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Proposed Nationwide FTC Ban on Non-Compete Clauses

On January 5, 2023, the Federal Trade Commission (FTC) announced a [proposed rule](#) ("Rule") that would effectively impose a nationwide ban on all existing and future non-compete clauses between workers and employers.

By way of background, a non-compete clause is a type of restrictive covenant that prevents a worker from working for a competitor or starting a competing business, generally within a certain geographical area and time frame after the worker's employment ends. The FTC's position, as stated in the Rule's overview, is that non-compete clauses prevent workers from leaving jobs, lower competition for workers, and reduce wages. According to the FTC, non-compete clauses also stop new businesses from forming, stifle entrepreneurship, and prevent novel innovation that would take place if workers were able to freely share ideas.

On the other hand, proponents of non-compete clauses have historically argued, among other things, that they are necessary to protect an employer's confidential information, trade secrets, and intellectual property and its often considerable investment in the training and development of its employees. Non-compete agreements are currently subject to state law.

Key components of the proposed Rule include:

- Providing that it is an "unfair method of competition" for an employer to enter into a non-compete clause with a worker, attempt to do so, or inform a worker they are subject to an enforceable non-compete clause, when there is no "good faith" reason for the employer to believe that is the case
- Requiring employers to rescind all existing non-compete clauses within 180 days of the Rule's effective date and notify all affected employees within 45 days of doing so, even in situations where an employee no longer works for them
- Adopting a broad "functional test" of the term "non-compete" that would, importantly, prohibit other contractual terms that

would, importantly, serve as a *de facto* non-compete clause. For example, the Rule would prohibit a broad non-disclosure agreement that has the practical effect of precluding workers from obtaining employment in the same field as their current employer. Notably, however, the Rule does not contain a blanket prohibition on non-disclosure agreements and other post-employment contractual terms, such as non-solicitation agreements, provided those terms do not serve as *de facto* non-compete clauses.

The Rule would apply to workers, whether paid or unpaid, including, *inter alia*, employees, contractors, externs, interns, and volunteers.

The Rule does *not* apply to non-compete clauses entered into in the sale-of-business context.

The proposed Rule will go through the customary 60-day notice and comment period once published in the Federal Register and become effective if and when the FTC formally votes to adopt the final rule.

If ultimately implemented, the ban on non-compete clauses may be met with a myriad of legal challenges to the FTC's authority to issue such a ban, possibly raising constitutional and other questions regarding (1) freedom of contract, (2) state's rights, (3) administrative overreach, (4) intellectual property and trade secrets, and (5) public policy concerns.

While employers need not take immediate action while the proposed Rule is pending, they should remain aware of ongoing developments and prepare for any changes that may impact their contractual agreements with employees. Interested parties are encouraged to contact the firm if they have any questions or concerns about the proposed Rule.

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