

Employer Non-Compete Agreements Face Possible Ban by FTC

Alert

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The Federal Trade Commission (FTC) started off 2023 with a bang. On January 5, the FTC proposed a [new rule](#) that would effectively ban most non-compete agreements, making them an unfair and unlawful method of competition under the FTC Act. The proposed ban would extend to non-compete agreements between an employer and its employees, independent contractors, interns, externs, volunteers, and sole-proprietors who provide services. It would not extend to franchisees or non-compete agreements in contracts for the sale of a business. The proposed rule expressly supersedes any inconsistent state law or rule.

THE BAN ON NON-COMPETES AND REQUIREMENT TO RESCIND

The proposed rule would prohibit employers from entering into, attempting to enter into, enforcing, or representing the existence of non-compete requirements with covered workers. Moreover, employers would be required to rescind their existing non-compete agreements with covered workers and provide notice to them, with a compliance deadline that will occur six months after the date of publication of the final rule. Model language for the required notice is included in the proposed rule, which advises current and former workers that their non-compete restrictions are no longer in effect, and that there are no limitations on their ability to work for any company, competitor, or even to start a competing business.

THE BAN EXTENDS TO CONTRACTS OTHER THAN NON-COMPETE AGREEMENTS

The proposed rule would not only apply to contract provisions that are explicitly drafted as non-compete provisions, but extends to any contract provision that functions as a *de facto* non-compete agreement by prohibiting a covered worker from seeking or accepting employment with a competitor after the

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employment or contracting relationship ends. The FTC says that includes (but is not limited to) overly broad non-disclosure (i.e., confidentiality) agreements, and agreements that require workers to repay employers for training costs if they do not remain employed for a specified duration. Although the FTC did not expressly say so, non-solicitation agreements that have the effect of prohibiting workers from seeking or accepting employment or operating a competing business could also be deemed *de facto* non-compete agreements under the proposed rule.

NEXT STEPS

The public may submit comments to the proposed rule in the 60-day period following January 5, 2023. The comment period could result in changes to the proposed ban before the final rule is published. Employers who depend on non-compete agreements to protect confidential information and good will should consider submitting comments to the FTC. Topics that employers may want to comment on include whether the proposed rule should be limited to low-level or low-wage workers, whether the proposed rule should apply to exempt employees or executives, and whether or how the rule should apply when employees have access to valuable trade secrets.

The proposed rule—and any final rule—is likely to face legal challenges. However, employers should be prepared to take swift action to comply with the rule, in anticipation of its enactment. Employers can start by identifying their current and former employees and contractors with non-compete agreements, confidentiality agreements, non-solicitation agreements, and repayment agreements, and by seeking legal counsel about how best to address these agreements.

The FTC is currently using the existing provisions of the FTC Act, which bans unfair competition, to take action against companies that it believes use onerous non-compete clauses with their workers, recently ordering three companies to terminate non-compete agreements with their employees. For an analysis of the FTC's recent use of the FTC Act to challenge non-compete agreements, [see Stinson's recent article](#).

For more information on employer non-competes, please contact [Amy Conway](#), [Alisa Ehrlich](#), [Carrie Francis](#), [Sharon Markowitz](#), [Sharon Ng](#), [Hailey Perkins](#), [Kevin Robinowitz](#), [Bernadette Sargeant](#), [Stephanie Scheck](#), [Nicci Warr](#), [Sara Welch](#), [Benjamin Woodard](#) or the Stinson LLP contact with whom you regularly work.

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