

## **Cutting through the Noise: What Your Business Needs to Know About the FTC’s Proposed Rule to Ban Non-Compete Agreements Nationwide**

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Kicking the New Year off with an unpopular bang, the Federal Trade Commission (“FTC”) announced a Proposed Rule in January 2023 that would broadly ban non-compete agreements between employers and their workers. (The proposed rule is available at: <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking> (issued Jan 5, 2023) (the “Proposed Rule”).

### **What is the Proposed Rule?**

The Proposed Rule is a broad ban against using “non-compete clauses” in the employment context. The rule defines a “non-compete clause” 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.”

Unlike the shifting tide on non-compete laws across the country, the Proposed Rule makes no exception for high-level employees or employees with direct access to trade secrets. Rather, the proposed non-compete ban only contains an exception that allows for non-competes to prevent employees from departing to a competitor after sale of their employer’s business.

### **Is the FTC’s Ban Already in Effect?**

No. Like all rules issued through regulatory agencies, the FTC’s proposed rule will go through a notice-and-comment period, which is a 60-day period by default. The comment period regarding the Proposed Rule is open through March 20, 2023, which allows stakeholders and members of the public to submit comments on the Proposed Rule. At some unknown point after the comment period closes, the FTC will likely issue a final version of the rule, which may differ from the current language of the Proposed Rule.

Further, any final rule issued to ban non-competes will face legal challenges and will likely be stayed by a court order while those challenges are reviewed.

### **Would the Proposed Rule impact existing non-compete agreements?**

Yes. Existing non-competes are impacted under the proposed rule. Section 910.2(b) of the Proposed Rule provides that “an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than” the “compliance date,” which the rule defines as 180 days after publication of a final rule.

### **Does the New Rule Apply to Other Restrictive Covenants, such as Nondisclosures, Customer Non-solicits, and Non-recruitment Covenants?**

Generally, no. But, the exact scope of the rule is not clear because, in addition to banning non-competes, the rule prohibits “de facto” non-competes, or contractual provisions that have the effect of preventing an employee from working elsewhere after their employment ends. For example, the Proposed Rule

identifies Non-disclosure agreements that are so broad that they prevent an employee from working in the same field elsewhere, as being an example of a de facto non-compete. Another example set forth was training-repayment provisions that require workers to repay training costs upon departure.

These examples suggest that other restrictive covenants like customer non-solicitation, employee non-recruit, and non-disclosure agreements will not be impacted even if the Proposed Rule goes into effect without being pared down.

**Can I still enforce my existing Non-Competes in the meantime?**

Yes. The FTC's proposed ban has not taken effect. Employers can enforce non-competes consistent with existing state law. But, employers should stay mindful that are developments are in progress and keep an open dialogue with counsel experienced with non-compete and trade secret matters.

Further, employers should review what steps they are taking to protect their trade secrets and other confidential information. Federal and state trade secret law will be unaffected by the potential ban and will take on a more significant role moving forward in preventing unfair competition.