

FTC Issues Proposed Rule Banning Non-Competes

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On January 5, 2023, the Federal Trade Commission (“FTC”) proposed a rule prohibiting employers from entering or enforcing non-compete clauses with their workers. The proposed rule would supersede any inconsistent state law. Given a March 2022 US Treasury Department report finding that one in five Americans is subject to a non-compete, this proposed rule – if it becomes final – will have a significant impact on the workplace.

The proposed rule prohibits employers from asking workers to enter non-competes and requires them to rescind any existing non-competes (through written notice) within 180 days of the date the final rule is published. The term “worker” includes not only employees but also any person who works for an employer, whether paid or unpaid, such as independent contractors, externs, interns, volunteers, apprentices, and sole proprietors who provide services to a client or customer. Interestingly, the rule also bans contractual terms that essentially function as a non-compete clause, such as an overly broad non-disclosure agreement that effectively precludes the worker from later working in the same field or a requirement that a worker re-pay training costs if the worker’s employment ends within a specified time period (where the required payment is not reasonably related to the employer’s actual cost).

The proposed rule would not prohibit non-compete clauses entered into in connection with the sale of a business or all of its assets where the person restricted by the non-compete is a substantial owner in the business entity.

The rule is subject to public comment for the next 60 days. The FTC will then consider those comments and publish the final rule. Employers must comply with the final rule by the 180th day after it is published.

The FTC notice also requested public comment on alternatives to the proposed rule. The alternatives include:

- Banning non-competes for workers making less than a certain wage threshold and, either having no rule regarding the non-competes of higher-earning workers or having a rebuttable presumption of illegality with respect to their non-competes;
- Having a rebuttable presumption of illegality for all non-competes; or
- Having a rebuttable presumption of illegality for the non-competes of workers earning less than a certain wage threshold with no rule regarding the non-competes of higher-earning workers.

The proposed rule is part of the FTC’s broader effort to eliminate post-employment restrictions for employees. The FTC recently took action against three different companies, forcing them to drop non-compete restrictions previously in place for thousands of workers. The FTC’s hostility towards post-employment restrictions is

consistent with the growing trend of states preventing or significantly restricting an employer's right to demand compliance with non-competition and non-solicitation agreements. California, Colorado, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, North Dakota, Oklahoma, Oregon, Rhode Island, Virginia, and Washington have passed some of the more stringent laws with respect to post-employment restrictions.

Not surprisingly, numerous business groups have already threatened legal challenges to the FTC's proposed rule, arguing that Congress never delegated the authority to create this sort of rule to the FTC and that the proposed rule is unlawful. Employers should remain alert for further developments on the proposed rule. If and when a final rule is published, only the FTC can seek relief on behalf of aggrieved workers; it does not appear to create a private right of action for workers.

The proposed rule may be found at <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-competition-rulemaking>.

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