



FTC PROPOSED RULE WOULD RENDER ALL NON-COMPETES UNENFORCEABLE

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On January 5, 2023, the Federal Trade Commission ("FTC") released a notice of proposed rulemaking that would essentially ban employers from using non-compete agreements with employees and independent contractors throughout the United States. Through the proposed rule, the FTC seeks to declare that an employer's use of a non-compete clause is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. If adopted, the rule would apply both prospectively and retroactively, and could be enforced by the FTC, but not by individuals through a private right of action.

Upon release of the proposed rule, opponents promptly questioned whether the FTC has the authority, as delegated by Congress, to enact such a rule and how such a rule would be enforced. Similar legislation has been proposed in recent years in Congress, but had not passed. If the FTC ultimately enacts such a rule, legal challenges will likely follow to address whether the FTC has the authority to enact such a rule, even though Congress has declined to do so.

The proposed rule also states that it would supersede any State statute or order that is inconsistent with its provisions. Some states, including California and North Dakota, have already outlawed the use of non-competes in employment contracts. Many other states, including Illinois, have passed legislation restricting the use and narrowing the enforceability of the provisions. The enforceability of non-competes in other states is often guided by decades of case law. Whether an FTC rule could supersede these state laws will likely also be a question to be decided by the courts.

Still, it is important to know that according to the FTC, non-competes are unfair restrictions on workers' mobility and that they have the effect of suppressing workers' wages. The proposed

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rule would ensure that employers are not able to use unfair bargaining power to force workers to enter into non-competes. The proposed rule would also prohibit the use of language in employment contracts that would effectively function as a non-compete, such as a nondisclosure provision that is written so broadly that it would have the effect of preventing the worker from working in the same field. The rule would also rescind all current non-competes and require employers to advise current and former employees that non-competes would not be enforced.

However, the rule would continue to allow the limited use of non-compete provisions in agreements regarding the sale of a business entity, when the person being restricted by the clause is an owner, member or partner holding at least a 25 percent ownership interest in the business entity. In addition, other types of restrictive covenants such as non-disclosure and non-solicitation provisions would still be permitted in employment agreements.

The proposed rule is now out for public comment for 60 days. If the FTC goes forward, the rule will go into effect 180 days after the final version is published. While the proposed rule could have a significant impact on employers – who would be required to revise their current employment agreements and issue notices to current and former employees who are currently covered by non-competes – there are numerous hurdles the proposed rule must overcome before it will govern business operations nationwide.

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