

Federal Trade Commission Proposes Broad Ban on Use of Non-Compete Covenants

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The Federal Trade Commission (FTC) has [issued](#) a [Notice of Proposed Rulemaking](#) to broadly ban the use of non-compete covenants throughout the country.

The proposed rule, which would supersede all contrary state laws, is remarkable for its sweeping definition of “non-compete clauses” that fall within the ban. The ban would extend to “de facto” non-compete clauses — *i.e.*, contractual provisions that have the effect of prohibiting workers from seeking or accepting employment or operating a business after the conclusion of the worker’s current employment. In this regard, the ban may implicate broadly drafted non-disclosure of confidential information restrictions and repayment of training costs provisions. The ban could also implicate non-solicitation of customer restrictions, depending on the surrounding facts.

If adopted, the proposed rule will require all employers that use any agreement with a non-compete clause (or with a clause that could be deemed a non-compete clause under the definition in the proposed rule) to take action to rescind the non-compete clause. Any provision negotiated in exchange for the non-compete (for example, a severance provision) would remain intact. This rescission action will require individualized communications from the employer to all current employees, as well as former employees.

While the proposed rule contains a sale-of-business exception, even that is exceptionally narrow and limited to individuals who owned at least 25 percent of the ownership interest in the business.

In his [July 9, 2021, Executive Order](#), President Joe Biden encouraged the FTC to engage in rulemaking to “curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” Although Biden’s use of the phrase “*unfair* use of non-compete clauses” suggested that, perhaps, there could be a “*fair*” use, the FTC’s outright ban suggests otherwise.

The Notice of Proposed Rulemaking permits the public to submit comments by March 10, 2023 (within 60 days after publication of the proposed rule in the *Federal Register*). A final rule will then be issued.

Legal challenges to the rule are expected.

Jackson Lewis attorneys are examining the proposed rule and continuing to assess its potential impact. We will provide updates on significant developments. Please contact a Jackson Lewis attorney with any questions or assistance in submitting comments to the proposed rule.

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