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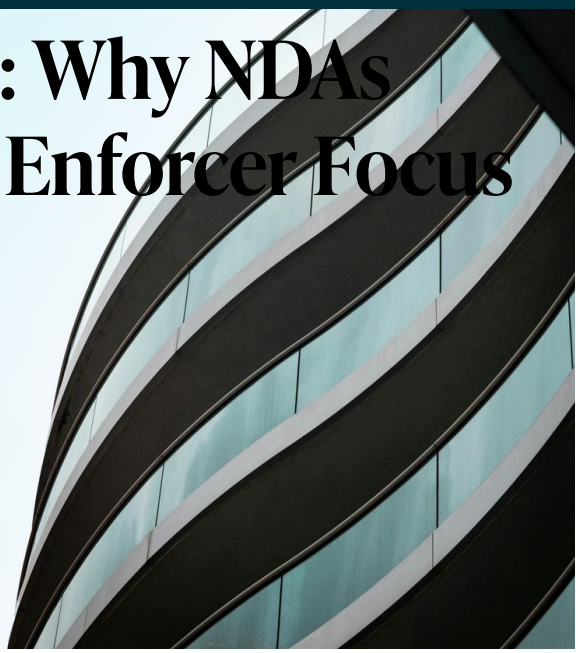
Move Over Non-Competes: Why NDAs May Be the Next Antitrust Enforcer Focus



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By: James W. Attridge

On August 20, a federal judge issued a nationwide injunction blocking the FTC's proposed non-compete clause rulemaking that had been set to go into effect today. Had it gone into effect (and it may still at some point, as the FTC is "seriously considering" an appeal), the proposed rulemaking would declare most non-compete clauses an unfair method of competition. However, its definition of non-compete clauses "does not categorically prohibit" non-disclosure agreements (NDAs) that the FTC found "do not impose the same burden on competition as non-competes." Indeed, the FTC explained that "nothing in the final rule prevents employers from entering new NDAs with workers."

Yet the enforcement community – and soon perhaps the *antitrust* enforcement community – has its sights on NDAs for another reason that the business, bar, and compliance communities should take note of.

In late July, the Consumer Financial Protection Bureau (CFPB) (headed by former FTC Commissioner Rohit Chopra) issued a Circular "to remind regulators and the public" that CFPB-regulated businesses that "require their employees to enter into broad confidentiality agreements that do not clearly permit communications with government enforcement agencies or cooperation with law enforcement risk" violating bars against whistleblower discrimination and can also undermine the government's ability to enforce the law. Specifically, the CFPB argues that whistleblower protections contained in its Consumer Financial

Protection Act (CFPA) prohibit employers from terminating or "in any other way *discriminat[ing] against*" employees covered by the statute for engaging in whistleblower activity.

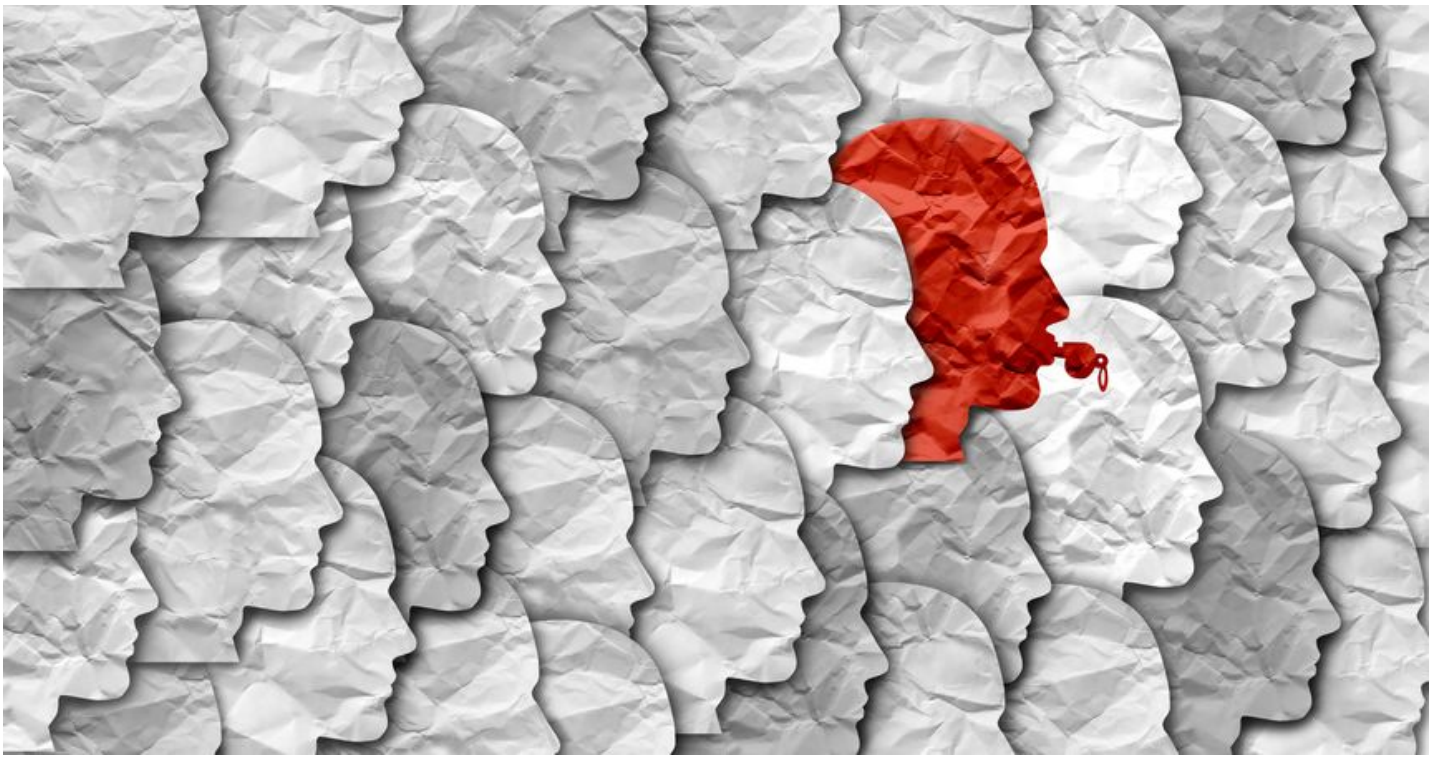
Since December 2020, the Criminal Antitrust Anti-Retaliation Act (CAARA) has provided whistleblower protections for employees who report criminal antitrust violations. CAARA generally prohibits employers from "discharg[ing]," "threaten[ing], or "in any other manner *discriminat[ing] against*" employees who provide the federal government with information relating to violations of Section 1 of the Sherman Act, another criminal violation committed in conjunction with a violation of Section 1, or DOJ's investigation into the potential antitrust violation. If OSHA finds the employer violated CAARA, it can order the employer to pay lost wages, put the employee back to work, restore benefits, and pay litigation costs and attorney fees. *See* 15 U.S.C. § 7a-3(c).

The CFPB contends that discrimination, in context of its and other whistleblower statutes, broadly prohibits employers from actions that "prevent or dissuade employees from whistleblowing or to punish them for whistleblowing." Likewise, last year, the FTC published an analysis maintaining that confidentiality and non-disclosure agreements that chill individuals' willingness to speak voluntarily with FTC staff "are contrary to public policy and therefore void and unenforceable."

So what, in the CFPB's view, should employers be careful to avoid?

- The CFPB's stance is that employers should avoid clauses that employees perceive – or misperceive – as a threat against reporting information or cooperating in a government investigation. That risk is heightened if an employer proposes an NDA in connection with an internal investigation. Instead, the CFPB suggests ensuring agreements expressly permit both communicating and cooperating with the government.

- Employers eyed by competition enforcers should expect similar scrutiny, and draft NDAs to avoid employees' misconceptions and anticipate regulators' skepticism.



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