FTC Noncompete Rule

Independent Insurance Agents

- Unlike other distribution channels, IAs own their own businesses and their books of business.
  - They are not bound to one carrier and place business through many different insurers.
  - In 2023, the IA channel placed 62.2% of all p/c insurance in the U.S. (87% of the commercial market, 39% of the personal market, and 51% of the homeowners market).
- The core assets of an agency are intangible.
- Independent agencies rely on employment agreements with individual agents to protect their investments, customer and carrier relationships, confidential knowledge, goodwill, and the overall value of their businesses.

Employment Agreements

- A noncompete agreement bars a person from working for a competitor or starting a business after employment ends.
  - But many view the term “noncompete agreement” as a catch-all term that broadly includes other forms of employment agreements.
- Other, narrower types of agreements include:
  - Non-solicitation agreements, and
  - Confidentiality or non-disclosure agreements.
- When discussion of the use, regulation, or prohibition of “true” noncompetes has arisen, many have been confused about what is truly at issue.
  - These other types of agreements are often more important to agents.

Recent History

- Noncompete agreemenys have increasingly come under scrutiny from policymakers (state and federal, Republicans and Democrats).
  - This is especially true with regard to low wage workers (e.g., Jimmy John's employees).
- Regulation of noncompetes has historically been a matter of state law.
- CA, ND, and OK have largely banned their use since the 1800s.
  - Minnesota passed a similar law last year.
- In recent years, at least 12 jurisdictions (CO, DC, IL, ME, MD, MA, NV, NH, OR, RI, VA, and WA) have restricted/banned their use based on worker earnings or others factors.
- In January 2023, the FTC issued its proposed rule.

Big "I" Views on the Proposed Rule

- In our testimony and in written comments, the Big "I" maintained that the FTC lacked the authority required to issue the rule.
- We focused on three primary issues:
  - Whether the rule would allow noncompetes to be used in connection with the sale of a business,
  - Whether the affected the use of other forms of employment agreements, and
  - Recommending the addition of an exemption for highly paid workers.

The Final Rule

- The FTC rule was approved by a 3-2 vote in April, and it would prohibit most non-compete agreements.
  - The regulation defines them as a term or condition of employment that "prohibits," "penalizes," or "functions to prevent" a person from working elsewhere or starting a business.
  - The rule would ban agreements that prohibit a person from working elsewhere … as well as those that require a person to pay liquidated damages to do so and severance agreements in which a person is paid only if they refrain from competing against a former employer.
- The FTC estimates that 30M workers (or 20% of the U.S. workforce) are subject to a noncompete today.
  - It would apply to employees, independent contractors, interns, volunteers, etc.
- The rule is scheduled to take effect on September 4.
  - After that date, the rule would invalidate noncompetes in place with most workers and make it illegal to attempt to enforce a noncompete.
  - The likely impact on agents will not be as significant due to revisions that were made.

Exception for Sales of Businesses

- This exception allows the use of noncompete agreements that are "*entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets*."
- This exemption is important to independent agents, and it benefits both sellers and buyers.
  - This exemption is not novel. Similar exemptions exist in the four states that have otherwise banned noncompete agreements.
- The original draft would have arbitrarily restricted the use of this exemption to sellers with at least a 25% ownership stake in the business.

Treatment of Other Key Issues

- Other types of employment agreements are not prohibited by the regulation.
  - Agreements could still be used to affect the way that a worker competes with their former employer (e.g., restrict who a worker may contact after leaving a job), but they may not prevent a former worker from working elsewhere.
  - Other agreements would be banned, however, if they were crafted so broadly that they effectively acted as noncompete agreements.
- The FTC also added an exemption for "senior executives," who meet an earnings test (i.e., earn more than $151,164) and a duties test (i.e., someone in a "policymaking position," as defined).

Fate of the Rule

- Many believe the rule will be overturned by the courts.
  - No federal law expressly bans the use of noncompetes in this way.
  - This rule has vast economic impact.
  - The FTC's authority to issue legislative rules is highly questionable, and many argue that this type of policymaking is best left to legislators.
  - Recent Supreme Court activity does not favor the FTC.
    - The Chevron doctrine has come and gone since the last significant court case considered these issues, and the major questions doctrine has emerged.
- What is the precedential impact of this rulemaking?
  - If the FTC can implement public policy in this way, what are the limits of this power? How else might it be employed?

A Return to the States?

- States have been responsible historically for regulating noncompete agreements, and activity addressing their use is most likely to come from state policymakers.
- Employments agreements, including noncompetes when a business is sold, are important business management tools for independent insurance agents.
- Any legislation in this area should (1) allow the use of noncompetes when a business is sold and (2) not restrict the reasonable use of confidentiality, non-solicitation, and other forms of employment agreements.