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FTC's Proposed Ban on Noncompetes Stirs Legal, Ethical Issues

In early January, the Federal Trade Commission (FTC) proposed a new rule that would ban employers from imposing noncompete agreements or restrictions on their workers. The commission, in a release, calls these agreements "a widespread and often exploitative practice that suppresses wages, hampers innovation and blocks entrepreneurs from starting new businesses."

For many years, with the sale of law firms, and with attorneys either starting out or advancing in their careers, noncompete and nonsolicit agreements have, sometimes, been a part of agreements to work.

Interpretation of these restrictive contracts has been open to question and enforcement has often been problematical, at best.

It's far easier for a court to serve an injunction if a law firm is purchased by an entity that opens a similar firm across the street, taking clients with them. But other types of noncompete agreements, in fact the very nature of the agreements, can be in question.

What does a noncompete mean to an attorney who needs employment or is just starting his or her career? Could a desire to question the wording in the employment contract or a refusal to sign jeopardize her or his employment?

"A noncompete can basically mean anything," said Andrew S. Abramson, Abramson Employment Law LLC, Blue Bell. "When we get initial contact from people by e-mail or call, and they say, 'I have a noncompete,' to me, that doesn't mean much. It's what the actual content of the noncompete is."


Andrew S. Abramson


Brendan P. Lynch


Marie Milie Jones

Abramson said that in Pennsylvania, courts are going to look at a number of factors in the agreement. Enforcement will depend on the geography, duration of time, the industry and whether it's really necessary to protect some legitimate interests.

"Is it precluding someone from just working in an industry within a certain geographic area?" Abramson said. "That may be a classic example, but today we're also seeing agreements that are labeled and designed to say they're nonsolicitations, which would be not soliciting the firm's clients, but they're almost quasi-noncompetes in certain industries where there's only a limited pool of clients in a very specific, narrow industry."

Courts must be able to distinguish between a pure nonsolicit, "you won't solicit the firm's clients, as opposed to you won't open up the same kind of business that we have, that you're in while working with us," Abramson said. "On the nonsolicit end, first of all, courts are more apt to enforce a nonsolicitation of clients much more than noncompetes. Law firms that are advising large employers are saying 'design the restrictions around a nonsolicitation of clients versus a noncompete with the firm, because a court will be more apt to enforce that.'"

Everything is going to depend on the circumstances, he said.

"First of all, you have to find out that someone is soliciting," Abramson said. "But the cases where courts really come down hard on that is when a former employee has taken proprietary information, client data and lists prior to leaving. There's a constant footprint in today's world, with computers and technology, of exactly what an employee is doing at all times regarding that information. When that information is taken, and it's not the kind of information that's in the public domain anyway, that's the kind of circumstance in which a court is much more apt to enforce a nonsolicitation."

"I signed one nonsolicitation agreement with at least one firm I used to be with," said Harold M. Goldner, Friedman Schuman, Fort Washington. "Enforcing them

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would be extremely difficult. If I were trying to enforce one, what I would really be trying to do is show that while the lawyer was working for me, they were actually sidelining clients and were stealing clients from me. Lawyers who have engaged in that behavior have gotten into a lot of hot water, not just from the civil suit from their former firm but with the disciplinary board for pulling that kind of stuff."

Abramson said noncompete and nonsolicitation agreements relate to all employees, including attorneys.

Range of Industries

Noncompete agreements are popular across several industries, including technology companies, retail, sales and high-wage, high-responsibility, executive-level positions. But noncompetes have even extended to home health care. To some, that may be surprising, since traditional jobs in home health care pay a low wage.

"It does vary across the board in terms of the range of fields that we see, in which noncompetes are implemented, in terms of their scope," said Brendan P. Lynch, Community Legal Services, Philadelphia. "Some are just very unartfully drafted, and we've seen one or two that were extraordinarily broad that no court would even contemplate enforcing. But we've seen ones that were written to last for two years or five years, often encompassing Philly and surrounding counties, or in a 15-mile radius of Philly."

A home health care company wrote a noncompete agreement for an employee that extends five years for 50 miles. But the employees "are paid so little, in fact, that I would argue that they should not be held subject to noncompetes, even under current law," Lynch said. "There's very little case law on this."

Not Common Practice

Some attorneys and firm owners have heard of instances when noncompete and nonsolicitations are offered, but it's not a very common practice.

"I have not been asked to address a noncompete for lawyers," said Marie Milie Jones, founding partner, JonesPassodelis PLLC, Pittsburgh. It may be possible for an agreement to "restrict certain knowledge of a lawyer about a firm or a particular piece of work, such as when a particular lawyer represents a certain industry a lot, for example," Jones said. "But I've not seen the ability to stop a lawyer from going from one firm to another. There may be different issues with an in-house lawyer."

Jones said that another restrictive covenant, particularly a nonsolicitation provision, is handled a little differently in the legal profession. "Lawyers are doing the business of their clients: It's the client's business, not the lawyer's business, per se," she said. "It's hard to say to a lawyer that he or she is being asked to restrict the lawyer's business, because the client could always say to the lawyer that it's not your business to restrict. It is really the business of the client that is the critical part of any

lawyer's movement to a firm, and the client makes that decision."

"I think even nonsolicitation is problematic for lawyers, because the Supreme Court has always held the position that the client owns the relationship, not the lawyer," Goldner said. "That's why it was so hard for Pennsylvania to get Rule 1.17 in about the sale of a law practice, because the Supreme Court was going, 'How can you sell a law practice? You don't own the client.'"

(Also, read more about what the Rules of Professional Conduct have to say about noncompetes under Rule 5.6, Restrictions on Right to Practice, at https://bit.ly/Rules-Conduct.)

"A lot of people use noncompete really broadly," he said. "When I prepare or I'm interpreting a noncompete agreement, it's actually three different things. One is literally a noncompete: You can't ply your trade within a certain area over a certain period of time. More importantly, especially for the lawyers and professionals, is nonsolicitation, which is you can't talk to our customers, you can't talk to our clients within a certain area for a certain period of time or you can't solicit them. If they call you, you can talk to them, but you can't go out and call them."

The third consideration is solicitation of employees.

That means, Goldner said, "'You can't leave here and then raid my workforce and steal my staff, my paralegals, my lawyers,' and so forth. Those are all under the name of 'noncompete.' Since the Pennsylvania Supreme Court has exclusive authority to regulate conduct of public affairs, contractually I don't think a lawyer can compel another lawyer not to practice law within a certain area."

"The firm has business, but if the lawyer goes from firm to firm, he or she has to get the client's permission to take the work," Jones said. "It's not like the firm can stop the client's work from leaving, per se. Maybe the really big law firm could argue the client is an institutional client, but the client could always say yay or nay."

"I have represented law firms, and some of them really like noncompetes," Goldner said. "I have told them I don't want to have to take this to court to enforce it, because I think the environment is increasingly hostile to noncompetes."

Generally speaking, the pure noncompete, what Goldner calls the "you-can't-ply-your-trade within this area over a certain period of time" in a pure employment situation, "are increasingly disfavored and are on their way out," he said.

However, Goldner said, if you sell a business, "if I sell you my law firm, I think it's reasonable for you to say you can't now set up across the street and open a new law firm and try and grab your clients back. Noncompetes associated with the sale of a business: that's another story. That's completely reasonable, because you're selling that goodwill, you're selling those relationships, so to try and steal them back is more of a breach of contract in a sale situation," he said.

Little Bargaining Power

For attorneys beginning their career, or transferring from one firm to another, the situation if a noncompete is presented affords them little bargaining power and the attorney believes that he or she must sign.

"When you are a young lawyer, you don't feel like you have a choice, so you sign the thing," Goldner said. "If they slap the thing down on your desk after you've been there for six months, a year, or two years, and they just decided you need to do this and they don't offer you any more consideration, and your employment is under consideration, go ahead and sign that, because it's not enforceable. You have to have adequate consideration for noncompetes. In Pennsylvania, continued employment is not adequate consideration for noncompetes. You can sign that because, ultimately, if you leave and you talk to employment lawyers, they'll tell you that's not an enforceable agreement."

"What we always tell our clients is we need to look at what the noncompete is, they need to know what the situation is, and if there is an alternative potential opportunity with no noncompete or a much less restrictive one, even if perhaps the financial terms are not as good as the other offer: that can absolutely impact decision-making," Abramson said.

No. 1, the attorney has to fully understand what the scope of the agreement is, depending on whatever field that attorney is in, Abramson said.

"If they're new, they should consult with an experienced lawyer in the field first," he said.

No. 2, in terms of just an outright order precluding someone from working in a field or with clients, "I think the courts are going be very reluctant to just outright ban that," Abramson said. "They might fashion some remedy around it, but an outright ban doesn't happen frequently."

Afford to Sign

The important question is: can those who are presented with a noncompete agreement afford not to sign it?

"Part of the problem is that these clients are totally unable to afford legal representation," Lynch said. "Somebody making $12.50 an hour can't possibly pay a lawyer to attend multiple hearings. It does happen occasionally that these get heard in court. The end result is that there is virtually no precedent out there. Low-wage workers can't afford to fight it, so they don't."

But in fields unrelated to law, "it's not an easy thing to tell the shift manager or the regional manager offering you an entry-level job on an hourly wage that you have to go consult with a lawyer about your rights, pursuant to the piece of paper they are asking to sign," Lynch said. "That's an awfully tough thing to do.

"I have not found a case where some court would say whether or not the federal poverty guidelines, poverty level wages can be sufficient consideration for a noncompete," Lynch said. "I would say no, but I have no case law to which I can point.

"I think a very common scenario is that they did sign it, but didn't know what it said, and it wasn't explained to them," he said. "It was part of a stack of papers where they were told sign here, sign here and here, and that's what you had to do to get the job. If you didn't sign, then you simply didn't get the job."

"In a position of a tight employment market, potential employees may not want to push back," Jones said. "I think that's probably true in any tight employment market. It's so hard to find people now that I'd be surprised if employers would not be willing to bargain with people. People need employees right now, in a lot of industries, including ours. Employees have sort of bargaining power these days, from a salary standpoint and from a restrictive covenant standpoint."

Jones said the noncompetes that are ultimately signed have a lot to do with sales positions and adequate compensation. She recalls one instance in which a "manufacturing company that had high-level sales people in different regions was trying to ensure that if sales representatives went out and garnered new business, that they couldn't take it away and work on it themselves, so it was a noncompete to prevent them from going to another company or creating their own new competing company," she said. "They were also being asked to sign a restrictive covenant on nonsolicitation at the same time. You need some consideration for these assurances, so there was an increase in pay/a change in pay structure that allowed them to ask for the restrictive covenants in both instances. An employer is supposed to give you consideration, if it's not for a new position or a new title, then maybe a new compensation plan. You have to get something for what you're giving up, so to speak."

Jones said her firm has litigated restrictive covenants as well as helped negotiate the resolution of either a termination, resignation or separation, "and you have to evaluate if the restrictions are valid and can be enforced," she said. "What are you willing to give them or get from them to give everybody a little bit of freedom moving forward? Certainly, at a higher level, an executive level, you want to make sure these issues have been addressed."

'Look at the Terms'

Jones said her firm will "look at the terms," she said. "Is it an enforceable agreement? Is it reasonable? Does it make sense for both sides? Was it fair for the employer to ask in the first place, because they really are protecting something unique that the employer created? Did they give the employee something in exchange for it, and are the terms reasonable regarding the geography or length of the time the employee is restricted?

"Courts don't want to prevent somebody from working," Jones said. "Judges may say that you can't stop somebody from making a living, but you can put some restrictions in place. It might be unique to the industries,

but I have seen noncompetes stopping somebody from working but literally paying them through the whole period of the noncompete. If you really want to stop them, the best way to stop them is to pay them for it. I've seen it twice I recent years, in a retail environment."

"I have seen multiple cases sometimes in the court of common pleas, sometimes in municipal court, to enforce a noncompete," Lynch said. "I have literally seen a case in which a home health care agency sued a home care worker, saying that she had to stop working, because of the noncompete she had signed, and the court entered a temporary restraining order, preventing her from caring for her own mother.

"If they can sue you to stop you from caring for your own mother, they can sue anybody."

Expand Career Opportunities

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

In a release, the FTC is seeking public comment on the proposed rule, which is based on a preliminary finding that noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act. The proposed rule would apply to independent contractors and anyone who works for an employer, whether paid or unpaid. It would also require employers to rescind existing noncompetes and actively inform workers that they are no longer in effect.

The commission voted 3-1 to publish the Notice of Proposed Rulemaking (NPRM), which is the first step in the FTC's rulemaking process. The NPRM invites the public to submit comments on the proposed rule. The FTC will review the comments and may make changes, in a final rule, based on the comments and on the FTC's further analysis of this issue. The comment period was open through March 20.

In a Jan. 18 feature in the *Legal Intelligencer*, FTC enforcement likely would focus on companies using noncompetes with low-wage workers. According to a Jan. 25 feature in the journal, any ban on noncompetes is more likely to originate in individual states rather than the FTC. The rule is still in its nascent stage, the journal noted, and the final version could look much different after the close of the 60-day public comment period.

"If the FTC has the power to regulate this behavior, which is a hotly disputed issue, it would theoretically, in most settings, make the nonsale settings, make the noncompete invalid," Goldner said. "I would expect any final rule to make an exception for certain types of employees: high-up level executives. For example, the president of Ford Motor Company prevents him or her from becoming president of another car company for six months."

For the FTC ruling to pass, "I think it's going to be a huge battle,"

Abramson said. "We are seeing employers or large companies taking a very hard stance the opposite way on this issue. I think there might be some question whether the FTC could, just on its own, adapt that kind of abolishment without Congress passing actual legislation."

Abramson said California will not enforce a noncompete. Recently, in Massachusetts, there's been some very severe restrictions, and in some other states as well.

"Even if the FTC were to adopt something, I think you will see litigation over whether it has the right to do that on its own without legislation being passed by Congress," he said.

Exceptions to Ruling

Some believe exceptions to the ruling will be made.

"The FTC rule even indicates there's going to be some exceptions for when there's a sale of a business, because of that uniqueness," Jones said.

Would attorneys still sign a noncompete if the FTC ruling fails to pass?

"You're going to sign," Goldner said. "Is it ethical? I don't think law firms should require associates to sign noncompetes. It's better negotiated than litigated."

Goldner said he makes a living enforcing noncompetes.

"I make a living writing them," he said. "I make a living helping clients either enforce them or extricate themselves from them. I think at least the pure noncompete is not a good thing. It only makes sense in a limited set of circumstances, like selling a business or a unique professional in an unusual role.

"Unfortunately, the biggest problem with signing a noncompete, even when someone knows there's potential red flags in them, is what is the person's leverage in the situation, and do they really have an alternative?" Abramson said. "There are some occasions where people, including possibly attorneys, may be out of work for a significant length of time for whatever reason. They have to provide for themselves and their family."

It's a question about looking at the short term versus the long term, he said.

In Pennsylvania, the court decisions have basically evolved over time from case decisions and precedent.

In the end, for an attorney, watch what you sign.

Share your reactions or comments about this feature with Andy Andrews, editor, at Andy.Andrews@pabar.org.