



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Competition
Office of the Director

June 15, 2023

Re: Contracts That Impede Bureau of Competition Investigations

SUMMARY

Bureau of Competition staff have learned that the targets of our investigations are increasingly imposing and invoking certain types of contract terms that can impede our ability to conduct voluntary interviews with market participants. Voluntary interviews are a crucial investigative tool for carrying out our mandate from Congress. As a result, the Bureau believes that contractual requirements and limitations that impede Bureau investigations are contrary to public policy and therefore unenforceable.

IMPORTANCE AND BENEFITS OF VOLUNTARY INTERVIEWS

The Federal Trade Commission's Bureau of Competition investigates potentially unfair methods of competition across a wide variety of industries. A core aspect of Bureau investigations is outreach to the people and businesses affected by the activity we are investigating. While the FTC has authority to obtain information through compulsory methods, speaking on a voluntary basis with stakeholders is a critical investigative tool. During an investigation, FTC staff may speak to dozens of individuals—competing businesses, customers, suppliers, trade organizations, labor unions, financial institutions, analysts, and more. These voluntary interviews are essential to help us understand real-world dynamics and effects. They allow the Bureau to get up to speed—and stay up to speed—quickly and effectively. They can also help to reduce unnecessary burdens on marketplace stakeholders and Bureau staff. As explained fully below, contractual requirements and restrictions that hinder or obstruct the voluntary-interview process impede the Bureau's ability to fulfill our congressional mandate.

RELEVANT TYPES OF CONTRACT PROVISIONS

Although exact terms vary, the following general types of contract provisions can impede Bureau investigations: confidentiality agreements, nondisclosure agreements, and notice-of-agency-contact provisions. Confidentiality agreements purport to prohibit all of the contracting parties from disclosing certain information to others. Nondisclosure agreements prohibit a specified party from disclosing information to others. Notice-of-agency-contact provisions require the covered person or business to give notice of any contact with a government agency. They sometimes also require a summary of any discussions with law enforcers and regulators.

ANALYSIS

The exact terms and conditions may vary, but these restrictions and requirements can all have the same chilling effect on individuals' willingness to speak voluntarily with Bureau staff. That chilling effect impedes the Federal Trade Commission's ability to carry out its statutory mandate.¹

While the FTC does not intend to provide legal advice to any potential witnesses and advises anyone with concerns about liability under such contract terms to consult an attorney, the Bureau of Competition believes that these provisions are contrary to public policy and therefore void and unenforceable insofar as they purport to (1) prevent, limit, or otherwise hinder a contract party from speaking freely with the FTC; or (2) require a contract party to disclose anything to an investigation target about the FTC's outreach or communications.

Case law clearly establishes that contractual provisions that impair or prohibit the ability to communicate freely with an administrative agency acting within its statutory mandate are void and unenforceable.² To take just one example, in *EEOC v. Morgan Stanley & Co.*, the court voided a contractual requirement that required all employees, current or former, to provide the employer notice and copies of all documents served upon them by any court, agency, or regulatory authority. As the court explained, there was "significant public interest in encouraging communication" with the federal agency, it was "crucial" that the agency be able to conduct investigations, and those investigations required access to information, including relevant employees.³ The "chilling impact" that these kinds of provisions can have was contrary to public policy.⁴ Many other courts have similarly struck down these contractual clauses where they could otherwise prevent a government agency from seeking and obtaining complete, candid information in furtherance of a statutory mandate.⁵

Other federal agencies, among them the U.S. Securities and Exchange Commission, National Labor Relations Board, Federal Aviation Administration, and the National Highway

¹ See 15 U.S.C. §§ 41-58, as amended (describing the Commission's authority to gather and compile information and conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce, among other things).

² See *EEOC v. Morgan Stanley & Co.*, No. 01-CIV-8421-RMB-RLE, 2002 WL 31108179, at *1-2 (S.D.N.Y. Sept. 20, 2002).

³ *Id.* at *1.

⁴ *Id.* at *2.

⁵ See, e.g., *EEOC v. Astra USA*, 94 F.3d 738, 744-45 (1st Cir. 1996) (holding that employers may not use confidentiality agreements to interfere with or restrict law enforcement agencies' ability to interview their employees); *FTC v. AMG Services, Inc.*, 2:12-cv-00536-GMN-VCF, at 3 (D. Nev. 2013) (unpublished) ("[T]he court finds that the confidentiality agreements at issue before the court are unenforceable to prohibit former employees from willingly cooperating with the FTC."); *Sparks v. Seltzer*, No. 05-CV-1061 (NG)(KAM), 2006 WL 2358157, at *4 (E.D.N.Y. Aug. 14, 2006) ("Indeed, agreements restricting former employee revelation of events in the workplace which are not privileged but may involve violations of federal law have the effect of hindering implementation of the Congressionally mandated duty to enforce the provisions of federal statutes.") (internal quotations and citation omitted); *EEOC v. Int'l Profit Assocs.*, No. 01 C 4427 (N.D. Ill. Apr. 23, 2003) (unpublished) ("[A]ny contractual impairment of present or former [] employees' ability to communicate freely with the EEOC is void as against public policy."); *Hoffman v. Sbarro, Inc.*, No. 97 CIV. 4484(SS), 1997 WL 736703, at *1 (S.D.N.Y. Nov. 26, 1997) ("To the extent that the [nondisclosure] agreement might be construed as requiring an employee to withhold evidence relevant to litigation designed to enforce federal statutory rights, it is void.").

Transportation Safety Administration, have all reached the same conclusion: these contractual provisions can impede agencies' ability to conduct lawful investigations and, as a result, run contrary to public policy.⁶

In addition, investigation targets and their attorneys should be aware that attempts to obstruct FTC investigations and enforcement actions may be viewed as unlawful efforts to discourage or influence cooperation with the FTC. Such conduct can potentially rise to the level of a criminal violation, and the FTC may refer appropriate matters to the U.S. Department of Justice.⁷

The Bureau of Competition takes very seriously its statutory obligation to investigate potential violations of the antitrust laws and § 5 of the FTC Act. Contractual provisions that inhibit law-enforcement investigations do a disservice to the American consumers, workers, and honest businesses the Bureau is tasked with protecting.

⁶ The U.S. Securities and Exchange Commission adopted Rule 21F-17, which prohibits enforcing or threatening to enforce a confidentiality agreement that would impede communications with the agency. 17 C.R.F. § 240.21F-17. The National Highway Transportation Safety Administration has stated that it is unlawful to use confidentiality and non-disclosure provisions to impede oversight and enforcement-related regulatory obligations. *See, e.g.,* Neal Boudette, *Tesla Model S Suspension Failures Under Scrutiny by Safety Agency*, N.Y. TIMES, June 9, 2016, <https://www.nytimes.com/2016/06/10/business/tesla-model-s-nhtsa-suspension-failure.html>; *see also* Fed. Aviation Admin., Impact of Non-Disclosure and Confidentiality Covenants on Agency Investigations, *available at* https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/enforcement/media/Non_Disclosure_Guidance.pdf; *EEOC v. Baker & Taylor, Inc.*, No. 13-cv-03729, documents #1 and 14 (N.D. Ill. May 20, 2013) (requiring that employee agreements include language protecting the right to communicate with the EEOC and comparable regulatory agencies); *Quicken Loans Inc. & Garza*, 361 N.L.R.B. No. 94 (Nov. 3, 2014) (invalidating the use of non-disclosure and confidentiality clauses in employee handbooks and other agreements).

⁷ *See generally* Holly Vedova, BC's Criminal Liaison Unit is Off to the Races, Mar. 24, 2023, <https://www.ftc.gov/enforcement/competition-matters/2023/03/bcs-criminal-liaison-unit-races>.