” That might constitute a non-compete, even though it's technically called a non-disclosure agreement. Another example the FTC provided is a term that requires the worker to pay the employer for training costs, if the worker's employment terminates within a particular time period where that payment is not reasonably related to the cost that the employer incurred for training the worker. So again, that's not called a non-compete, but the FTC says that might constitute a de facto non-compete. And so under this functional test, it's conceivable that non-disclosure agreements, non-solicitation agreements preventing employees from soliciting former or current clients of the employer, and other forms of employment contracts might constitute prohibited non-compete agreements.

But from my perspective, ultimately, if employers craft their employment agreements carefully and tailor them to their legitimate business interests, my understanding of the scope of this FTC proposed rule is that it should be limited to a ban of de facto and clear non-compete clauses and Chair Lena Khan in her statement in support of this rule, Chair Lena Khan of the FTC, she stated that the rule was not intended to invalidate all non-solicitation agreements. And she even specifically says employers still have contractual methods to protect their client lists under the proposed rule. And I guess one final thing, it's worth noting that many employers are complaining publicly about how the FTC's rule might impact their trade secrets. That's like a catchphrase right now. But the proposed rule clearly and explicitly states that the non-compete ban does not apply to trade secret protections. And just to note, employers still have access to the federal Defend Trade Secrets Act and the Uniform Trade Secrets Act which has been adopted by 47 states and DC. Both of those separately provide for civil actions for trade secret misappropriation, and trade secret theft is also a federal crime under the Economic Espionage Act. Also, intellectual property law provides significant legal protections for trade secrets. And so this proposed rulemaking does not weaken or threaten existing trade secret protections. And it might affect other employment agreements. But again, those that are de facto non-competes, which should arguably fall under a non-compete ban.

Shelby Garrett

Awesome. I feel like I have learned so much already from talking to you and I'm excited to re-listen to the podcast so that I can take more time to absorb everything. This is awesome. So we have the comment period set to end on April 19th. What would the next steps be if it does end on April 19th?

Rachel Green

So that is when the FTC begins to review the comments. And I haven't checked in a couple of weeks, but there are thousands of comments. So I'm sure they're just continuing to flow in. And it's not really clear how long the FTC will take. I know for other rules and other agencies, it's usually a couple of months, but it could take longer, it could be shorter. I have no idea how many resources they intend to devote to this, but that's the next step. They'll be reviewing the comments, making edits to the extent they decide to and then eventually they will announce the final rule and whatever is in the final rule does not take effect until 180 days after that date of publication. So those are the next steps.

Shelby Garrett

Awesome. And along with that we have some legislation in Congress, the proposed Workforce Mobility Act, how is that going to work along with this?

Rachel Green

The Workforce Mobility Act, as currently proposed in the Senate, would essentially codify the meat of the FTC's proposed rule. It would narrow the use of non-competes to permit them only in very narrow instances, like the dissolution of a partnership or sale of a business, the same thing that we discussed before. It would also charge the FTC and the Department of Labor with enforcement of the act and create a private right of action in federal court. But again, the bulk of the Act, as written, is essentially to ban non-competes nationwide. So it does mainly the same thing as the FTC proposed rule.

And I'll note that, as many who are opposed to the FTC proposed rule have discussed, any final rule that the FTC issues is likely to face legal challenges. And one of the first challenges is certain to be an argument that the agency lacks the power to regulate non-compete so broadly on such a wide-ranging scale. And for just a tiny bit of background, the FTCA gives the FTC the power to prevent what are called unfair methods of competition. And in its proposed rule, the FTC says, it defines non-compete clauses as unfair methods of competition, which, arguably, brings non-competes under the FTC enforcement power. But opponents are likely to challenge that definition, whether or not non-compete clauses actually are unfair methods of competition, such that the FTC is able to ban them on a national scale. So given that background, that this final rule, however it ends up being, the FTC is likely to going to be challenged in court, it's helpful if Congress sort of simultaneously moves forward with federal legislation providing comparable prohibition of non-compete clauses, and again, charging the FTC with enforcement of that law. It would be excellent if this act gets through.

Shelby Garrett

What are the next steps for the Workforce Mobility Act? Where is it at right now?

Rachel Green

So in February, I think it was February 1st, Senators Chris Murphy of Connecticut and Todd Young of Indiana reintroduced the Act and I believe the same day it was referred to the Committee on Health, Education, Labor and Pensions in the Senate. Ultimately, hopefully, the next step would be for it to come up for a vote before the Senate, and if it passes it would then go to the House for a vote, and if it passes there as well it will go to the President for his signature before becoming law. So there's sort of a long road. It's not, I mean, I wish it were that simple, but it's not. But if all of the ducks get lined up, it would be an excellent piece of legislation that, again, would bolster employees and their abilities to move from one workplace to another more freely nationwide.

Shelby Garrett

As we're coming to a close here. Are there any final thoughts that you would like to share with us?

Rachel Green

I mean, I'd just like to repeat that the notice and comment period now closes April 19th. And it's really important for everyday people, businesses, law firms, to express their support for the proposed rule. And I don't want to discourage people from expressing their opposition. This is one of these really interesting opportunities that we have in this country to weigh in on proposed rulemaking introduced by our agencies. So it's really important for people who care about this proposed rulemaking to share what they think about it, and we have until April 19th to do so.

Shelby Garrett

And where can our listeners find you?

Rachel Green

I regularly post blogs on my firm's website, Katz Banks Kumin, about a variety of legal topics that affect employees. And I'll also note that on behalf of my firm and with the support of my colleagues, we've drafted a comment that is in support of the proposed rulemaking which we will submit by the close of the notice period. And if folks are interested in joining as a signatory, they're welcome to reach out to me, my email's on our website, Katz Banks Kumin, and that's where I can be found. I appreciate the opportunity to come and speak. This has been really wonderful.

Shelby Garrett

Thank you. Awesome. We really appreciate you taking the time to share your insight with us. You did an amazing job taking a really complex subject and bringing it down, to my level at least. So I really appreciate that.

And thank you everyone who is listening. Hope you have an amazing day.

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