



Is It the End of Non-Compete Clauses? The Federal Trade Commission Proposes a Prohibition and Rescission of Non-Compete Clauses

01.06.2023

On January 5, 2023, the Federal Trade Commission announced a Notice of Proposed Rulemaking that would prohibit and rescind non-compete provisions in employment contracts. The public has 60 days to offer comment on the proposed rule, and a final rule will be published thereafter.

Background on the FTC Act

Section 5 of the FTC Act declares, “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”

On November 10, 2022, the Commission issued a Policy Statement concerning its interpretation of the scope of Section 5. The Commission explained that Section 5’s prohibition against “unfair methods of competition” is broader than federal antitrust laws’ prohibition against “unfair competition.” Thus, the Commission stated that part of its role is to identify unfair methods of competition—which the Commission defined as conduct undertaken by an actor in the marketplace that (1) is coercive, exploitative, collusive, abusive, deceptive, predatory, or overly restrictive and (2) negatively affects competitive conditions (e.g., reduces output, limits choice, lowers quality, reduces innovation, impairs market participants, or reduces potential competition).

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The FTC's Proposed Rule

On January 5, 2023, building off the Policy Statement -- as well as President Biden's July 2021 executive order calling for the Commission to limit non-compete agreements -- the Commission announced a Notice of Proposed Rulemaking (NPRM) labeling non-compete agreements as unfair methods of competition. The FTC found that non-compete clauses reduce workers' wages, stifle new businesses and new ideas, and hinder workers' economic liberty.

The proposed rule defines non-compete clauses as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." The proposed rule would:

- Prohibit an employer from entering into or attempting to enter into a non-compete clause with a worker;
- Require employers to rescind existing non-compete clauses with workers;
- Prohibit any contractual provision that would require a worker to repay training costs upon separation within a specific time period if the required payment is not reasonably related to the actual costs incurred by the employer; and
- Put at risk other agreements (e.g., protection of confidential information) if the agreement could prevent a worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer.

Moreover, the proposed rule would define "worker" broadly. "Worker" would be defined as any natural person who works, whether paid or unpaid, for an employer, which would include an employee, independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer.

Currently, the only exception to this broad proposal is a limited exclusion for non-compete clauses between the seller and buyer of a business.

As expressed by Commissioner Wilson in her dissent to the NPRM, the proposed rule seeks to reverse over a hundred years of legal precedent on this issue. Thus, Commissioner Wilson notes when finalized, the proposed rule will meet substantial and protracted litigation. Commissioner Wilson suggests (1) the Commission lacks authority to engage in this rulemaking; (2) the NPRM runs afoul of the major questions doctrine, which was recently discussed by the Supreme Court in *West Virginia v. EPA*; and (3) the NPRM is contrary to the non-delegation doctrine. In other words, the FTC will not be the final arbiter on this issue; rather, the Supreme Court will most likely address this issue, if necessary.

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Take Action

The Commission is seeking public comment on all aspects of the NPRM, including:

- Should the rule apply different standards to noncompetes that cover senior executives or other highly paid workers?
- Should the rule cover noncompetes between franchisors and franchisees?
- What tools other than noncompetes (such as, trade secret laws and confidentiality agreements) might employers use to protect valuable investments, and how sufficient are these alternatives?

Public comments must be received by the Commission within sixty days after the proposed rule is published in the Federal Register, which will likely come today or early next week.