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Business Groups File Lawsuit to Block FTC Non-Compete Ban

Cross section of industries align in opposition

The U.S. Chamber of Commerce and multiple other business groups sued the Federal Trade Commission (FTC) on April 24, one day after the FTC in a 3-2 vote to finalize rules that would broadly prohibit noncompete provisions in employer contracts.

In April 2023, WHA joined the American Hospital Association (AHA), U.S. Chamber of Commerce, Wisconsin Manufacturers & Commerce (WMC), and numerous other organizations across the U.S. expressing significant concerns with and opposition to the FTC's then-proposed and now final blanket rule.

The lawsuit filed in federal district court in Texas states that the FTC's rule exceeds the FTC's rulemaking authority and "represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry" regarding the legality of agreements between employees and employers. The lawsuit requests that the Court vacate the rule in its entirety and order a delay of the 120-day effective date pending the conclusion of the lawsuit.

The American Hospital Association joined multiple other groups expressing strong opposition to the FTC's action in a press statement on April 23.

"The FTC's final rule banning non-compete agreements for *all* employees across *all* sectors of the economy is bad law, bad policy, and a clear sign of an agency run amok," said Chad Golder, American Hospital Association General Counsel. "The agency's stubborn insistence on issuing this sweeping rule—despite mountains of contrary legal precedent and evidence about its adverse impacts on the health care markets—is further proof that the agency has little regard for its place in our constitutional order."

"The only saving grace is that this rule will likely be short-lived, with courts almost certain to stop it before it can do damage to hospitals' ability to care for their patients and communities," said Golder.

In WHA's April 2023 comment letter to the FTC, WHA wrote, "A blanket declaration that all non-compete related terms are unreasonable and illegal not only substitutes the will of the consenting, contracting parties and their assessment of the reasonableness and adequacy of the entirety of the bargain between each other, but also replaces our state and federal courts' appropriate approach to determining what is an unreasonable and illegal restraint of trade through an individualized examination of the context of the consenting parties to the contract, the benefits of the agreement flowing to both contracting parties, and the breadth or narrowness of an alleged unreasonable non-compete related term."

WHA's comment letter referenced Wisconsin's existing non-compete statute, s. 103.465, Wis. Stats., and its accompanying case law, as an appropriate and balanced approach to non-compete clauses that would be usurped by the FTC rule.

"The [rule] also substitutes Wisconsin's policy choice to allow some, but not all, non-compete clauses. Like many other states, Wisconsin's Legislature has enacted a statute that renders non-compete agreements 'illegal, void and unenforceable' unless the restriction is 'reasonably necessary for the protection of the employer or principle,'" wrote WHA. "Wisconsin's legislative choice has further been interpreted, clarified, and supported by substantial case law in both state and federal courts."

WMC in its March 2023 comment letter to the FTC opposing the rule similarly highlighted how Wisconsin's current non-compete law is beneficial to Wisconsin's economy.

"Allowing for appropriate non-compete clauses helps Wisconsin's economy, employers and employees," wrote WMC. "Having a blanket ban on non-compete clauses will harm both employers and employees. One way that non-compete clauses are beneficial to employers and employees is that the clauses encourage investment in employees. As the FTC acknowledges, two studies have found that 'non-compete clauses increase employee training and other forms of investment.'"

"Without the availability of non-compete clauses, employers will be forced to take significant efforts to restrict employee knowledge, including strict limitations on information sharing, restrictions of computer access and devising business structures in order to protect trade secrets and client lists," said WMC in its comment letter to the FTC.

WHA echoed WMC's concerns that the blanket FTC rule would negatively impact employer investment in employee education, training and development, as well as communication and information sharing between employers and employees, not only in the overall economy but in health care especially.

"Wisconsin hospitals and health systems make significant investments educating, training and supporting its health care workforce; a blanket prohibition on non-competes creates new questions regarding these investments at the very time the nation and Wisconsin is experiencing critical, long-term health care staffing challenges," wrote WHA. "Further, non-compete clauses can encourage the sharing of proprietary information such as business plans, strategies and research within hospitals and health systems, including with both clinicians and non-clinicians, to achieve outcomes mutually beneficial to the employer and its employees. Blanketly prohibiting non-compete agreements that are reasonably necessary to protect such investments and communications will have negative impacts on health care delivery that are ignored by the proposed rule."

WHA will continue to follow and inform members as actionable developments in the federal litigation to pause and invalidate the FTC rule occur.

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