

the ISSUES

Here We Go Again!

The National Widespread Use of Non-Compete Agreements Is Under Government Attack

The Federal Trade Commission (“FTC”) has recently proposed a rule which would ban non-compete clauses nationwide. The FTC claim is that such clauses stifle competition and keep workers from seeking similar jobs in the same industry. The proposed language is:

It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good-faith basis to believe that the worker is subject to an enforceable non-compete clause.

16 CFR 910.2

The proposed rule as written works retroactively, containing a rescission requirement for all non-competes entered into prior to the rule’s compliance date, i.e., 180 days after date of publication of the Final Rule. See 16 CFR 910.2(b)(1) and 910.5.

The proposed rule is exceptionally broad in scope and would also define some non-disclosure agreements “written too broadly” as acting like non-competes.

The irony here is that non-compete clauses have been in effect in the United States for centuries! And the U.S. economy has grown pretty well since the year 1800. Moreover, the unemployment rate in Silicon Valley — where non-competes are prohibited — has often been much higher than the unemployment rate in states which allow non-competes.

Moreover, and unfortunately, the instances are legion where employees have or have attempted to walk off with their former employer’s confidential business and trade secret information.

Fortunately, if the proposed Rule passes, businesses can still use precisely-worded non-disclosure, non-solicitation and anti-piracy agreements to protect their confidential business information.

(see side two)



(cont'd. from side one)

Moreover, there are a myriad of equitable principles which business owners can use to protect various aspects of their intellectual property, trade secrets and other forms of confidential business information.

Good examples of such methods can be found in my article entitled, *"That's Not Fair!" Equitable Principles and Remedies That Can Help Your Business*. You can find this article under the "Resources" section of my website www.apblaw.com.

You are also entitled to provide comments on the FTC's proposed Rule before it may become law, should you object to its promulgation.

As a 30 year practitioner in the area of non-compete enforcement, I can state emphatically that judges are extremely sensitive to the enforcement parameters of non-competes.

They have the equitable power to essentially revise the non-compete contract if they feel it is too strict or comprehensive. I have had Superior Court judges in Massachusetts limit the time, manner and scope of non-competes they felt were too broad under the circumstances. This reformation power has ensured the fair and equitable enforcement of these agreements since their inception.

- Andrew P. Botti



Andrew Botti provides practical, common-sense solutions to complicated legal issues and litigation in the areas of business, commercial and employment law.

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