Insights

FTC Takes Unprecedented Action Against Non-Compete Agreements

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Last week the Federal Trade Commission ("FTC") took unprecedented action against multiple businesses due to their non-compete agreements with employees. This action comes in response to an **Executive Order** issued by President Biden well over a year ago in July of 2021 asking the FTC to act against anti-competitive behavior, including restricting non-compete agreements. We previously discussed that Executive Order with you during a **Krieg DeVault podcast**, where we indicated that our listeners should merely wait and see because the Executive Order did not make any changes. We now "see" the action that has occurred because of the Executive Order, and it is not good for employers.

On January 4, 2023, the FTC issued a **press release** indicating it pursued action against three companies and two individuals forcing them to drop their non-compete restrictions imposed on workers. The two cases in which this action was taken are *In the Matter of Prudential Security, et al.* and *In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Group S.A., et al.* The facts of each case are important for employers to know to determine if action could be taken against your company for its non-compete agreements.

1. In the Matter of Prudential Security, et al.

The FTC announced the settlement of its complaint against Prudential Security, Inc., and Prudential Command, Inc., two affiliated Michigan corporations, and their co-owners Greg Wier and Matthew Keywell (collectively, "Prudential").[1] The Prudential companies provided security services to their clients and employed security guards assigned to work at their clients' facilities. The security guards were paid hourly at or slightly above minimum wage. Prudential's security guard employees were required to sign non-compete agreements as a condition of employment.

Under Prudential's standard non-compete agreement, the employees agreed not to accept employment with a competitor within a 100-mile radius for two years after employment. The non-compete agreement contained a liquidated damages clause requiring the employee to pay a $100,000 penalty for any conduct in breach of the agreement. The FTC cited several instances in which Prudential had actively sought to enforce particular non-compete agreements when a former employee moved to a competitor. In 2019, a Michigan state court found the agreements unenforceable. Prudential has since sold its assets to Titan Security Group, LLC, another security services company. Prudential no longer provides security guard services.

The FTC investigated and found that Prudential violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The FTC ordered Prudential to stop enforcing existing non-compete agreements for both present and past workers or stop requiring employees to sign new ones even in future business ventures. The FTC also required Prudential to prepare regular compliance reports and notify its current and former employees that the agreements were no longer valid. In reaching their decision, a majority of the FTC commissioners found

that the non-compete agreements had "harmed employees"[2] and were "inherently coercive."[3] However, as Commissioner Christine S. Wilson noted in her strong dissenting opinion against this FTC action, there was no evidence that the agreements had any anti-competitive effect. She further noted that, since Prudential no longer provides security guard services, the "enforcement action is designed not to provide effective relief but instead to signal activity with respect to non-compete agreements in the employment arena."[4]

2. In the Matter of O-I Glass, Inc.* and *In the Matter of Ardagh Group S.A., et al.

The FTC also resolved two related complaints it filed against corporations that manufacture glass food and beverage packaging. The respondent in the first complaint was O-I Glass, Inc. ("O-I"), a Delaware corporation with its principal place of business in Ohio.[5] The respondents in the second complaint were Ardagh Group S.A., a Luxembourg corporation, and its two American subsidiaries (collectively, "Ardagh").[6] As with Prudential, the FTC took issue with the non-compete agreements enforced by O-I and Ardagh: The FTC claims "the glass container industry in the United States is highly concentrated. There are substantial barriers to entry and expansion, including the ability to identify and employ personnel with skills and experience in glass container manufacturing."[7]

The non-compete agreements used and enforced by both O-I and Ardagh were similar. The employees agreed not to work for or provide similar services to a competitor. O-I's standard agreement prohibited competition for a one-year period, while Ardagh's imposed a two-year period. At both companies, several hundred employees in a variety of roles (including glass production, engineering, and quality assurance) were subject to the agreements as a condition of employment. In both complaints, the FTC asserted that the agreements were "unfair" because they raised barriers to entry for competitors, reduced "employee mobility," and led to lower wages.[8]

The FTC similarly found that both O-I and Ardagh violated Section 5 of the Federal Trade Commission Act. As with Prudential, the FTC required the glass manufacturers to refrain from imposing or enforcing the non-compete agreements, to notify its employees of the agreements' invalidity, and to participate in compliance activities. The FTC majority found that the non-compete agreements "had the potential to deprive aspiring entrants of access to a critical talent pool, thereby impeding entry into a relatively consolidated industry that has experienced tight supply and unmet customer demand."[9] The majority also reiterated its emphasis on "labor mobility" and the potential of non-competes to "lock[] up" workers. In her separate dissent, Commissioner Wilson noted that the FTC did not find that the non-compete agreements were in any way unreasonable, which is "a significant departure from hundreds of years of legal precedent." She also questioned whether elimination of non-competes will mean that employers will be "less willing to invest in employee training" if employees can leave and not be subject to a non-compete.[10]

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This action marks a significant change. This FTC action, coupled with the new proposed rule detailed in another Krieg DeVault alert, signals that employers should examine their non-compete agreements, especially as to wage level employees. We cannot yet predict what, if any, action the FTC will take against other employers. Thus, at a minimum, employers should ensure any non-compete agreements are enforceable under the applicable state law and that they are not overreaching to all employees or low-income employees that would subject their company to FTC scrutiny. Additionally, employers should audit their policies, practices, and procedures for non-competes and other restrictive covenants for compliance with upcoming FTC regulations. More will be known once the proposed FTC new rule receives comment and becomes final. If you have questions or would like assistance auditing your restrictive covenants, please reach out to **Scott S. Morrisson**, **Elizabeth M. Roberson**, or another member of our **Labor and Employment team**.

Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.

[1] *Prudential Security*, 174 F.T.C. No. 2210026 (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2210026-prudential-security-et-al-matter.
[2] Compl. ¶ 23, *Prudential Security*, https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecuritycomplaint.pdf.
[3] Statement of Chair Lina M. Khan, Joined by Commissioners Slaughter and Bedoya, in the matters of Prudential Security, O-I Glass, Inc., and Ardagh Group, S.A. (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioners-slaughter-bedoya-matters-prudential-security-o-i.
[4] Dissenting Statement of Commissioner Christine S. Wilson Regarding the Matter of Prudential Security (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-regarding-matter-prudential-security.
[5] *O-I Glass, Inc*., 174 F.T.C. No. 2110182 (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110182-o-i-glass-inc-matter.
[6] *Ardagh Grp.*, 174 F.T.C. No. 2110182 (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110182-ardagh-group-et-al-matter.
[7] Compl. ¶ 6, *O-I Glass, Inc*., https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf; Compl. ¶ 8, *Ardagh Grp*., https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf.
[8] Compl. ¶ 8, *O-I Glass, Inc*., https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf; Compl. ¶ 10, *Ardagh Grp.*, https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf.
[9] Statement of Chair Lina M. Khan, Joined by Commissioners Slaughter and Bedoya, in the matters of Prudential Security, O-I Glass, Inc., and Ardagh Group, S.A. (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chair-lina-m-khan-joined-commissioners-slaughter-bedoya-matters-prudential-security-o-i.
[10] Dissenting Statement of Commissioner Christine S. Wilson Regarding the Matters of O-I Glass, Inc. and Ardagh Group S.A. (Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-christine-s-wilson-regarding-matters-o-i-glass-inc-ardagh-group-sa.