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Client Alert

Global Human Capital & Compliance

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Newly Appointed FTC Chairman Andrew N. Ferguson to Target DEI and Pursue More Case-by-Case Enforcement Policy Against Non-Competes

On January 20, 2025, President Trump officially designated Andrew N. Ferguson as Chairman of the Federal Trade Commission ("FTC"). Ferguson was originally nominated to serve as a member of the FTC by President Biden and was sworn in as an FTC Commissioner in April 2024.

Chairman Ferguson's public record as an FTC Commissioner offers some indication of his policy priorities. On hot-button issues like DEI, Ferguson has begun to implement President Trump's executive orders to terminate all DEI-related programs, practices, orders, and contracts within the FTC's sphere. Having dissented against the adoption of the FTC's Non-Compete Rule, he is also likely to rescind that rule once the necessary majority is in place at the FTC.

Beyond the above issues, he is generally expected to roll back the expansive interpretation of the FTC's rulemaking authority and enforcement powers advanced by his predecessor, Lina Khan, and instead pursue more targeted investigations and enforcement antitrust and consumer protection actions. He has specifically identified "taking on Big Tech" and using antitrust laws to promote competition in the healthcare and labor markets as two of his top priorities.

FERGUSON'S ANTI-DEI MEASURES

Since assuming his position as FTC Chairman, Ferguson has moved swiftly to implement President Trump's various executive orders terminating DEI-related activities and programs within the federal government. In a statement issued on January 22, 2025, Ferguson characterized DEI as a "scourge on our institutions" that "denies to all

Americans the Constitution's promise of equality before the law" and "divides people into castes on the basis of immutable characteristics." Notably, he announced that he has taken measures to (1) forbid the FTC from "promoting DEI in any internal or external operations, rules, law-enforcement decisions, or hiring decisions," (2) order a review of all FTC orders "to ensure that the Biden Administration's DEI dictates did not make their way into formal Commission decisions," (3) close the FTC's Office of Workplace Inclusivity and Opportunity, (4) scrub all references to DEI from the FTC's website, and (5) audit all FTC contracts to eliminate any trace of what he identified as "DEI ideology."

How these policy prescriptions will impact the FTC's broader enforcement policy remains to be seen. During the Biden Administration, the FTC treated race discrimination as a prohibited unfair trade practice under Section 5 of the FTC Act and pursued enforcement actions on that basis. It remains unclear whether the FTC will now use its Section 5 unfairness authority to instead target companies actively engaging in DEI initiatives or pursue claims concerning unlawful censorship of conservative voices.

THE FTC WILL LIKELY RESCIND THE NON-COMPETE RULE

On May 7, 2024, the FTC issued its Final Non-Compete Rule, which banned most non-competition clauses in agreements between employers and their employees, including contracts predating the adoption of the rule. Federal district courts in the Fifth and Eleven Circuits subsequently blocked implementation of the rule, finding that the FTC lacked the authority under the FTC Act to promulgate rules concerning unfair methods of competition. Those cases are currently on appeal.

The appointment of Chairman Ferguson, however, may moot the ongoing legal challenges to the Non-Compete Rule. Prior to his elevation to Chairman, on June 28, 2024, Ferguson released a Dissenting Statement arguing that the FTC lacked rulemaking authority under Section 6(g) to broadly regulate all private employment contracts in the United States. Once there is a majority of commissioners willing to do so, Ferguson may move the FTC to rescind the Non-Compete Rule, returning the country to the pre-rule status quo.

A RETURN TO MORE TARGETED/LIMITED FTC ENFORCEMENT ACTION IS EXPECTED

Ferguson's appointment will likely mark a pronounced shift away from former Chairwoman Khan's expansive view of the FTC's rulemaking and enforcement powers to protect social welfare as opposed to the agency's traditional approach of protecting consumer welfare. For example, under Ferguson, employers can expect the FTC to withdraw from attempts to address issues like independent contractor misclassification that were traditionally seen as the remit of other agencies, and to rescind the Biden FTC's January 14, 2025 policy statement shielding independent contractors and gig workers from antitrust liability for engaging in collective bargaining and other collective economic action.

Enforcement activity in more traditional spheres is likely to continue, however. On February 10, 2025, the FTC announced its unanimous approval of Chairman Ferguson's appointment of Daniel Guarnera as Director of the Bureau of Competition. Guarnera joins the FTC from the U.S. Department of Justice's Antitrust Division, where he led the taskforce that filed antitrust lawsuits against large tech companies. Guarnera's background and statements by Chairman Ferguson may signal that the FTC will continue targeting large tech companies that are potentially vulnerable to monopolization claims, particularly ones that have, according to Chairman Ferguson and Guarnera, used that power to censor conservative voices. Separately, Chairman Ferguson has signaled that he intends to deploy antitrust laws to promote competition in the healthcare industry, likely signaling the allocation of enforcement and investigative resources towards large healthcare conglomerates. The Trump administration has also singled out high drug prices, so that is likely a priority target for the FTC. Finally, in announcing Guarnera's appointment, Chairman Ferguson emphasized Guarnera's work in promoting competition in "labor markets" and further emphasized that this would be one of his top priorities. At present, the full scope of prioritizing labor markets is unclear.

TAKEAWAYS AND NEXT STEPS FOR EMPLOYERS

Employers can expect the FTC to retreat from regulating employee non-competition agreements and independent contractor misclassification issues. That said, the FTC will not leave a vacuum. States and other federal agencies will continue regulating these areas and the FTC itself will continue exercising its enforcement powers (particularly in the healthcare and tech industries). Employers should consider the following next steps:

- Review DEI policies with counsel for potential risk under Trump's executive orders (addressed here);
- Review existing non-competition and non-solicitation clauses with employees and independent contractors and consult with counsel regarding their enforceability under the shifting state-by-state legal landscape; and
- Engage counsel to conduct an audit of independent contractor classification practices for compliance with evolving state and federal standards.
