King & Spalding
Client Alert

JANUARY 9, 2023

FTC Cracks Down on Non-Competes

For more information, contact:

Norman Armstrong
+1 202 626 8979
narmstrong@kslaw.com

Jeffrey Spigel
+1 202 626 2626
jspigel@kslaw.com

Emily Marsteller
+1 202 626 2622
emarsteller@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue, NW
Suite 900
Washington, D.C. 20006
Tel: +1 202 737 0500

In his 2021 Executive Order on Promoting Competition in the American Economy, President Biden called on the Federal Trade Commission ("FTC") to "ban or limit non-compete agreements." Last week, the FTC responded by taking legal action against three companies and announcing a proposed rulemaking to ban these agreements, which the FTC considers harmful to workers, innovation, and the competitive marketplace.

The FTC filed complaints against Prudential Security, Inc. as well as the two largest glass food and beverage producers, O-I Glass, Inc. and Ardagh Group, S.A., along with proposed settlements with each of these parties. The Prudential case involves an agreement preventing the company's security guards from working in a competing business within a 100-mile radius of their Prudential job sites, under the threat of a $100,000 fee. O-I Glass's case concerns a one-year prohibition on former employees working for or owning businesses selling similar products or services within the United States. Ardagh imposes a two-year ban on workers doing "the same or substantially similar services" for any competitor in the US, Canada, or Mexico.

In all three cases, FTC prohibited the employers from enforcing, threatening to enforce, or imposing these agreements. These companies also cannot suggest to their employees that they are subject to a non-compete agreement, and they must void any such agreements that they currently hold without penalizing employees. In addition, the companies must provide copies of the order to both past and current employees as well as directors, officers, and employees involved in hiring. For the next ten years, they are required to give "clear and conspicuous notice" to all employees that they may freely seek employment elsewhere without these restrictions. The FTC also requires regular, detailed compliance reports from the companies.

Each consent agreement was approved by a 3-1 vote, with commissioner Christine S. Wilson filing written dissents. She critiqued the decisions for departing from well-established precedent, failing to conduct a reasonableness analysis, and refusing to credit valid business

justifications. She also raised due process concerns, as the companies lacked prior notice that the conduct was unlawful.

These consent agreements are notable for their sweeping use of Section 5 of the Federal Trade Commission Act ("Section 5"). Last year, FTC repealed its then-existing Section 5 guidance and adopted a new policy statement. The statement asserts that Section 5 "reaches beyond" both the Sherman Act and the Clayton Act in the conduct that it covers. It also promises that FTC will use Section 5 not only as an add-on to other antitrust statutes, but also on a "standalone basis." Last week's enforcement actions uphold that promise, and depart from the typical custom of bringing Section 5 claims only in conjunction with other statutes.

Indeed, Chairperson Lina Khan, joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, issued a statement claiming that Section 5 grants the FTC "distinct grounds" to challenge non-competes. They also applauded the consent agreements for harnessing the broad power of Section 5 to disrupt the "cumulative effect of parallel actions." Commissioner Wilson, on the other hand, objected to the Section 5 expansion, warning that it has been "used to condemn conduct summarily as an unfair method of competition based on little more than the assignment of adjectives."

Consistent with these legal actions, the following day the FTC announced a proposed rule that bans non-compete agreements and requires employers to rescind any such agreements that already exist. It defines non-competes broadly to encompass overly broad non-disclosure agreements, as well as clauses imposing unreasonable training expenses on employees who terminate their employment early. The proposed rule also imposes rigorous notice requirements, whereby employers must notify current and former employees in writing that they are no longer subject to non-compete agreements. Notably, though, the proposed rule does not cover non-compete agreements entered into by a seller in connection with the purchase of the seller's business. These types of agreements will continue to remain subject to a rule of reason analysis and generally will be viewed as lawful if they are reasonable in scope. The proposed rule is subject to public comments, which are due within sixty days of the rule's publishing in the Federal Register.

The FTC's proposed rule will affect many businesses, as the FTC estimates that one in five employees is currently subject to a non-compete. As last week's cases show, the FTC will not consider business justifications such as confidentiality or the economics of firm-provided training when litigating these cases. In addition, these agreements will be both outlawed and voided should the proposed rule pass. Employers will then need to consider confidentiality agreements and other measures to protect their interests.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MIAMI	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	