FTC's New Task Force to Target Noncompetes: 5 Top Answers for Employers

A Practical Guidance® Article by
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In a somewhat surprising development, the Federal Trade Commission just announced that it intends to continue scrutinizing noncompete agreements and other arrangements the FTC feels are unfair to workers. Last week, Federal Trade Commissioner Andrew Ferguson announced plans for a Joint Labor Task Force that will identify and prosecute labor-market practices the FTC deems to be "deceptive, unfair, and anticompetitive" and harmful to workers. Notably, the FTC continues to see a substantial role for itself in protecting workers as they participate in the labor market, with Commissioner Ferguson commenting that "the ability to command a reasonable wage on the labor market is an individual's single most valuable commodity." What does this development mean for employers and how can you plan accordingly? Here are the answers to your top five questions.

What Will the Task Force Do?

The FTC's Task Force is charged with a specific list of responsibilities, including:

- **Prioritizing labor matters.** The Task Force will investigate and prosecute deceptive, unfair, or anticompetitive labor market conduct through the Bureaus of Competition and Consumer Protection with support from the Bureau of Economics.
- **Cooperating and sharing information.** The team will harmonize the Bureaus› methods and procedures to uncover and investigate deceptive, unfair, or anticompetitive labor market conduct; create an «information-sharing protocol» across Bureaus to enhance effectiveness; and coordinate investigations and prosecutions across Bureaus.
- **Public information sharing and outreach.** The Joint Labor Task Force will promote research on deceptive, unfair, or anticompetitive labor market conduct; disseminate those findings within the FTC and to the public; engage in public outreach to inform workers about the state of the law; and encourage workers to report labor market conduct concerns to the FTC.
- **Advocating for legislative and regulatory changes.** The Task Force will also identify opportunities for advocacy on legislative or regulatory changes that would remove barriers to labor market participation, mobility, and competition.

With members from each Bureau and the Office of Policy Planning, the Task Force is directed to meet at least monthly, in part to "assess the status of all ongoing labor matters" and report to Commissioner Ferguson on all such matters at least quarterly.

What Practices Will the Joint Task Force Review?

- Topping the list are agreements between employers, meaning agreements not to poach, hire, or solicit each

other's staff, and agreements among employers to fix wages they pay to workers. Neither of these is surprising, and the memorandum comments that each are likely to be seen as automatic violations.

- Next up on the list are noncompete agreements. The FTC spent years engaged in rulemaking during the Biden administration, only to see the final rule blocked by multiple courts prior to its effective date. The current memo does not describe noncompetes as automatic violations, but rather as something employers "can use to impose unnecessary, onerous, and often lengthy restrictions on former employees› ability to take new jobs in the same industry after they leave their employment.»
- The memo also calls out "termination penalties" in employment agreements, which it described as impeding workers from switching jobs by imposing "unjustified fees" when workers want to leave their jobs.
- The memo also assigns the committee eight other topics, ranging from job scams to "misleading franchise offerings" and "collusion or unlawful coordination on DEI metrics." You can read more about them here.

What Does This Mean as a Practical Matter?

- **Protecting workers.** The press release and internal memo make a clear statement that the FTC is not going to step back from its evolving focus on protecting workers in the labor market. This poses an interesting contrast to the National Labor Relations Board's decision in February to rescind two General Counsel memos that had been issued by President Biden›s NLRB General Counsel, which suggest the NLRB is stepping away from its focus on noncompetes.
- **Scrutinizing noncompetes.** At the FTC, the Joint Task Force›s instructions from Commissioner Ferguson signal that the FTC will continue to scrutinize noncompete agreements it feels unfairly harm worker mobility. Unlike lateral agreements, such as no-poach or wage fixing agreements, which are seen as automatically illegal, it appears that the FTC views the use of noncompetes as requiring closer inspection regarding the nature of the restrictions and the type of worker signing them.

What About the FTC's Noncompete Rule?

- **Broad rule.** Last year, after lengthy consideration and public comment, the FTC issued a final rule to largely ban the use of noncompetes with nearly all workers across very broad swaths of the economy.
- **Halted by courts.** The rule was quickly challenged in multiple court actions, resulting in the rule being blocked by courts in both Texas and Florida. Because of these injunctions, the rule never took effect. The FTC appealed these decisions, and those appeals are still pending.
- **Impact of new administration.** With the change of presidential administration and shift in priorities, many observers had expected the FTC to perhaps withdraw the rule, abandon the court challenges, and step away from its focus on noncompete agreements. While the FTC so far has been silent about the rule itself, the Joint Task Force memo signals that the FTC remains interested in noncompetes and may make them a priority for investigation and enforcement activity.
- **Focus on investigation and enforcement.** Commissioner Ferguson›s preference for investigation and enforcement may have been foreshadowed when he disagreed with the FTC›s decision to issue the noncompete rule. He claimed that such rulemaking was beyond the scope of the FTC›s authority. Combined with his creation of the Joint Task Force, this suggests that the new administration›s FTC remains interested in noncompetes, but will address them through investigations and enforcement actions, not through rulemaking. Indeed, the Task Force is also charged with seeking opportunities to advocate for legislative or regulatory change on these topics, which may be an acknowledgment that the power to make such regulatory or legislative change lies with other bodies, not the FTC.

What Should Employers Do?

- **Prepare for scrutiny.** Employers should recognize that their use of noncompetes could be scrutinized. But this doesn't mean employers must abandon them altogether.
- **Fine-tune your practices.** The best approach is to analyze what restrictions are needed—and with which workers—and focus on noncompete agreements only with employees who pose unfairly competitive risks that would not be sufficiently prevented or mitigated through the use of less restrictive covenants, such as confidentiality clauses, non-solicitation of customer clauses, or agreements not to solicit company personnel.
- **Remember the purpose.** Used judiciously, noncompetes remain an important tool that you can consider using in appropriate jurisdictions to protect your business against unfair competition.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates as warranted. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information, and check out Blue Pencil Box updates on restrictive covenant law. If you have any questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Employee Defection and Trade Secrets Practice Group.

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Christopher P. Stief, Regional Managing Partner, Fisher & Phillips LLP

Chris Stief is Regional Managing Partner of the Portland, Maine office and a partner in the Philadelphia office. He is also a past co-chair and co-founder of the firm's Employee Defection and Trade Secrets Practice Group, and a core member of the International Practice Group and Financial Services Industry Team. Prior to moving to Portland, Chris was the founding Regional Managing Partner of the firm's Philadelphia office from 2007 through 2024. Chris represents employers in labor and employment matters, with a nationwide and international practice focusing on restrictive covenant and trade secrets issues. His practice includes litigating and advising companies on matters relating to covenants not to compete, non-solicitation and non-disclosure agreements, unfair competition, employee raiding and team moves, trade secrets, duty of loyalty, the U.S. Defend Trade Secrets Act (DTSA), the U.S. Computer Fraud & Abuse Act (CFAA), and various state trade secrets and unfair competition statutes. He has a particular focus on advising and providing representation on restrictive covenant issues for companies that have a multi-state or multi-national workforce, and a consequent need to interpret and account for the varying laws of diverse jurisdictions. In addition to his advisory and litigation practice, Chris also offers his services as a mediator. He earned a Certificate in Professional Mediation with an employment law focus from the Scheinman Institute on Conflict Resolution at Cornell University's Industrial & Labor Relations (ILR) School. He is also a CEDR Accredited Mediator, having successfully completed the Mediator Skills Training Program of the Centre for Effective Dispute Resolution (CEDR) in London. There are five main segments to Chris's practice:

1. **Drafting & Implementing Restrictive Covenants & Confidentiality Programs**: Chris drafts restrictive covenants and helps clients develop programs to protect their competitive assets against employee departures. He places particular emphasis on advising and creating such programs for businesses that operate on a multi-state or multi-national basis, helping employers develop and implement a consistent corporate approach across a broad range of sometimes conflicting jurisdictional law and workplace cultures. International and cross-border drafting and strategy is an area of increasing demand.
2. **Employee Transitions -- Strategic Planning, Advice & Counseling**: Chris spends a good deal of time engaged in strategic planning with companies about potential recruits or upcoming employee transitions and onboarding. This includes risk assessment of prospective recruiting opportunities and developing strategic options to manage legal risks while preserving the business value of a hiring and expansion opportunity. Chris has provided counseling, advice and risk assessment relating to hundreds of employee transitions throughout the United States.
3. **Restrictive Covenant, Trade Secrets and Employee Raiding/Team Move Litigation**: Chris has handled and led teams for litigation and other contentious non-compete, trade secrets, employee raiding and team-move disputes throughout the United States (at least 45 states, D.C., and Puerto Rico), as well as international matters arising out of Mexico and Canada, plus key jurisdictions in Asia, Europe, South America, and the Middle East. This includes both enforcement and defense, and often involves applications for temporary restraining orders or preliminary injunctions. Chris has led and advised litigation teams in cross-border restrictive covenant litigation, including prosecuting and resisting anti-suit injunction actions in both U.S. courts and the High Court Chancery Division in London, which involved application of the EU's Brussels Regulation (Recast) on Personal Jurisdiction.
4. **Mergers & Acquisitions**: Chris's restrictive covenant practice frequently intersects with mergers and acquisitions. This includes: (a) drafting restrictive covenants to use in purchase and sale agreements, (b) developing restrictive covenant and retention agreements for key employees, (c) assessment of assignability and successor enforcement rights for covenants previously signed by employees of target companies, (d) litigation to enforce sale-of-business covenants, (e) risk assessment and strategy formulation for third parties recruiting employees out of a competitor's pending acquisition target, (f) litigation relating to alleged employee "raids" of a recently acquired workforce, and (g) advising companies on implementation of effective restrictive covenant and asset protection programs to help position a company for potential acquisition, investment, or financing.
5. **Alternative Dispute Resolution**: Mediation, Arbitration Agreements, and Arbitrability Disputes: Chris earned a Certificate in Professional Mediation from Cornell's ILR School Scheinman Institute on Dispute Resolution, and also is a CEDR Accredited Mediator, having successfully completed the mediation skills program of the Centre for Effective Dispute Resolution (CEDR) in London. Chris also has litigated disputes about the interpretation and enforcement of arbitration agreements under the U.S. Federal Arbitration Act, the New York Arbitration Act CPLR Article 75, and other state arbitration statutes. Chris has extensive experience litigating and leading team strategy for the arbitration and/or mediation of disputes at FINRA Dispute Resolution, Inc. and its predecessor organizations at the NASD and NYSE, as well as AAA and JAMS in the U.S., and CEDR in London.

Prior to returning to Maine to help the firm launch its Portland office in 2025, Chris spent 30 years in Pennsylvania, including as the founding Regional Managing Partner of the Fisher Phillips Philadelphia office from 2007 through 2024, and founding Regional Managing Partner of the firm's Pittsburgh office from 2019-2021. Chris began his legal career in Portland in the 1990s with one of Maine's largest and oldest general practice firms.

Chris is a *Chambers USA* Ranked Lawyer for Pennsylvania Labor & Employment, is "AV" Peer Review Rated by *Martindale-Hubbell*, has been recognized by Benchmark Litigation, and has been selected for inclusion in *Who's Who Legal USA* – Management Labor & Employment and *Best Lawyers* for both Litigation-Labor & Employment Law and Trade Secrets Law. He also is a past Co-Chair of the Labor & Employment Law Committees of both the Philadelphia and the Delaware County (PA) Bar Associations.

Chris is a founder and co-leader of the Fisher Phillips Financial Services Recruitment Litigation Conference, which recently returned for its 14th iteration in October 2024 as a participatory conference focusing on issues relevant to restrictive covenant litigation among broker-dealers, private wealth management firms, Registered Investment Advisors (RIA), private banks and insurance carrier distribution networks and agencies. Conferences have been held since 2003, and topics addressed have ranged from employee raiding to FINRA and SEC regulations, and application of the Protocol for Broker Recruiting.

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Risa Boerner is a partner in the Philadelphia office. She is the Chair of the firm's Privacy and Cyber Practice Group. Risa is a Certified Information Privacy Professional (CIPP/US) and Certified Information Privacy Manager (CIPM) and has counseled clients on issues relating to state and federal data protection laws, responding to security breaches, surveillance of employees' electronic communications, workplace investigations and searches, social media and electronic communication policies, and the protection of trade secrets and confidential information.

Risa also regularly litigates and counsels clients on issues pertaining to the hiring and termination of employees, compliance with employment discrimination laws, negotiating and drafting employment agreements, covenants not to compete, confidentiality agreements, employee raiding, unfair competition, and related matters.

Risa has litigated employment matters in federal and state courts and before arbitration panels throughout the country and internationally. She has represented clients in a variety of industries, including printing and publishing, finance, asset management and valuation, online retailing, retail mortgage lending, home health care, personnel placement and recruitment, computer technology, construction, manufacturing, medical, securities, banking and insurance.

Risa has also assisted corporate clients in drafting and updating existing employment agreements and in implementing local and nationwide policies for protecting trade secrets and other proprietary information, and has advised clients on how to tailor restrictive covenants to comply with legal requirements in multiple jurisdictions.