

CLIENT ALERTS

FTC = Freedom to Compete? FTC Proposes Rule to Ban Non-Compete Clauses

Client Alert

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On July 9, 2021, President Biden signed an Executive Order on Promoting Competition in the American Economy, which encouraged the Federal Trade Commission ("FTC") to exercise its statutory rulemaking authority under the Federal Trade Commission Act to stop "unfair" non-competes and other agreements that limit worker mobility, as written about [here](#).

Shortly thereafter, Butzel attorneys, along with nearly five dozen recognized national non-compete/trade secret lawyers from across the country, signed on to a letter to the White House and the FTC attempting to educate them on the facts and data behind non-competes and urging restraint in any future rulemaking. Most notably, the signatories noted that such rulemaking may overstate the FTC's authority to involve itself in such agreements and may also misstate the perceived disadvantages and untold benefits. That letter can be found [here](#).

On January 5, 2023, nearly 18 months after above Executive Order was issued, the FTC issued its proposed rule to BAN non-compete agreements. The FTC's proposed rule would generally prohibit employers from using non-compete clauses. Specifically, the FTC's new rule would make it illegal for an employer to:

- enter into or attempt to enter into a non-compete with a worker;
- maintain a non-compete with a worker; and/or
- represent to a worker, under certain circumstances, that the worker is subject to a non-compete.

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The proposed rule would apply to employees, independent contractors and anyone who works for an employer, whether paid or unpaid.

Even more concerning, the proposed rule also appears to impact often used non-disclosure/confidentiality agreements (“NDA’s”). Indeed, the rule seeks to ban “de facto” non-competes, which would arguably include most currently used NDA’s. From a pure trade secret protection perspective, that may have huge ramifications across the country.

When does the proposed rule go into effect?

Notably, the proposed rule is NOT in place at this time. The public is invited to submit comments on the proposed rule, which are due 60 days after the rule is published. Butzel attorneys, along with other expert practitioners from around the country, are working on another letter commenting on the proposed rule.

What should employers do right now, if anything?

First, as noted above, Butzel will be part of an expert group providing public comments. If you are interested in joining in these efforts or providing comments on behalf of your company and/or industry group, please feel free to contact your Butzel attorney to discuss.

Second, employers should continue to audit their current non-compete agreements and other agreements (like NDA’s), ensure that those agreements are reasonable under the current law, and continue to enforce them as appropriate.

As more information comes out as to potential changes in the law, Butzel will continue to provide updates.

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