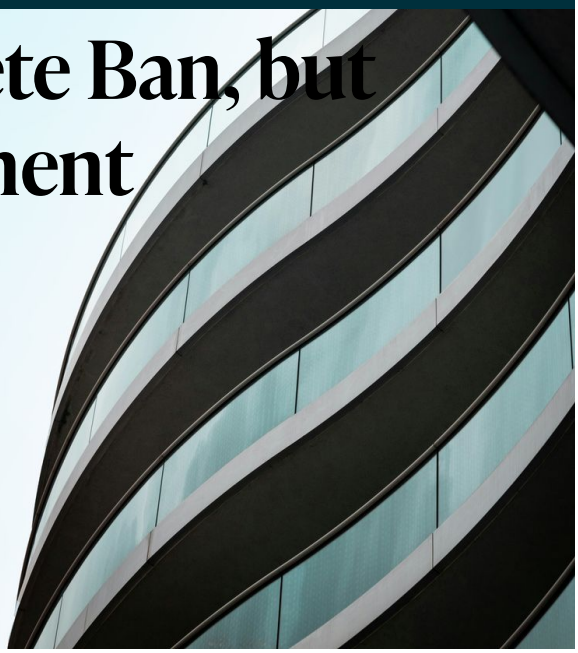
axinn

FTC Drops Its Non-Compete Ban, but Vows Continued Enforcement



6 MIN READ

September 8, 2025, 10:05 PM
By: James W. Attridge, Daniel K. Oakes

The Federal Trade Commission (FTC) has abandoned its defense of the rule proposed by the Biden Administration banning almost all employer-employee non-competes. As a result, the broad non-compete rule is dead.

At the same time, the FTC's Republican majority made clear that the FTC will prioritize aggressive case-by-case enforcement against unreasonable non-compete clauses. As FTC Chair Andrew Ferguson put it, the "failure of the Biden Commission's rule does not mean that employers are free to impose noncompete agreements willy-nilly."

Statements from FTC Commissioners, its recent request for information, and an enforcement action shed light on agreements that the FTC may prioritize for investigation.

Favoring Law Enforcement, Not Rulemaking

The FTC issued its final non-compete rule in April 2024. Then-Commissioner Ferguson and fellow Republican Commissioner Holyoak dissented from the rule but made clear they "would support the Commission's prosecution of anti-competitive non-compete agreements, where the facts and law support such enforcement."

A suit to enjoin the rule followed. In August 2024, a district court in Texas blocked the FTC from enforcing the rule. The FTC appealed, but following Commissioner Ferguson's designation as Chair, sought stays while it determined whether to maintain its appeal. Now, on September 5, 2025, the FTC announced it would dismiss its appeal and accede to the vacatur of its proposed rule. Rather than continue to pursue the Biden Administration's nationwide ban, Chair Ferguson explained the FTC would prioritize case-by-case enforcement by "taking bad actors to court" and sending "warning letters" to "firms in industries plagued by thickets of noncompete agreements . . . urging them to consider abandoning those agreements as the Commission prepares investigations and enforcement actions."

A "Pro-Worker Era" of Antitrust Enforcement

To begin, policing non-compete agreements should be understood as part of a broader effort to promote competition for workers. In February 2025, Chair Ferguson announced a Labor Markets Task Force targeting anticompetitive practices that "harm American workers." Likewise, after a March 2025 meeting, the Teamsters celebrated Antitrust Division head Gail Slater as "the perfect person to lead the DOJ's Antitrust Division into a new pro-worker era." The Antitrust Division has also put labor-market enforcement atop its priorities. After obtaining its first guilty plea in a criminal case involving labor-market collusion, for instance, AAG Slater vowed to "zealously prosecute those who seek to unjustly profit off their employees."

Continuing that focus, the day before the FTC abandoned its non-compete rulemaking, the Commission announced a public Request for Information regarding employer non-competes and an enforcement action to prevent enforcement of one employer's non-compete agreements.

An Enforcement Example and Explanation

In *FTC v. Gateway Services*, the FTC challenged non-compete clauses imposed by the nation's largest pet cremation services company. Gateway's clauses restricted its employees outside of California (where such clauses are prohibited by state law) from working in the pet cremation industry anywhere in the United States for a year after their separation.

The settlement broadly prohibits entering into or enforcing non-compete agreements for ten years, subject to exceptions for: (i) certain covenants entered into in connection with the sale of a business; and (ii) specific individuals whose exclusion Gateway justified, including equity holders, their families, very senior managers, or those with "more unique access to competitively sensitive information."

Chair Ferguson's statement, which was also joined by Commissioner Holyoak, explains why they found Gateway's non-compete clauses "neither reasonable in scope nor justified to protect a legitimate business interest."

Although the clauses had a "limited" one-year duration, the nationwide scope effectively required workers – including those in hourly, relatively low-skill positions whose duties do not require extensive training – to exit the industry within the United States for a year. Gateway also attracted the FTC's attention because it "demanded noncompetes from workers they terminated only weeks later, or in areas where Gateway exited operations," facts Chair

Ferguson cited in concluding their agreements curtailed employees' mobility and negotiating leverage and presented an entry barrier in the pet cremation industry itself.

Enforcement Guidance

Beyond Chair Ferguson and Commissioner Holyoak's statement, Commissioner Meador outlined a proposed framework for analyzing whether a non-compete agreement is reasonably necessary to achieve a legitimate business interest and narrowly tailored toward that end.

That analysis provides helpful guidance for employers using, evaluating, or enforcing non-complete clauses:

Reasonable Scope and Duration: The clause should be no broader in geographic scope, duration, and field of employment than necessary to protect its legitimate interests.

Commissioner Meador suggests the following "may be more likely to present competitive concerns:"

- *Duration*: exceeding one to two years;
- *Geography*: exceeding the employer's current operations or the location(s) where the employee performed their regular duties;
- *Field*: restrictions on an employee's ability to work in industries or professions unrelated or only tangential to their former employer's core business or the employee's specific role.

Similarly, the Commission's RFI emphasizes that employers are more likely to draw scrutiny if they "impose noncompete agreements as a matter of course, simply inserting them into employment contracts without due consideration."

Legitimate Business Justification: Commissioner Meador acknowledges that non-compete clauses can protect legitimate investment in training, the need to safeguard confidential information and proprietary know-how, and encourage internal collaboration. In such a circumstance, non-competes can prevent freeriding "that would otherwise discourage such procompetitive investments" in human capital development and safeguarding trade secrets.

Contextual Factors: The employees' and employers' circumstances also matter.

Starting with the employee, restrictions "tend to be less justified" for low-wage workers than highly-skilled and specialized employees because such employees are less likely to receive employee-specific training or access confidential information. Indeed, the *Gateway* settlement carved out and allowed restrictions in the context of a sale of business, certain equity grants, and covering specified senior employees and employees with unique access to competitively sensitive information.

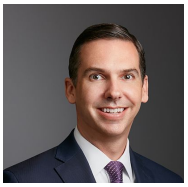
When it comes to the employer's circumstances, the employer's market power over its workers is another key factor because of the potential effect on worker mobility and wage suppression.

The industry at issue also matters. The FTC's RFI highlights healthcare markets, particularly those in rural areas, where limiting employment options may also restrict patients' choice of who provides their medical care or even lead to a shortage of service. The FTC is also on the lookout for non-compete clauses that facilitate collusion, particularly if they are deployed across a distribution network where distributors may also be competitors or if clauses are adopted at the behest of franchisees in the franchise context.

Finally, actual evidence of a clause's pro- or anti-competitive economic effects, such as limiting entry or materially reducing worker mobility, are also key factors. For example, the Commission's RFI asks for examples of employees moving, incurring costs, or hiring a lawyer to deal with their former employer's attempts to enforce their agreement, or limiting their ability to start or operate a small business.

The result is that employers should take care not only when drafting non-compete clauses and assessing those that are in place, but also in determining whether and how they will go about enforcing each clause.

Related People



James W. Attridge

Daniel K. Oakes

Related Services

Antitrust

To subscribe to our publications, click here.

News & Insights

- Informa Antitrust Texas 2025
  SPEAKING ENGAGEMENT **ANTITRUST**
- ACI Forum on Pharma & Biotech Patent Litigation USA 2025
  SPEAKING ENGAGEMENT **INTELLECTUAL PROPERTY**
- MCCA Gala 2025
  SPONSORSHIP **ANTITRUST**
- Centerforce IP Strategy Summit: Palo Alto
  SPEAKING ENGAGEMENT **INTELLECTUAL PROPERTY**
- CCWC 21st Annual Career Strategies Conference
  SPEAKING ENGAGEMENT
- Pro Bono Partnership 28th Anniversary Gala
  SPONSORSHIP **ANTITRUST**

SPONSORSHIP ANTITRUST

- Ronald McDonald House New York Together in Gold Annual Gala
  SPONSORSHIP

- Fordham 52nd Annual Conference on International Antitrust Law and Policy
  SPEAKING ENGAGEMENT **ANTITRUST**

- Kisaco Research Trade Secret Legal Protection Conference 2025
  SPEAKING ENGAGEMENT **INTELLECTUAL PROPERTY**

- SCCE 23rd Annual Compliance & Ethics Institute
  SPEAKING ENGAGEMENT **ANTITRUST**