

The Administrative State's Attack on Noncompetes What the FTC's Rule Requires and Why it is Unlikely to Survive

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The FTC Noncompete Rule

- FTC voted 3-2 on party lines to issue the final rule on April 23, 2024
- If not enjoined, the rule will go into effect 120 days following formal publication in the Federal Register
 - However, it is likely, in our view, to be enjoined and ultimately struck down by the Supreme Court
- Would ban virtually all post-employment noncompetes nationwide
 - Only exception is existing noncompetes with "senior executives"
 - Requires written notice to all affected employees on or before the effective date

Does not cover:

- Noncompetes entered into with sellers in connection with bona fide sale of a business
- Causes of action accrued prior to the effective date
- Non-solicits, NDAs, training cost repayment requirements, garden leave provisions *But . . . it could cover these things if they are too broad
- Certain industries the FTC does not have authority over: nonprofits, banks, etc. *But . . . the FTC may challenge nonprofit status
- Good faith (but failed) attempts to comply are <u>not</u> unfair business practices



"Noncompete clauses systemically drive down wages, even for workers who aren't bound by one."

• "By stopping this practice, the agency estimates that the new proposed rule could increase wages by nearly \$300 billion per year and expand career opportunities for about 30 million Americans."

The New Hork Times

GUEST ESSAY

Lina Khan: Noncompetes Depress Wages and Kill Innovation

"[N]oncompetes reduce entrepreneurship and start-up formation."

• "We have already seen what life looks like without noncompetes because they have been legally unenforceable in California since the 19th century. Somehow, that hasn't kept the California economy — the world's fifth-largest — stuck in the Stone Age. Some observers have even suggested that Silicon Valley became the epicenter of America's tech industry precisely because noncompetes were unenforceable there."



FTC's Noncompete Proposal Is Based On

Misrepresentations

By Erik Weibust and Stuart Gerson (January 26, 2023, 4:04 PM EST

The Federal Trade Commission kicked off 2023 by taking two aggressive actions against employers who have sought to protect their business strategies, intellectual property and customer relationships by holding their employees to agreements not to compete with them after they leave

The FTC first announced that it had entered into consent decrees arising out of two enforcement actions accusing employers of engaging in alleged unfair competition merely by utilizing noncompetes;[1] and the next day, proposed a rule that would ban virtually all noncompetes nationwide with retroactive and preemptive effect.[2]

The FTC's announcement of these two actions was clearly coordinated, and the former may have been intended as a warning to companies considering publicly opposing the latter.

These lawless actions standing alone are troubling enough.

But in announcing them to the public, the FTC made numerous misrepresentations about the use and effects of noncompetes, presumably fo purposes of garnering public support for a move of the sort that no state legislature has taken since the 1800s, despite repeated attempts over the years by opponents of noncompetes in some of the most employee-friendly states and cities in the country.[3]

FTC Chairwoman Lina Khan repeated these misrepresentations in a widely read op-ed published in The New York Times earlier this month.[4]

"[N]oncompetes lead to higher prices for consumers by reducing competition"

Source: https://www.law360.com/articles/1569485/ftc-s-noncompeteproposal-is-based-on-misrepresentations

Pending Legal Challenges to the Rule

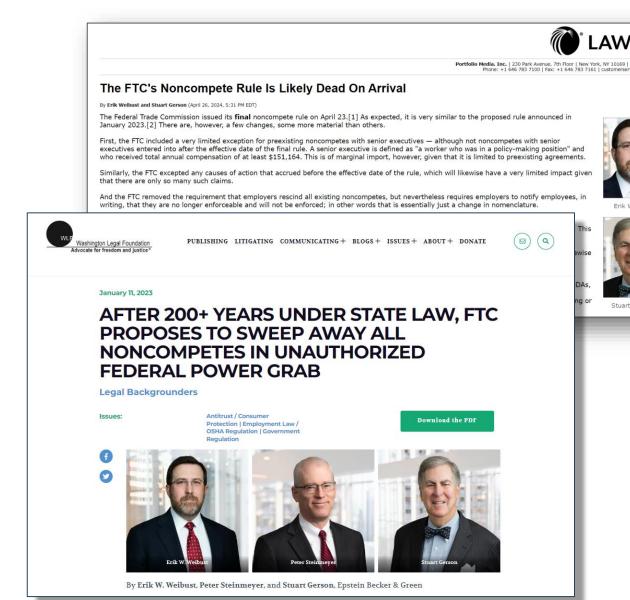
- Ryan, LLC v. Federal Trade Commission, C.A. No. 3:24-cv-986 (N.D. Tex.)
 - Filed on April 23, 2024
 - Motion for Stay of Effective Date and Preliminary Injunction filed on May 1, 2024
 - Order to be issued on or before July 3, 2024



- Chamber of Commerce of the United States of America, Business Roundtable, Texas Association of Business, and Longview Chamber of Commerce v. Federal Trade Commission and Lina Khan, C.A. No. 6:24-cv-00148 (E.D. Tex)
 - Filed on April 24, 2024
 - Motion for Stay of Effective Date and Preliminary Injunction filed the same day
 - Case stayed pending Ryan litigation; Chamber has moved to intervene in that case
- ATS Tree Services, LLC v. Federal Trade Commission, Lina Khan, Rebecca Slaughter, Alvaro Bedoya, Andrew Ferguson, and Melissa Holyoak, C. A. No. 2:24-cv-1743 (E.D. Pa.)
 - Filed April 25, 2024

Legal Arguments In Favor of Striking Down the Rule

- Non-Delegation Doctrine
- Major Questions Doctrine
 - West Virginia v. EPA (2022)
- Chevron Deference
- Administrative Procedure Act –
 Arbitrary and Capricious
- 5th Amendment Takings Clause





Stay the course and focus on compliance with evolving state laws and trends

- Compensation thresholds
- Notice requirements



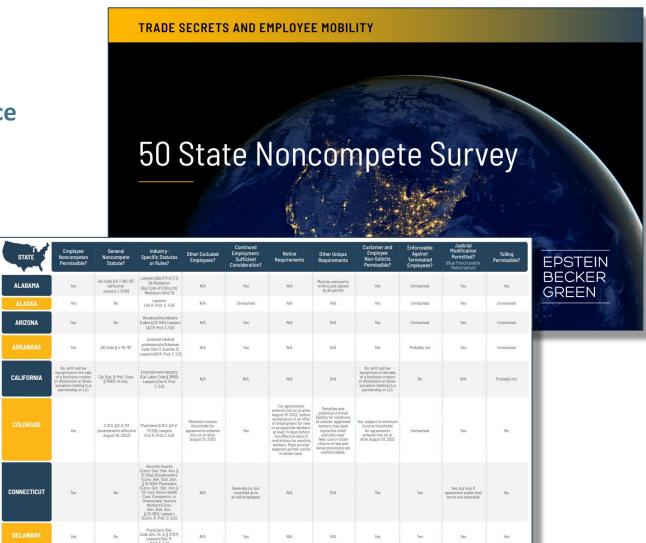
Take a holistic review of restrictive covenant strategy and practices.

- Inventory current restrictions
- Consider overall strategy
- Review onboarding and offboarding policies and procedures



Focus on trade secret protection and securing customer relationships

Consider a trade secret audit



https://www.ebglaw.com/50-State-Noncompete-Survey



Questions?

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Attorney Stuart Gerson's respected trial and appellate skills and power of persuasion help him successfully represent health care, life sciences, and financial services clients in high-stakes civil and criminal matters nationwide.

Stuart has extensive experience litigating cases involving the cybersecurity of health care information, trade secrets, and other confidential data as well as civil and criminal fraud issues, particularly under the federal False Claims Act. He also defends various antitrust and securities matters for clients in the health care and financial sectors.

Stuart was appointed Acting Attorney General of the United States during the early Clinton administration, after having served as President G.H.W. Bush's appointee as Assistant Attorney General for the Civil Division of the Department of Justice (DOJ). He has also served as an advisor to several presidents.

Stuart writes a blog series on LinkedIn, about Supreme Court rulings and dynamics: SCOTUS Today.



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Companies of all sizes and in various industries call upon attorney Erik Weibust for his practical and thoughtful advice—and his aggressive representation in high-stakes trade secret, non-compete, and commercial litigation.

Many of the world's leading pharmaceutical, biotech, medical device, technology, financial services, staffing, and insurance companies look to Erik for thoughtful and practical advice concerning how best to protect their trade secrets and customer relationships from misappropriation by former employees, ex-business partners, competitors, and hostile actors in the United States and abroad, and to avoid liability when hiring from competitors. When necessary, clients rely on Erik for aggressive representation in litigation, where he has won substantial victories in court and at the negotiating table, including broad-reaching injunctive relief and multimillion-dollar payouts, in trade secret misappropriation, unfair competition, and breach of restrictive covenant cases.

Erik's national litigation practice provides him with particular insight into how courts and arbitrators in a variety of jurisdictions analyze relevant issues, keeping him abreast of cutting-edge legal arguments, industry trends, and litigation strategies that he brings to bear in all of his representations. In addition to serving as the immediate past Chair of the American Intellectual Property Law Association (AIPLA) Trade Secret Committee, Erik regularly publishes articles and speaks locally and nationally about trade secret and restrictive covenant law, and he has been quoted on these topics in publications such as *The Washington Post, Bloomberg, Law360, Business Insurance*, and *Financial Times*.

Erik serves as Co-Chair of Epstein Beker Green's Trade Secret & Employee Mobility Practice Group and as a member of the firm's national Litigation Department Steering Committee.

