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~~THE CURRENT STATE OF NON COMPETES: ARE THEY STILL ENFORCEABLE?~~
TUTSA DAMAGES

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I. Introduction

When properly used, non-compete agreements provide employers a means of protecting legitimate business interests by reasonably restricting the post-employment activities of former employees entrusted with the employer's confidential information and associated with the employer's goodwill. When improperly used, non-compete agreements are a plague on innovation and market regulation, unfairly denying future employers and present consumers the benefits of the talents of the individual subject to the noncompete.

Under the Biden administration, the Federal Trade Commission ("FTC") sought to ban (effectively) non-competes, a move quickly restrained by the courts given the regulatory and state-rights issues involved. In the wake of the election, the FTC's interest in banning post-employment, non-competition agreements has evolved into something less aggressive but nevertheless present, leaving states as the principal regulators of the enforceability and enforcement of such agreements pending further action (if any) from the federal government. And while state regulation has thus remained significant, it has not changed radically in the last year.

What has changed, however, is the apparent increase in the use of high-dollar trade secret claims as a means of protecting an employer's sensitive information, independent of the use of any non-compete. Although the trend began prior to the FTC's rule, the uncertainty created by that rule certainly fueled a continuation of the trend. Indeed, courts and juries have been making headlines in recent years with large damages awards in cases involving claims for trade secret misappropriation and breach of fiduciary duty, in addition to traditional claims based on non-competition agreements.

This paper provides (1) a summary of recent FTC activity and litigation relating to the effort to curtail the enforceability of non-competes, (2) a general overview of the current enforceability of non-competes across five key states, and (3) a deeper dive into the available legal arsenal for employers to address disloyalty, theft of information, and unfair competition including the framework of damage models in trade secrets and fiduciary duty cases.

II. The FTC's Evolving Recent Efforts Regulating Non-Compete Agreements

On April 23, 2024, the Biden-era FTC under then-Chair Lina Khan voted 3–2 to adopt a final rule that would have banned nearly all noncompete agreements in employment.[1] The vote split along party lines, with both Republican commissioners voting against it. *Id*. On May 7, 2024, the Federal Trade Commission (FTC) published the final text of its Non-Compete Clause Rule (the "Rule") banning most non-compete agreements. Non-Compete Clause Rule 89 FR 38342 (May 7, 2024). In simple terms, the Rule banned the vast majority of non-competition agreements as an "unfair method of competition" under the Federal Trade Commission Act (FTC Act). In a dissenting statement issued on June 28, 2024, then-Member Andrews Ferguson argued the rule was unlawful and "by far the most extraordinary assertion of authority in the Commission's history."[2] As anticipated, the Rule faced immediate legal challenges. On August 20, 2024, U.S. District Judge Ada Brown in the Northern

[1] https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes
[2] https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf

Title search: Where Are We Now with Non-Competes?

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