How the FTC's Non-Compete Rule Will Impact Commercial Insurers

Legal experts weigh in on the impact that the commission's new rule banning non-compete agreements will have on commercial P&C insurers — provided, of course, that it goes into effect.

By James Comtois | April 29, 2024

Now that the **Federal Trade Commission** has voted to ban most non-compete agreements, what does this mean for the commercial P&C insurance industry?

The new rule, which the commission passed on Tuesday by a vote of 3 to 2, bans new non-competes with all workers, including senior executives after the effective date. The new rule

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could impact the largest commercial carriers, some of whom are commencing litigation centered on NCAs. The most immediate effect should be lower retention rates at large firms, with sales and marketing professionals ranking as the biggest likely flight risks.

FTC HQ in Washington, D.C./Photo Credit: Carol M. Highsmith collection, in public domain

P&C Specialist: Commercial reached out to legal experts to see how the rule will impact the space (provided it doesn't get struck down from litigation).

"If the new FTC rule survives legal challenges and goes into effect, it will have significant and immediate impacts on the commercial insurance and brokerage industries," said **Timothy Brinks**, a litigation partner in the New Orleans office at **Adams and Reese LLP**. "Non-compete agreements are common in these

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industries, and this new rule will not only ban new non-competes, but also void most existing non-competes."

The rule currently contains exceptions for non-competes arising from the sale of a business and for existing non-competes with employees who qualify as "senior executives." (A "senior executive" is defined by the rule as an employee in a policy-making position that earns more than $151,164 a year). And while the FTC's rule bans NCAs, it does not prohibit non-disclosure or non-solicitation agreements.

So, Brinks suggested that insurers "should closely review both their new and existing employment agreements with this new FTC rule in mind, and consider bolstering these agreements with additional protections, such as trade secret and non-solicitation restrictions and confidentiality agreements that do not run afoul of the new FTC rule."

Rod Ganske, a senior attorney with the law firm **Lawrence & Bundy LLC**, shared this sentiment in a separate phone interview.

"The rule doesn't ban non-solicitation clauses on its face," Ganske said. "So, now would be a good time for insurers to look and see if they're protected in the way that they want through non-solicitation clauses."

Separately, sister publication *FundFire* — which covers the asset management industry — reported Monday that the rule could lead to the rise of not only non-solicitation agreements, but potentially "elaborate" and "draconian" non-disclosure pacts as a potential means to prevent executives from leaving firms.

However, firms may struggle to craft NDAs and non-solicitation agreements in such ways that they are broad enough to protect the company's interests "but not so broad that they would trip over the rule," **K&L Gates** partner **Ed Dartley** told *FundFire*. Indeed, the FTC has warned that it will deem agreements that effectively act as non-

competes invalid, thus putting firms in a tough situation if they get too aggressive with these pacts, the attorney said.

Ganske added that within the insurance industry, given the higher executive pay levels found in the industry, "you're going to have more people that may qualify for the exception under senior executives."

Eric S. Beane, a partner at the Los Angeles-based law firm **Foundation Law Group LLP**, where he leads the firm's labor and employment group, also believes that the rule could have a big impact on the insurance industry, given its "very competitive nature."

From a sales and marketing perspective, Beane said that banning non-competes would "allow more movement flexibility" from the senior executives in the industry, "and the big players in the space will have more trouble retaining employees than they do now."

That said, Beane doesn't think the rule as it's written now will go into effect.

"I think the odds of it going into effect 120 days are very, very slim," Beane said. "I would suspect if this rule does go into effect, it will be potentially narrowed down from where it's at now."

On the brokerage side, **Wes Bissett**, senior government affairs counsel at the **Independent Insurance Agents & Brokers of America (Big "I")**, told *P&C Specialist* that the impact of this new rule, should it go into effect, won't "be as significant as it would have been under the original proposal." In particular, the commission "cleaned up" parts of the rule that would have prevented business owners from using non-competes pact during the time their ventures are sold.

However, Bissett noted that "there is a general concern in the insurance world about the precedent that's been set here." After all, if the FTC can grant itself this kind of authority through a law that's more than 100 years old, then "what are the bounds of their authority? "

The FTC estimates that banning NCAs will result in up to $194 billion in reduced healthcare costs, more than 8,500 additional new businesses created each year, and up to $488 billion in increased wages for workers over the next decade.

Business groups, including the **U.S. Chamber of Commerce**, are suing the commission, calling the new rule "unnecessary and unlawful," and a "blatant power grab" from the commission.

In response to the suit led by the Chamber of Commerce, FTC spokesman **Douglas Farrar** issued the following statement:

"Our legal authority is crystal clear. In the FTC Act, Congress specifically 'empowered and directed' the FTC to prevent 'unfair methods of competition' and to 'make rules and regulations for the purposes of carrying out the provisions of' the FTC Act. This authority has repeatedly been upheld by courts and reaffirmed by Congress. Addressing non-competes that curtail Americans' economic freedom is at the very heart of our mandate, and we look forward to winning in court."

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