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Heyman Center Panel Discusses Non-Compete Clauses



The Federal Trade Commission's controversial proposal to ban employee non-compete clauses was the subject of a panel discussion moderated by Cardozo Professor Sam Weinstein on April 3. It was sponsored by the Heyman Center on Corporate Governance. Designed to protect company trade secrets, client lists and other confidential information from being divulged when employees move to competing companies, non-compete clauses have been expanded in recent years to include workers in a variety of low-paying jobs ranging from custodians to security guards. They are so common that it is estimated that 18% of employees are required to sign them, prompting the attorney general of New York and others to file lawsuits against the practice.

The panelists – Cardozo Professors Myriam Gilles and Michael Eric Herz, Professor Richard J. Pierce of George Washington Law School and Maria Cáceres-Boneau '08, labor and employment attorney at Duane Morris LLP -- laid out the

administrative, antitrust and corporate law issues raised by the proposed ban and discussed the likelihood of its passage.

Much of the discussion focused on whether the FTC has the power to create a rule that bans non-compete clauses and whether the proposed rule as written can pass.

Cáceres-Boneau detailed the history of non-competes and current usage, noting that California, South Dakota and Oklahoma ban them in part or whole.

Herz and Pierce explained how the courts established the power of agencies to pass regulations based on statutory interpretation, a practice that started in the 1970s with regulations requiring gasoline companies to post octane mounts at the pump.

The FTC's first rules were established to prevent companies from "unfair and deceptive acts and practices" such as deceptive advertising. The new rules would expand the power of the FTC into a category of unfair methods of competition that can lead to companies exploiting employees.

"Companies have an enormous amount of power over employees at the time of hiring," said Gilles. "If everything is covered as protected information, can you ever leave?"

The panelists pointed out that there have already been 16,000 comments, so many that the FTC has extended the period for public remarks. They added that if a rules change is put into effect, it is likely to be challenged by state attorneys general.