Clients&FriendsAlert

THE FEDERAL TRADE COMMISSION "STRONGLY ENCOURAGE[S] ALL EMPLOYERS … TO REVIEW THEIR CONTRACTS CLOSELY, TO ENSURE THAT ANY RESTRICTIONS ON EMPLOYEE MOBILITY ARE IN FULL COMPLIANCE WITH THE LAW."

After First Non-Compete Enforcement Action, FTC Requests That Competitors and Employees Identify Firms Using Illegal Non-Compete Agreements in Support of Future FTC Enforcement Targeting and Issues Warning Letters to Large Healthcare Employers to "Conduct a Comprehensive Review of Their Employment Contracts."

September 17, 2025

The rule prohibiting the enforcement and use of employer-employee non-compete agreements ("Rule") is dead (for the foreseeable future). Last week, the Federal Trade Commission ("FTC" or "Commission") "took steps to dismiss its appeals in *Ryan LLC v. FTC* (5th Cir.) and *Properties of the Villages v. FTC* (11th Cir.), and to accede to the vacatur of the Non-Compete Clause Rule."[1] The appellate courts have granted the Commission's requests for dismissal.

Notwithstanding the Commission's dismissal of its appeals of the unfavorable decisions with respect to the Rule, FTC Chairman Andrew Ferguson indicated that the Commission is not backing off from an interest in non-competes. The Commission, he says, will "protect American workers by … patrolling … markets for specific anticompetitive conduct that hurts American … workers and taking bad actors to court."[2]

The FTC took three steps last week to advance this position:

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[1] Press Release, *Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule* (Sept. 5, 2025). The scope of the non-compete rule and its litigation history is discussed in previous Cadwalader client alerts and articles: *FTC Appeals Recent Losses in Non-Compete Rule Litigation* (Oct. 2024); *FTC's Rule Banning Non-Compete Agreements is Set Aside Nationwide* (Sept. 2024); *District Court Issues Limited Preliminary Injunction in First Challenge to FTC Rule Prohibiting Use and Enforcement of Non-Compete Clauses* (July 10, 2024); and *FTC Adopts Broad Ban on the Use of Non-Compete Clauses in Employment Agreements* (Apr. 24, 2024). It seems certainly plausible that another Democratic Administration will attempt to revive the Rule as previously advanced or with changes.

[2] Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, Ryan LLC v. FTC, at 3 (Sept. 5, 2025).

1. It challenged Gateway Services' use of employee non-compete agreements across its pet cremation business.

2. It encouraged "members of the public including current and former employers restricted by noncompete agreements, and employers facing hiring difficulties due to a rival's noncompete agreements . . . to share information" with the FTC to "uproot the worst offenders and restore fairness to the American labor market."[3] In support, it released an extensive request for information on the use of non-competes, "to understand which specific employers continue to impose noncompete agreements." (Responses to the request are due no later than November 3, 2025.)

3. It issued warning letters to "several large healthcare employers and staffing firms urging them to conduct a comprehensive review of their employment agreements – including any non-competes or other restrictive agreements – to ensure they are appropriately tailored and comply with the law."[4] The letter noted that "available information suggests that many healthcare employers and staffing companies include noncompete agreements in employment contracts that may unreasonably limit employment options for vital roles like nurses, physicians, and other medical professions."

For those businesses who believed that the Rule and the Biden Administration's enforcement actions prior to adoption of the Rule were overbroad and undermined the legitimate use of non-compete agreements in the employer-employee relationship, the actions of the Trump Administration will raise similar concerns and may require significant adjustments to the use of non-compete agreements in employment contracts. The Trump Administration's recent enforcement action, statements, and request for information indicate that it is likely to move more aggressively than the Biden Administration to identify, investigate and prohibit non-compete agreements. The recent record suggests that the Commission will treat non-compete agreements as "inherently suspect" and require employers to show that any legitimate benefit from the use of non-compete agreements cannot be obtained by a less restrictive alternative. This burden is inconsistent with Supreme Court Sherman Act case law. The Commission has adopted an expansive and Commission-

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[3] Press Release, Federal Trade Commission Issues Request for Information on Employee Noncompete Agreements (Sept. 4, 2025). Federal Trade Commission, Request for Information Regarding Employer Noncompete Agreements (Sept. 4, 2025). The FTC was interested in the effects of non-compete agreements during the first Trump Administration. *See, e.g.,* Federal Trade Commission, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020).

[4] Press Release, FTC Chairman Ferguson Issues Noncompete Warning Letters to Healthcare Employers and Staffing Companies (Sept. 10, 2025).

friendly interpretation of the application of Section 5's prohibition of unfair methods of competition to non-compete agreements.

We strongly suggest that employers take the FTC's advice: Employers who use non-compete agreements should review the scope and breadth of those agreements to confirm that they are consistent with applicable law, including the Commission's aggressive interpretation of Section 5.

First Trump Administration Non-Compete Enforcement Action: Gateway Services, Inc.

In Gateway Services, Inc. ("Gateway" or "company"), the Commission alleged that the company's requirement that all employees (except those in California) agree to a 12-month post-employment covenant not to compete was an unfair method of competition and prohibited by Section 5 of the FTC Act.[5] Gateway entered into non-compete agreements without any individualized consideration of an employee's role. According to the Commission, non-competes were used with highly compensated executives and with hourly workers (including facility-level laborers[6]).

The Commission's proposed Decision and Order ("Order") settling its complaint:

- Prohibits Gateway from entering into, maintaining, enforcing (or threatening to enforce) a "Covered Non-Compete Agreement" with a "Covered Employee."

- Prohibits Gateway from communicating to a Covered Employee or any prospective or current employer of a Covered Employee that the Covered Employee is subject to a Covered Non-Compete Agreement.

- Prohibits Gateway from preventing a Covered Employee from "soliciting current or prospective customers, except with respect to those current or prospective customers with whom the Covered Employee, in the last 12

[5] 15 U.S.C. §45. Gateway is a pet cremation company that operates throughout the United States and Canada, with approximately 2,000 U.S. employees (including approximately 1,800 employees subject to the non-compete agreements), and with over 100 locations across the United States and Canada. Proposed Complaint, Gateway Services, Inc. (released Sept. 4, 2025), at ¶¶ 7, 9.

[6] Facility-level laborers include persons performing "everyday functions at cremation facilities, such as operating incinerators and route drivers who pick up deceased pets from veterinary clinics. Hourly workers "account for the vast majority of [Gateway's] U.S. based employees subject to Non-Compete Agreements." See Analysis to Aid Public Comment, Gateway Services, Inc. (released Sept. 4, 202), at 2.

months of his or her employment by [Gateway], had direct contract or personally provided service."

- Requires Gateway to cease enforcing all existing Covered Non-Compete Agreements.
- Requires Gateway not require any Covered Employee who is a party to an existing Covered Non-Compete Agreement in the United States to pay any fees or penalties relating to a Covered Non-Compete Agreement.
- Restricts the use of non-competes in the sale of a business by limiting their use to persons with an equity stake in the business being sold.[7]
- Contains substantial access, compliance, notice, and reporting obligations, consistent with those of other FTC Orders.[8]
- Runs for ten years.

A Covered Employee is:

> A Person employed by [Gateway], previously employed by [Gateway] during the previous one year prior to the date that the Order is issued, or in the process of being employed by [Gateway], in the United States, including third-party contractors.[9]

A Covered Non-Compete Agreement is:

> An Agreement [agreement, contract, understanding, or provision or term thereof, whether express or implied, written or unwritten] between [Gateway] and a Covered Employee that restricts or restrains the right or ability of the Covered Employee to seek or accept employment with any Person

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[7] Proposed Decision and Order, Gateway Services, Inc. (released Sept. 4, 2025), § I.G. "Nothing in the definition of Covered Non-Compete Agreement prohibits [Gateway] from entering non-compete agreements in conjunction with the sale of a business, *provided that the individuals subject to such an agreement have a pre-existing equity interest in the business being sold.*" (emphasis added).

[8] The prohibitions and requirements are set out at § II of the Proposed Decision and Order, Gateway Services, Inc. (released Sept. 4, 2025). The access, compliance, notice, and reporting obligations are set out at § III-VII.

[9] Proposed Decision and Order, Gateway Services, Inc., § I.F.

> [including corporations, partnerships, unincorporated entities, or a natural person], to operate a business, or otherwise compete with [Gateway].[10]

However, a Covered Non-Compete Agreement does not include:

> Agreements containing a non-competition covenant entered into with [Gateway's] director, officer, or senior employee, *in conjunction with the grant of equity or equity-based interests in [Gateway].*[11]

Interested persons can provide comments on the proposed Order through October 10, 2025 at regulations.gov.

The Commission's Analysis of Gateway's Non-Compete Agreements and Subsequent Commissioner Statements Suggests the Commission Will Treat Non-Competes as "Inherently Suspect."

The Commission's analysis of the competitive effects of the Gateway non-compete agreements was limited but differs slightly from the analysis articulated in the Biden Administration's non-compete enforcement actions.[12] At the time, those enforcement actions were criticized by the one Republican member of the Commission as insufficiently pleading to allege an antitrust violation.[13] The complaint in Gateway does not set forth per se illegality for non-competes under Section 5, but the bar which the Commission set for

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[10] Proposed Decision and Order, Gateway Services, Inc., §I.G. The Complaint defined a Non-Compete Agreement as "contract terms that, following the conclusion of a worker's employment with one employer, restrict the worker's freedom to accept employment with competing businesses or otherwise to compete with the former employer for a period of 12 months post-employment." Proposed Complaint, Gateway Services, Inc. at ¶1. The proposed Order prohibited Covered Non-Compete Agreements without regard to length of term.

[11] Proposed Decision and Order, Gateway Services, Inc., §I.G.

[12] Complaint, Anchor Glass Container Corp. (May 18, 2023); Complaint, Prudential Security, Inc. (Feb. 23, 2023); Complaint, Ardagh Group S.A. (Feb. 21, 2023); and Complaint, O-I Glass Inc. (Feb. 21, 2023).

[13] Dissenting Statement of Commissioner Christine S. Wilson, Anchor Glass Container Corp. (Mar. 14, 2023) ((complaint alleges that the use of non-compete agreements has a tendency to harm competition and workers, but fails to provide facts to support the hypothesized outcome," "does not make factual allegations regarding the inability of a competing rival in the glass container industry to enter or expand," and "does not identify a relevant market for particular types of labor and fails to allege a market effect on wages or other terms of employment"); Dissenting Statement of Commissioner Christine S. Wilson, Prudential Security (Jan. 4. 2023) at 1-2 ("complaint offers no evidence of any anticompetitive effect in any relevant market" and offers only a conclusory assertion that any possible legitimate objectives … could have been achieved through significantly means"); Dissenting Statement of Commissioner Christine S. Wilson, O-I Glass and Ardagh Group (Jan. 4, 2023) at 3 ("the complaints described in detail the barriers to entry in the glass container industry but did not reference the difficulty of obtaining experienced employees" and "do not identify a relevant market for skilled labor as an input to glass container manufacturing, and fail to allege a market effect on wages or other terms of employment").

showing competitive harm sufficient to support an unfair method of competition claim is very low.

Gateway "recognize[d] that Non-Compete Agreements for employees reduce competitive pressures" and viewed them "as important in suppressing competition, not just for employees it might terminate but also for those it intended to retain."[14] According to the Commission, the company also used them "as a direct response to competitive threats in one market – responding to the entry of a competing pet cremation business by executing Non-Compete Agreements with employees not already subject to [such] agreements, including hourly employees."[15] In alleging competitive harm, the Commission's complaint identified the Non-Compete Agreements as "anticompetitive because they alter[ed] the bargaining position between employees and Gateway," "because they have the likely purpose and effect of suppressing competition by impeding the entry and expansion of Gateway's competitors in the pet cremation services industry," and "have the likely purpose and effect of suppressing competition by preventing or discouraging Gateway employees from opening competing pet cremation businesses."[16] The complaint alleges harm to both workers – lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees – and, arguably, harm to current competition in the pet cremation industry.[17] The Commission also believed that "any legitimate objectives" of the Non-Compete Agreements "could have been achieved through significantly less restrictive means."[18] Very similar allegations, with similarly limited factual foundation, are included in the Biden Administration complaints.[19]

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[14] Complaint, Gateway Services, Inc., at ¶¶ 12-13.

[15] Complaint, Gateway Services, Inc., at ¶¶ 14. The earlier complaints, referenced in footnote 11, did not have a similar factual allegation.

[16] Proposed Complaint, Gateway Services, Inc., at ¶¶ 12-17.

[17] See Analysis to Aid Public Comment, Gateway Services, at 2 (interpreting complaint).

[18] Proposed Complaint, Gateway Services, Inc., at ¶18. In the earlier Commission enforcement actions, the Commission believed the same. See Complaint, Anchor Glass Container Corp. (May 18, 2023) at ¶ 11 (legitimate objectives could have been achieved through significantly less restrictive means, including by entering into confidentiality agreements); Complaint, Ardagh Group S.A. (Feb. 21, 2023) at ¶ 11 (same); Complaint, O-I Glass Inc. (Feb. 21, 2023) at ¶9 (same); Complaint, Prudential Security, Inc. (Feb. 23, 2023) at ¶ 26.

[19] See Complaint, Anchor Glass Container Corp. (May 18, 2023) at ¶ 10 (tendency or likely effect of harming competition consumers and workers by impeding the entry and expansion of rivals in the glass container industry, reducing employer mobility and causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees); Complaint, Ardagh Group S.A. (Feb. 21, 2023) at ¶ 10 (same); Complaint, O-I Glass Inc. (Feb. 21, 2023) at ¶ 8 (same); and Analysis to Aid Public Comment, O-I Glass and Ardagh Group at 4 ("Restrictions typically result from employers' outsized bargaining power compared to that of employees. And, by reducing workers' negotiating leverage vis-à-vis their current employers, Non-Compete Restrictions tend to impair worker's ability to negotiate for better pay and working conditions."). See also Complaint, Prudential Security, Inc. (Feb. 23, 2023) at ¶¶ 24,25 (use of non-compete agreements interfered with competition and forced employees to accept significantly lower wages and less favorable working conditions;

The Commission did not allege that Gateway had market power in any labor market, nor in any market related to its operation of pet cremation facilities. It did not allege that the markets that Gateway operated in were concentrated.[20] Perhaps because it could not show or provide indicia of market power, the Commission did not allege that Gateway's conduct was, or had the effect of, restraining competition consistent with a Sherman Act Section 1 claim. On the facts, it could not allege that the non-compete agreements allowed Gateway to obtain or maintain a monopoly position or created a reasonable probability of monopolization of a relevant market, under Section 2 of the Sherman Act. The Commission could only allege a "stand-alone" violation of Section 5's prohibition of unfair methods of competition – a claim insufficient to meet the requirements of the Sherman Act but consistent with the Commission's Policy Statement Regarding the Scope of Unfair Methods of Competition.[21]

Chairman Ferguson characterizes the analysis the Commission will apply to non-compete agreements as like the reasonableness test applied by state courts when assessing the lawfulness of non-compete agreements.[22] This, he suggests, is similar to antitrust law's rule of reason. But the rule of reason generally requires an analysis or showing of market power, either indirectly through market shares, or directly, through anticompetitive effects in a relevant market, before concluding a restraint in that market is not reasonable;[23] this is especially true with respect to vertical restraints.[24] Here, the Commission alleged no relevant

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because of the unequal bargaining power between employer and employee, employer was able to impose onerous non-compete agreements on employees). In Gateway, the complaint alleged that the non-compete agreements altered the bargaining power between employer and employees; the earlier complaints were slightly different, alleging that there was unequal bargaining power between employers and employees, and that allowed the employer to impose non-compete agreements on the employee.

[20] The "glass container" complaints all alleged that the industry was concentrated and substantial barriers to entry and expansion, including the ability to identify and employ personnel with skills and experience in glass container making. See Complaint, Anchor Glass Container Corp. (May 18, 2023) at ¶ 8; Complaint, Ardagh Group S.A. (Feb. 21, 2023) ¶ 8; Complaint, O-I Glass Inc. (Feb. 21, 2023) at ¶6. The Commission did not allege any of the respondents had market power in any relevant market, for labor or for end-products (or services) in these matters.

[21] The same position was adopted in the four Biden Administration's FTC non-compete enforcement actions. See also Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022).

[22] Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, In the Matter of Gateway Pet Memorial Services (Sept. 4, 2025) at 5-6.

[23] *NCAA v. Alston*, 594 U.S. 69 (2021) ("Determining whether a restraint is undue for purposes of the Sherman Act presumptively calls for what we have described as a rule of reason analysis. That manner of analysis generally requires a court to conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition.") (internal quotations omitted).

[24] *Ohio v. American Express*, 585 US 529, 541 (2018) (vertical restraints are assessed under the rule of reason, and "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market".) An employer-employee, non-compete agreement is a vertical restraint. A court, in reviewing a non-

market, and made no showing of competitive harm. **The Chairman and the Commission are applying a lower standard to the review of non-compete agreements than is required in a Sherman Act restraints case.**

Commissioner Meador Rejects a Requirement to Show Market Power to Prohibit the Use of Non-Compete Agreements and Proposes a Rebuttable Presumption of Illegality.

Commissioner Meador, in a separate statement, rejected the need for the Commission to show market power before prohibiting the use of non-compete agreements as an unfair method of competition.[25] Section 5 can reach conduct that has "adverse economic consequences on … employees … absent traditional showings of market power or structural market harms" and "offers a complementary approach" that shifts the analysis from a market power analysis and "precisely quantifiable economic effects" to "a more holistic analysis" of "problematic incentives and outcomes." It is an analysis "alongside" – not within – "Section 1 and Section 2 of the Sherman Act."

In effectuating this analysis, Commissioner Meador puts the burden on the respondent/defendant to defend the legality of the non-compete:

> [A]n employer [the respondent/defendant] must demonstrate that the noncompete is reasonably necessary to prevent harm from materializing and, in turn, that narrower restraints (*e.g.*, non-disclosure agreements, customer non-solicitation clauses, asset use restrictions, intellectual property protections, etc.) are insufficient to address the potential harm to the employer's business interests. … This approach would be more akin to treating noncompetes as being subject to a 'rebuttable presumption' of illegality, with the employer bearing the burden to demonstrate that the noncompete is reasonably necessary to achieve legitimate business interests and narrowly tailored toward that end.

Like Chairman Ferguson's approach, Commissioner Meador's approach illustrates the Commission's aggressiveness. While Sherman Act case law is muddled on the question of who has the burden of showing a restraint meets the least restrictive alternative test, recent Supreme Court law places it on the plaintiff. In *NCAA v. Alston*, 594 U.S. 69 (2021) and *Ohio v. American Express*, 585 US 529 (2018), the Supreme Court recognized that it is the

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compete under the Sherman Act would likely allow an employee to show an anticompetitive effect in a market for a class of labor.

[25] Statement of Commissioner Mark R. Meador, In the Matter of Non-Compete Clauses (Sept. 5, 2025).

plaintiff's burden, not the defendant's burden.[26] The framework the FTC is developing under Section 5 of the FTC Act shifts the burden to the respondent/defendant to show that there is no less restrictive alternative to the use of a non-compete agreement. This is likely to be difficult, especially in the case of non-senior executives and lower-wage employees.

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If you are interested in commenting on the FTC's settlement in the Gateway matter or conducting a comprehensive review of your portfolio of employee non-compete agreements, the following Cadwalader attorneys have experience in applying Section 5 to non-compete agreements and are available to help with commenting and/or a review of non-compete agreements.

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[26] *NCAA v. Alston*, 594 U.S. 69, 100 (2021) (the district court required the plaintiff student-athletes "to show that there are substantially less restrictive alternative rules that would [allow the defendant, the NCAA, to] achieve the same procompetitive effect as the challenged rules," as corresponds to the third step of the American Express framework) and *Ohio v. American Express*, 585 US 529, 542 (2018) ("burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means")