# A New Dawn for the FTC: Eschewing Traditional Antitrust Laws to Challenge Non-Competes Using Section 5 Powers

**Minding Your Business** on **January 12, 2023**

The FTC set its sights on non-compete agreements as it debuts its powers under Section 5 of the FTC Act—demanding more of employers than is required under traditional antitrust laws.

Through Section 5 of the FTC Act, Congress affords the FTC the unique ability to identify and police against "unfair methods of competition," beyond the contours of other antitrust statutes—namely, the Sherman and Clayton Acts. In the past, the FTC's policy has been to employ Section 5 in a limited set of circumstances invoking "the promotion of consumer welfare." In a statement made on November 10, 2022, the FTC shed its previous policy in favor of a more expansive and amorphous view of its statutory authority under Section 5. According to the FTC's "non-exclusive set of examples of conduct," unfair methods of competition include: (i) mergers and exclusive dealing arrangements that "have the tendency to ripen into violations of the antitrust laws;" (ii) "practices that facilitate tacit coordination;" and (iii) "parallel exclusionary conduct that may cause aggregate harm." As a result of the FTC's "know it when you see it" approach, practitioners and professionals were left in the dark as to how the FTC would choose to exercise its Section 5 authority.

But the FTC recently shed light on the exercise its Section 5 powers: bringing three complaints to halt non-compete agreements, which as FTC Chair Lina M. Khan put it, “can block workers from securing higher wages and prevent businesses from being able to compete.” The FTC sued the two largest manufacturers of glass food and beverage containers in the United States, O-I Glass, Inc. and Ardagh Group S.A., as well as affiliated companies Prudential Security, Inc. and Prudential Command Inc. and their owners. These three actions are the first instance of the FTC suing to block non-compete restrictions.  In each complaint, the FTC alleges that the non-compete “constitutes an unfair method of competition with a tendency or likelihood to harm competition [and] consumers. . . in violation of Section 5 . . .”  For each case, the FTC ordered respondents to cease enforcing, threatening to enforce, or imposing non-compete agreements, as well as notify covered individuals that they would no longer be bound by the agreements. The details of the complaints are as follows:

- With respect to Ardaugh and O-I glass, the FTC pointed to the concentrated nature of the glass container industry, as well as “substantial barriers to entry and expansion, including the ability to identify and employ personnel with skills and experience in glass container manufacturing.” The complaints added that, the agreements have the tendency or likely effect of “(i) impeding the entry and expansion of rivals in the glass container industry, (ii) reducing employee mobility, and (iii) causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees.”
- In the Prudential complaint, the FTC focused on the fact that Prudential and its owners took advantage of unequal bargaining power—particularly with respect to low-wage security guard employees.  Indeed, the Prudential non-compete barred employment with a competing business “within a one hundred (100) mile radius” of the employee’s primary jobsite, and included a $100,000 liquidated damages provision, despite the fact that many of the covered workers earned only slightly over minimum wage and were not offered any additional compensation in exchange for signing the non-compete.  In this case, the FTC noted that “Respondents repeatedly used their Non-Compete Agreements to block their employees from accepting alternative employment, including employment at significantly higher wages . . .”

With these actions, the FTC is giving us a taste of its reclaimed ability to expansively enforce Section 5. But the legitimacy of this ability remains to be seen—much less the consequences of such a dramatic departure from traditional antitrust enforcement. The FTC's actions could be viewed as a first step towards "federalizing" traditionally state-governed non-compete laws. But the path forward isn't clear. None of the three non-compete complaints were actually litigated. Future FTC targets could choose to contest the FTC's exercise of Section 5 authority, pointing to any of the number of issues cited by Commissioner Christine Wilson in her dissent from the issuance of the November policy statement. Wilson argued that the FTC's renewed embrace of its Section 5 powers improperly repudiates both the consumer welfare standard and the rule of reason, and—instead of providing businesses with meaningful guidance upon which to structure their conduct—the policy "announces that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful." And courts may well agree. The Second Circuit has instructed that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability." *E.I. du Pont de Nemours & Co. v. Federal Trade Commission*.

That being said, there are some things we can predict: it is only a matter of time before the FTC expands its focus to other industries, including entertainment, life sciences, and healthcare. Tellingly, the very day after the FTC filed these complaints, it proposed an expansive new rule that would impose a near-complete ban on the use of non-competes by employers.

For a more detailed breakdown of the proposed rule, please visit our sister blog: Law and the Workplace.

In the meantime, employers should reflect on their approaches to non-compete provisions and other restrictive covenants intended to protect trade secrets and other valuable business assets, such as non-disclosure agreements and non-solicitation agreements.

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