

DON'T PANIC: THE LONG VIEW OF FTC'S PROPOSED NON-COMPETE RULE

Jan 12, 2023

Last week, the Federal Trade Commission ("FTC") released a [Notice of Proposed Rulemaking](#) (the "Proposed Rule") proposing a rule that would ban "non-compete" agreements. Finding that non-compete clauses reduce competition, wages, and innovation, and relying on its authority to eliminate unfair methods of competition, the FTC proposed a nationwide prohibition on any U.S. employer entering into, attempting to enter into, or maintaining any non-compete agreements with any workers. Employers should take note of the following key details:

"Non-Compete Clause," Defined

The Proposed Rule would apply to all workers, including employees, individuals classified as an independent contractor, interns, volunteers, apprentices, or sole proprietors who provides a service to a client or customer. However, the Proposed Rule would not apply to non-compete clauses between two business entities, including between a franchisee and franchisor.

"Worker" Defined

The Proposed Rule would apply to all workers, including employees, individuals classified as an independent contractor, interns, volunteers, apprentices, or sole proprietors who provide a service to a client or customer. However, the Proposed Rule would not apply to non-compete clauses between two business entities, including between a franchisee and franchisor.

Retroactive Application

If the Proposed Rule takes effect, employers would be prohibited from entering into non-compete clauses with workers after the Rule's compliance date. Additionally, the Proposed Rule would require employers to rescind existing non-compete clauses no later than the Rule's compliance date, and provide written notice to workers released from non-compete clauses.

Sale of Business Exception

The Proposed Rule would include a limited exception permitting non-compete clauses between the seller and buyer of a business. This exception would only be available where the party restricted by

the non-compete clause is an owner, member, or partner holding at least a 25% ownership interest in the business entity being sold.

Potential Additional Exceptions

In its request for comment, the Proposed Rule invites stakeholders to weigh in on several potential alternatives to the general prohibition against all non-compete clauses, including:

- Whether senior executives should be exempted from the Proposed Rule, or subject to a rebuttable presumption that a non-compete clause is unlawful rather than an outright prohibition; and
- Whether low- and high-wage workers should be treated differently under the Proposed Rule (e.g., creating a minimum salary above which a non-compete clause may be permissible and exempt from the Proposed Rule).

Next Steps

The Proposed Rule's future is anything but certain. First, the Proposed Rule will be subject to a 60-day comment period, during which stakeholders (including employers) will weigh in on the Proposed Rule and suggest changes. From there, the FTC will review and, as it deems appropriate, incorporate feedback into any final rule it adopts—although, it should be noted, the FTC could decide not to implement any rule at all based on feedback received. The Proposed Rule sets the “compliance date” for all employers as 180 days after publication of any final rule.

Even if a final rule is adopted, it would almost certainly be subject to challenges in court. Indeed, in a statement voting against the Proposed Rule, Commissioner Christine S. Wilson noted that “the Commission’s competition rulemaking authority itself certainly will be challenged,” going so far as to opine the Proposed Rule “is vulnerable to meritorious challenges” because the FTC does not have the authority to implement such sweeping changes without authorization from Congress.

The Proposed Rule will not take effect any time soon. Still, employers should consult with their Human Resources professionals and legal counsel to ensure appropriate steps are taken to meet any compliance deadlines that may be set by the FTC when adopting a final rule.

MEET THE TEAM



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