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Can Noncompete Agreements Be Antitrust Heroes?

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Top talent takes time and money to develop. Knowing this, your company may invest in training, mentorship and impart proprietary knowledge to shape that talent. To protect this investment, you ask employees to sign a reasonable noncompete agreement. You think all is well. Then a competitor lures your top performer away, taking your hard-earned advantage with them.

For general counsel, this isn't just a contract dispute. In the right circumstances, it may raise antitrust concerns and expose the hiring firm to treble damages.

Recently, the Federal Trade Commission has sought to ban noncompete agreements, taking up the argument that such a ban makes it possible for talent and knowledge to circulate freely, fueling innovation and growth.

But this view contradicts legal precedent and economic scholarship that recognize that predatory hiring can be anticompetitive. Examples include Alan J. Meese's article, "Don't Abolish Employee Noncompete Agreements," which discusses the history of legal treatment of noncompete agreements, and "The Case for Noncompetes" by Jonathan M. Barnett and Ted Sichelman, which argues that the decline along Massachusetts' Route 128 was driven by macroeconomic forces — not noncompete enforcement — and that the region's recovery occurred alongside continued enforceability.

What's less well known, however, is that federal antitrust law may — under certain circumstances — supercharge noncompete enforcement by trebling damages.

As major companies make headlines for hiring their rivals' top AI talent and the FTC considers whether to defend its noncompete ban, it is worth revisiting the conditions under which hiring a competitor's employees is predatory — and noncompetes are antitrust heroes.

Defining Noncompete Agreements in Texas

A typical noncompete agreement restricts an employee from working for or starting a competing business after leaving a job, usually within a defined geographic area and for a limited time period — often six months to two years, according to a U.S. Department of the Treasury policy paper.

Under Texas Business & Commercial Code § 15.50, noncompete agreements are enforceable if they are "ancillary" to a valid agreement and "reasonable" as to time, geography and scope. A two- to five-year restriction "has repeatedly been held" reasonable under Texas law, according to *AMF Tuboscope v. McBryde*.

As to geographic scope, Texas courts generally consider whether the restraint aligns with the area in which the employer actually does business. For example, in *Diversified Human Resources Group, Inc. v. Levinson-Polakoff*, a Dallas appeals court noting that reasonableness depends on the nature and geographic reach of the employer's business. A restraint may be unenforceable if it reaches customers with whom the employee had no prior dealings. The Texas Supreme Court confirmed this in *Juliette Fowler Homes, Inc. v. Welch Associates, Inc.*, holding that a restriction covering customers outside the employee's past dealings was overbroad. In *Barrett v. Curtis*, a Dallas appeals court upheld a covenant that was limited to the business conveyed.

The FTC Has Challenged Noncompete Agreements

Noncompetes have recently been in the news as an antitrust villain. In 2024, the FTC announced a rule banning most covenants not to compete. The FTC predicted that banning noncompete agreements would lead to a 2.7 percent increase in new firm formations, allow workers to earn an average of $524 more per year and boost annual patent filings by 17,000.

But, as of this writing, the FTC's noncompete ban is not in force, having been struck down by a Texas federal district court in *Ryan, LLC v. Federal Trade Commission*. The FTC is currently evaluating whether to defend its noncompete ban at the U.S. Court of Appeals for the Fifth Circuit.

Courts and Scholars Recognize the Pro-Competitive Value of Noncompete Agreements

While the FTC's approach assumes noncompete agreements suppress innovation and wages, courts and scholars have long recognized that, when properly limited, noncompete agreements can protect legitimate business interests without undermining competition.

Noncompete agreements can encourage firms to invest in talent by protecting proprietary knowledge, client relationships and costly training from exploitation by competitors, as the Treasury Department notes in its paper. And, as noted in a working paper from the Federal Reserve Bank of Philadelphia, increased noncompete agreement enforcement in Michigan correlated with higher patenting and start-up job creation. They may also serve a broader competitive function, particularly by preventing the "absorption" of competitors through targeted hiring of key employees, as the Fifth Circuit noted in *Associated Radio Service Co. v. Page Airways, Inc.*

Legally, courts have generally assessed noncompete agreements under the rule of reason, rather than as per se unlawful, according to the U.S. Court of Appeals for the Third Circuit in *Eichorn v. AT & T Corp.* And Texas courts are not unique in recognizing the benefits of noncompetes: Courts across the country have long recognized that noncompete agreements can serve legitimate business interests if they are reasonably tailored in scope, time and geography. Examples include the New York Court of Appeals in *BDO Seidman v. Hirshberg*, the Supreme Court of New Jersey in *Solari Industries, Inc. v. Malady* and the Court of Appeals of Indiana in *Coates v. Heat Wagons Inc.*

A categorical ban would depart from this precedent and risk enabling the very types of anticompetitive conduct that current law is designed to prevent if "the effect was to allow entry through absorption of the most significant competitor by one who possessed great economic power," as the Fifth Circuit held in Associated Radio. In fact, under certain circumstances, the violation of a noncompete agreement, particularly when orchestrated by a competitor, may give rise to antitrust liability.

Violating Noncompete Agreements Can Be Anticompetitive

The Fifth Circuit has recognized, in cases like *Associated Radio and Taylor Publishing Company v. Jostens, Inc.*, that inducing employees to violate valid noncompete agreements may itself constitute anticompetitive conduct under the Sherman Act. Whether an antitrust violation occurs depends on the specific conduct alleged, but violating a noncompete may trigger liability under federal antitrust laws either as unfair competition under Sherman Act Section 1, 15 U.S.C. § 1, or predatory hiring under Section 2, 15 U.S.C. § 2.

Unfair competition under Section 1 of the Sherman Act

Unfair competition under Section 1 involves coordinated conduct among market participants that unreasonably restrains trade and harms the competitive process. It includes wrongful business practices such as deceptive or tortious interference with a competitor's ability to compete on the merits, as noted in the Restatement (Third) of Unfair Competition § 1.

In *Associated Radio*, the Fifth Circuit clarified that such conduct may constitute a Section 1 antitrust violation when a two-part test is met: (1) the conduct produces a market effect similar to those prohibited under merger law, and (2) it harms competition itself rather than merely injuring a rival. *Associated Radio* further held that the "hiring away of employees from a rival" may constitute anticompetitive conduct when it leads to the elimination of a significant competitor by a firm with substantial market power.

Thus, while hiring a competitor's employees is not inherently unlawful, inducing disloyal performance, such as misuse of confidential information or trade secrets, may support a Section 1 claim when it causes competitive harm. Accordingly, inducing breach of noncompete agreements may trigger liability under Section 1 of the Sherman Act.

Predatory hiring can violate Section 2 of the Sherman Act

Predatory hiring generally occurs when a firm acquires talent "not for the purposes of using that talent but for purposes of denying it to a competitor," as the Ninth Circuit held in 1990 in *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.* The Fifth Circuit reaffirmed this principle two decades later in *Taylor*, endorsing the analysis set forth in the Areeda & Hovenkamp Antitrust Law treatise: "No ... virtue would redeem efforts to induce such disloyal performance by a rival's employee as disclosure of trade secrets or other private information; steering customers, researchers, or others away from her employer and to the monopolist; physical or psychological sabotage; or intentionally lax performance."

In *Taylor*, the Fifth Circuit expanded on this concept, holding that such hiring practices may amount to unlawful exclusionary conduct under Section 2 when aimed at undermining a competitor rather than gaining productive use of talent. And the court recognized that such conduct becomes actionable when a rival induces currently employed workers to breach valid noncompete agreements, particularly when that action is coupled with additional wrongful acts such as diverting customers or misusing trade secrets.

To establish a Section 2 violation under *Taylor*, the plaintiff must also demonstrate that the defendant's conduct (1) is capable, if successful, of harming competition; (2) is inconsistent with competition on the merits; (3) has a significant actual or possible effect on the market; and (4) caused the plaintiff's specific competitive injury.

Accordingly, while hiring a competitor's employees is not always unlawful, Section 2 liability may arise when the conduct is intended to impair or eliminate a rival's ability to compete, such as by deliberately inducing employees to violate enforceable noncompete agreements in a way that harms the competitive process. These legal principles have real consequences for employers and practitioners, especially in states such as Texas, where noncompete agreements are regularly enforced.

While both doctrines address efforts to undermine rivals through improper hiring practices, they arise under different antitrust frameworks. Section 1 claims require coordination or agreement, while Section 2 claims target unilateral conduct by a firm with a certain degree of market power.

Practical Implications for Texas Practitioners

For the time being, Texas businesses should feel confident in including reasonable noncompete agreements with their employment contracts. While the FTC's rule purports to ban such agreements nationwide, its enforcement remains blocked pending resolution of ongoing litigation. If a noncompete agreement is violated, Texas lawyers should examine the facts to evaluate whether — in addition to unfair competition, standard breach of contract and misappropriation of trade secrets claims — an antitrust claim under Sections 1 or 2 of the Sherman Act is also warranted.

In practice, the drafting process is critical. Practitioners should ensure noncompete provisions are narrowly tailored in scope, geography and duration while safeguarding the client's proprietary business assets. A well-crafted agreement not only maximizes enforceability in state court but can also support federal antitrust claims when a competitor's conduct crosses the line into exclusionary tactics. And clearly documenting the legitimate business interests served by the agreement strengthens both defenses against antitrust challenges and the basis for pursuing enhanced remedies.

Counsel should also recognize when a competitor's conduct may give rise to liability under the Sherman Act. Some red flags to look out for when evaluating potential claims include:

- One or more competitors with "great economic power" hire a rival's employees, especially those subject to enforceable non-competes;

- The newly hired employees contact their former colleagues or customers shortly after starting their new job;

- Little or no actual work is assigned to the new hires after they join the competitor;

- The hiring leaves the original employer unable to service certain customers, continue its research program or operate in a key location; and

- The hiring process gives the competitor access to trade secrets or sensitive information, allowing them to leapfrog into the market.

When the facts support it, pairing breach of contract or trade secret claims with an antitrust claim can potentially unlock treble damages and attorney's fees. With the FTC's proposed noncompete ban tied up in litigation, Texas remains a favorable jurisdiction for well-drafted noncompete agreements. Accordingly, practitioners who structure agreements carefully and stay alert to anticompetitive hiring tactics can offer clients both a contractual shield and a potent antitrust sword.

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