

## ANTITRUST LAW SOURCE PODCAST

### WITH JAY LEVINE

#### Episode 54: FTC starts 2023 with a bang

*The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.*

**Intro:** Welcome to Porter Wright's Antitrust Law Source.

**Jay:** Welcome to our first podcast of 2023. This is Jay Levine, your host of the *Antitrust Law Source* podcasts in editor of its blog articles. I'm very excited to be here, good morning, afternoon or evening, wherever, wherever you may be hearing this. 2023 I think is going to shape up to be a very exciting year. And certainly one of my resolutions is to find out more podcasts and articles than I did last year. Hopefully, I can keep to that resolution.

But there's been a lot of activity and some of it means stuff, some of it doesn't. So I want to try to break things down for everybody, and hopefully give you something to take away with that you can use in your decision making in your businesses and your, law practices and the like. Because sometimes it's not really the details that matter, but really, the motivations that have prompted some of the actions.

So, in the upcoming series, I'm going to have a few part podcast series with one of my partners, Don Barnes, about Capper Volstead. I'm in 2022. That was the 100 year anniversary of the Capper Volstead Act, which is a limited antitrust exemption for agricultural cooperatives. And I'm excited to tell you that that's coming down the pike. And as I said, I hope to have more regular podcasts on issues of the day, and I also want to put into perspective, some of what happened last year. I mean, there's been a lot of legislation but frankly, in this politically charged climate, I don't know that a lot of legislation is gonna get passed. So I'm not sure the details of the legislation matter as much as what they portend in terms of enforcement, in terms of people generally thinking about antitrust and consumer protection, and generally taking a gauge of where the nation is in sort of their philosophy on these matters.

And towards that end, I want to speak about something that happened just recently. The FTC came out with a Notice of Proposed Rulemaking that they intend to under the rulemaking authority, they intend to have a rule that essentially bars non-compete clauses with employees. Essentially, the new rule would make it illegal for an employer to enter into or attempt to enter into a non-compete with a worker. It also makes it illegal to maintain any existing non-competes with workers, or that you can represent to a worker under certain circumstances that the worker is subject to a non-compete.

So essentially, it would categorically ban employers from using non-compete clauses. Now, not only that, the proposed rule would also clarify that whether a contractual term is a non-compete or not, has nothing to do with the words being used, but there's going to be a functional test. Does the restriction in the employment contract or in the agreement, essentially prohibit the worker from seeking or accepting employment with others after the conclusion of his working for

the particular employer. That's fairly broad functional test and some of the examples given are a nondisclosure agreement between an employer in a worker that's written so broadly that it effectively precludes a worker from working in the same field.

Another example given is a contractual term that requires the worker to pay the employer or a third party a back for the training costs, if the workers employment terminates within a specified period of time and where the required payment is not reasonably related to the cost the employer inferred.

Now, why is the FTC doing this? Well, their stated reasons are:

- they said it will increase workers earnings by nearly \$300 billion per year,
- that it will save consumers up to \$148 billion annually on a health care costs,
- that it will double the number of companies founded by a former worker in the same industry,
- it will expand career opportunities for about 30 million Americans
- And they also said that non competes nationwide, banning them would close racial and gender wage gaps by 3.6 to 9.1%.

Then sort of the FTC's and the administration's thought process was a lot back to their inherent belief that the freedom to change jobs is according economic liberty, that non-compete clauses stifle new businesses and new ideas, and that non-compete clauses exploit workers and hinder economic liberty.

So that's the rule, and that's sort of why the FTC is bringing it. Now. What I don't really want to get into, because I'm sure many others will and you will read and hear their podcasts is whether such a non-compete is truly needed. Is it too broad the way it's written? Or does the FTC even have the authority to do it? All those are very worthwhile questions, but just not ones that I sort of want to deal with right now.

But what I do want to point out, is kind of the broader perspective. First, this kind of rulemaking ties in with the administration's efforts to quote unquote, Safeguard workers. They've been pounding that theme for the past two years, and it's just going to continue. And this is pretty much in line with those efforts. It is interesting to note that rulemaking is not really used in the antitrust context, at the FTC. There's a lot of rulemaking on the consumer protection side. We're not using their Section 5 authority, really, on the antitrust side to make rulemaking, and this is just another example of the FTC is willingness to take some risks, to push the envelope, and to show that it really is serious when it said it wanted to use its Section 5 rulemaking authority more, and make these bright line rules. You know, this is an example of them putting their money, so to speak where their mouth is.

Now, whatever you think of their efforts, that's, that's what's going on. And it is important, I think, to stand back and say, okay, is this a harbinger of things to come? As I said, legislation, you know, even where there is bipartisan agreement, outside of the big picture, the devils in the details, and it's hard to see that antitrust legislation is going to get passed in this Congress, given the myriad details that would need to be hashed out between the two sides. Given that, I think the FTC believes that it's it can use its rulemaking authority to effectuate a lot of what it

might otherwise want to do via legislation. And this is, but a showing of that. We'll see. I mean, they're committed to bringing, you know, cases DOJ, certainly, as and is, and we'll talk about some of their successes, which have not actually been many, and some of their failures, which had been more prevalent. But whether that's going to stop them or not, and why it should or should not stop them.

But as you probably heard from my previous podcast, if you step back and you think more philosophically about what the antitrust laws are there to do, there is a fundamental differences between Democrats and Republicans and between certainly the progressives and others as to whether antitrust is meant to be this kind of regulatory framework. I know a lot of people always call antitrust, regulatory practice. But it really isn't a regulatory practice as much. And I think the Democrats would like to make it more whether that's good or bad, you know, depends on your political views. But I think this does represent a populist view of the little guy has to be protected. And we've got to protect them not with wishy washy, quote unquote, rule of reason, type of governing practices and frameworks where things are weighed. They want bright line rules to, you know, just basically, outlaw and prohibit. And, whether that's good or not is, is an entirely different matter whether there will be unintended consequences to this legislation. Whether this will end up chilling some pro competitive practices. Whether it will achieve any of the stated goals of the FTC has yet to be seen. But you know, this does jive with a lot of how this administration and the FTC, DOJ want to govern and have the antitrust laws enforced with these bright line rules.

We've seen it before on whether certain market shares are going to be deemed too much or not. There's just this kind of knee jerk reaction that this is that this kind of practice is bad. We don't want to restrict people, we want workers to be able to do anything they want. And we're just going to outlaw it. And I think that's what we're gonna see enacted, whether it's ultimately judged to be legal or not, is an entirely different matter, and there's some question about that. But for the time being, as a counseling matter, as a vein, you know, we saw where the government had a lot of misses in the last two years where they weren't successful. But we do see that they're going to continue to try. And certainly the FTC may be coming out with more of these notices of proposed rulemaking, where they do try to draw these very bright line distinctions of what kind of business behavior is appropriate and what is not. And will challenge a lot of assumptions about whether these restrictions do have pro-competitive value or not.

So I think it's interesting whether this proposed rule actually ever gets enacted, or if it's enacted wherever, whether it's ultimately deemed legal or not, is important. But I think the bigger picture is that the enforcement agencies are going to continue and maybe redouble their efforts at trying to change the antitrust laws trying to change the antitrust enforcement priorities, trying to change antitrust enforcement itself, and frankly, try to change how the antitrust laws are viewed in total.

So that's it for today. I hope you've enjoyed. Again, this is Jay Levine. You can reach me by email at [jlevine@porterwright.com](mailto:jlevine@porterwright.com). You can reach me at Twitter at JayLLevine I'm on LinkedIn. And please, if you have any ideas for podcasts or articles, please let me know. And if you have any reactions to this podcast, certainly let me know. And until the next time, have a wonderful day. Take care.

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