

Countering the Trend Against True Non-Competes

By Clifford R. Atlas & Erik J. Winton

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Transcript

INTRO

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Clifford R. Atlas

Principal, New York City

Hi, this is Cliff Atlas from the New York City office of Jackson Lewis.

Erik J. Winton

Principal, Boston

This is Eric Winton from the Boston office, but I am sitting here in New York today across from my friend and colleague, Cliff.

Cliff, today we're going to talk about the year ahead for our practice group and what we think the new year will bring for the world of restrictive covenants, trade secrets, and unfair competition. But before we break out our crystal ball, I think we probably need to talk about 2024 and how that may impact 2025.

Atlas

Thanks, Eric. You're right. Much of 2024 focused on the FTC's final rule, which was issued in April that would have outlawed nearly all non-competes with limited exceptions for current agreements with senior executives and agreements in

connection with the sale of business. After the rule was issued, litigation ensued. In fact, there were three cases that were brought.

Without getting into all the details of those cases, the case that was in the Northern District of Texas was really the key case here. Judge Ada Brown there held that the Federal Trade Commission Act did not authorize the FTC to issue substantive rules like the final rule banning non-competes. Instead, the Federal Trade Commission Act limited the FTC's authority to the prevention of unfair methods of competition through case-by-case adjudication. The court found that promulgating a rule that retroactively invalidated millions of existing contracts exceeded the FTC's statutory authority. So, on August 20th, Judge Brown set aside the final rule with nationwide effect, preventing the FTC from implementing or enforcing the rule. The FTC appealed this decision, and the appeal was pending at the Fifth Circuit.

In the interim, of course, there was the election, and President-elect Trump has announced that the current FTC commissioner, Andrew Ferguson, will become the new chair of the FTC, replacing Lena Kahn, whose term actually expired in September.

On April 23rd, when the FTC issued the final rule, Commissioner Ferguson and Commissioner Holyoke, the two Republicans on the FTC voted against the rule. In his comments, Commissioner Ferguson expressed his view that the FTC did not have the authority to engage in rulemaking on "major questions like this." Instead, he said that regulation of non-compete agreements is the particular domain of state law.

Now, at the same time, he also said that there are sound arguments in favor of legislation regulating non-competes, but it was the administrative solution that he felt offended constitutional principles.

Winton

So, Cliff, that's Commissioner Ferguson when he was just a commissioner. Now, he's going to be the chair. It's likely going to be difficult for him to walk back from the position he took as recently as April with respect to the FTC's authority, not only in dealing with banning or addressing non-competes but also in other issues that the FTC works with.

Atlas

That right.

Winton

So really, it looks like the FTC, and we'll get to this, might be going down a path that's less aggressive and less activist than what we saw under the current departing chair.

Atlas

That's right too.

Winton

Of course, the FTC still does have the authority to go after bad actors and employers

using its enforcement mechanism. We have [an article on our website from October 14th](#), which was primarily written by RPG members Mary Smith and Caterina Catalano. Thank you very much to both of them. That details the procedures of such enforcement actions before the FTC.

We note the FTC has continued throughout, even while their attempt to ban non-compete has been shot down and is currently being appealed. They've continued to go after certain employers. We recently saw news that they went after one employer trying to stop them from using no-hire agreements in their contracts with third parties. What was interesting about this case is that the agreements in question, which the FTC was attacking, were not actually with the employees of that employer. Again, they were with third parties, telling the third parties they couldn't hire those employees. So, the agreements were restricting the employees even though they weren't parties to it. In response to the FTC taking that action, in that case, the employer agreed to stop using or enforcing those agreements. Query as to whether they would have been able to successfully challenge the FTC on these issues, but at this point, we'll never know.

What do we expect from the FTC for 2025 after they've given us two years of tons of content?

All indications are that it will be a less activist agency in light of Commissioner Ferguson's comments. So, we don't expect the FTC to continue to push the non-compete ban or anything similar.

As for enforcement actions, they've always had that power, and they can still take such actions, which, of course, would impact a much smaller number of employers than the ban would have. One would think that such actions, such enforcement actions may potentially continue; however, they may be concentrating on the most egregious employer activity in this area.

As for other 2025 predictions, we should not be surprised by continued legislative activity at the state level. Perhaps an increase in certain 'blue states' to make up for the FTC's failed ban and what may be perceived as a more business-friendly incoming legislation.

Atlas

Well, it's funny you said, 'blue states.' I'm not sure that the disdain for non-competes is a 'blue state' issue alone. There are plenty of Republicans around and plenty of 'red state' politicians who've expressed their disdain for non-competes. Including former representative Matt Gaetz, who submitted an amicus brief in the Texas action supporting the FTC's ban. But of course, Matt Gaetz is no longer in play.

Winton

Wasn't he almost the Attorney General?

Atlas

Yeah, he was almost for about a minute and a half.

For context, many state laws in this area were enacted in 2023, but there were

actually only a few enacted in 2024. Remember that 2023 ended with New York Governor Hochul's veto of a sweeping bill banning non-competes in New York. While the New York City Council introduced three bills banning or limiting the use of non-competes earlier in 2024, those bills seem to have gained no traction.

Winton

So, that's state legislation. As for federal legislation, for 2025, we can definitely see the potential attempts to gain more traction on certain limitations for restrictive covenants to protect against perceived potential non-compete abuse.

But whether such legislation will actually pass with the current Republican majority, however slim in both the House and the Senate, is another question. Cliff, you're saying it's not necessarily an issue of Republican versus Democrat, but ordinarily, at a very base level, we have Republicans being more business-friendly in this regard.

We could see some type of legislation, which would be the first of its kind if it passes at the federal level, but it would likely need to be much less controversial than some of the previous attempts, something like no ban and addressing easy targets like salary thresholds, prior notice of the agreement and these types of things.

Atlas

That sounds like the bills that have been introduced in prior sessions of Congress, which were bipartisan. But in addition to the legislative efforts, there is case law that will continue to develop with all the attention garnered by the FTC ban and the perceived problems and abuses relating to non-competes. Whether as a result, subconsciously, or completely coincidentally, it's been getting more difficult to enforce true non-competes recently. This includes jurisdictions that historically had been more employer-friendly like Delaware. For example, in December, the Delaware Supreme Court took a critical look at a non-compete agreement, found it to be overly broad and declined to blue-pencil it. We don't see this trend reversing, and if anything, it may be more likely to gain steam.

Winton

Cliff, as we know, because our practice is not just litigating these matters but drafting and advising when something happens in litigation, you have to go back to drafting. So, there's going to be a whole lot of drafting and potential revisions to the extent that employers are relying on Delaware law as a choice of law for these agreements in light of the recent trend in Delaware.

All of this is to say that for 2025, and perhaps beyond, the writing appears to be on the wall as to true non-competes. They, whoever they are, are coming for employers who are aggressive in their choice of which employees are bound by true non-competes, the extent of the restrictions and the enforcement actions taken.

Prudent employers looking down the road should make sure they're prepared for this trend and are doing what they can from a drafting and training point of view to strengthen their other restrictive covenants and protection of confidential information and trade secrets.

I think that's it for now. I'm sure you all will be hearing from us again when invariably something new and exciting happens in the world of restrictive covenants, trade secrets, and unfair competition.

Atlas

I'm sure there will be many developments. Thank you, everyone.

Winton

Thanks.

OUTRO

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