
Proposed Rule to Ban Non-Compete Agreements: When and How Will This Impact the Future of Business and Employment?

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On January 5, 2023, the Federal Trade Commission (FTC) proposed the Non-Compete Clause Rule. The Proposed Rule would operate to (1) ban businesses and employers from engaging in non-compete agreements going forward, (2) rescind all current non-compete agreements, and (3) ban businesses and employers from representing to a worker that the worker is subject to a non-compete agreement. If this Proposed Rule were to go into effect, businesses and workers would be impacted greatly and the common practice of non-compete agreements would cease to exist.

Currently, Non-Compete Agreements that are deemed reasonable are legal and binding in most of the United States, and courts continue to enforce these agreements time and time again. If this Proposed Rule goes into effect, the future of the American workplace and employment agreements will change drastically.

The FTC rationalized its Proposed Rule based on its finding that non-compete clauses violate Section 5 of the Federal Trade Commission Act, thus, non-competes would be considered an “unfair method of competition.” This Proposed Rule is in alignment with a statement released by the FTC in November 2022 which provided that “[r]eactivating Section 5 in a way that is fully faithful to the authority that Congress gave us is critical for promoting the rule of law and for ensuring the democratic legitimacy of our work.”

Will This Proposed Rule Go into Effect; If So, When?

The FTC is bound by the rulemaking process. This means that it is required to publish a Notice of Proposed Rulemaking. After the publication of the Notice, the public will have an opportunity to comment on the Proposed Rule. The Proposed Rule specifically provides that the public can make comments on this Proposed Rule up to 60 days after publication in the Federal Register. Agencies sometimes will extend the deadline to submit rules depending on how the public comment period progresses. However, those who wish to submit a comment for consideration should do so on or before the deadline. The public comment period is not yet open.

How Will This Proposed Rule Change the American Workplace?

If this Proposed Rule goes into effect, employers and companies may need to make modifications to their employment contracts. Employers will need to:

1. Eliminate their current non-compete agreements.
2. Not enter into any new non-compete agreements.
3. Not hold out to any worker or employee that their employment includes a non-compete agreement.

Importantly, this Proposed Rule would apply to “workers” and employees, alike. Meaning, this Proposed Rule would apply to employees,

volunteers, independent contractors, interns, etc.

The FTC carved out one notable exception to the Proposed Rule. This Proposed Rule would *not* apply to the sale of a business. Thus, non-competes will still be allowed to prevent owners of businesses from competing with the purchaser of their previously owned business. However, the exception only applies to an owner, member, or partner holding at least a 25% ownership interest in the business entity.

What's Happens Next?

Once the public comment period opens, the responses will likely vary, and that comment period could inform what happens next with this Proposed Rule. The FTC may choose to adopt the Proposed Rule as it is currently published, or it may choose to move forward with an alternative proposal to the Proposed Rule. The FTC specifically outlined potential alternatives to the Proposed Rule. Thus, the comment period will help to inform the FTC of whether it should make modifications based on two key questions it has:

1. Whether the rule should impose a categorical ban on non-compete clauses or a rebuttable presumption of unlawfulness, and
2. Whether the rule should apply uniformly to all workers or whether there should be exemptions or different standards for different categories of workers.

So, the final rule that gets adopted may possibly specify that a ban on non-competes should apply to workers who earn below a specific wage threshold. Alternatively, the final rule may provide that non-competes are only permissible for certain types of workers. Specifically, the FTC questions and seeks comments as to "whether it should adopt different standards for non-compete clauses with senior executives."

Many of these unanswered questions as to what happens next will be answered over the course of the rulemaking process. The FTC may choose to publish the Proposed Rule as it is, or it could publish a final rule that only vaguely resembles the current Proposed Rule.

Further, if the Proposed Rule does pass, it will likely be challenged in court and the subject of significant litigation. Arguments are already surfacing as to whether the FTC has the authority to issue such a rule.

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