

Insights: Alerts

FTC Proposes Rule That Would Ban Non-Compete Clauses

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On January 5, 2023, the Federal Trade Commission (“FTC”) issued a [notice of proposed rulemaking](#) that would prohibit almost all non-compete agreements between employers and employees. In announcing the proposed rule, Commissioner Lina Khan noted “[t]he freedom to change jobs is core to economic liberty and to a competitive, thriving economy. Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand. By ending this practice, the FTC’s proposed rule would promote greater dynamism, innovation, and healthy competition.” The Proposed Rule was likely prompted at least in part by President Biden’s July 2021 Executive Order related to competition that, among other things, provided that “[t]o address agreements that may unduly limit workers’ ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.” See Section 5(g) of July 9, 2021 Executive Order on Promoting Competition in the American Economy, available at [Executive Order on Promoting Competition in the American Economy | The White House](#).

The FTC’s [proposed rule](#) is broad in a number of respects and would apply to almost any form of non-compete, with the exception of an express carve-out for non-competes associated with the sale of a business. Moreover, the proposed rule would apply to the establishment of non-competes, the enforcement of non-competes, and any implication that an employee is subject to a non-compete even when there is no actual agreement in place. The proposed rule also would explicitly apply to agreements the agency refers to as implicit non-compete agreements like “[a] non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker’s employment with the employer.” See Proposed Rule at 910.1(b)(2)(i). The proposed rule would expressly require the rescission of any existing non-competes that violate the rule by the date of compliance.

Non-competes are quite common, and in many industries, are considered standard practice. Available statistics vary, but suggest that about 50% of private companies have non-competes, and that between 20% and 33% of American employees may be subject to non-compete agreements. See July 9, 2021 Fact Sheet [available at FACT SHEET: Executive Order on Promoting Competition in the American Economy | The White House](#). Non-competes can help employers manage concerns that departing employees may take with them valuable information, including, but not limited to trade secrets and other confidential and proprietary information that

could be shared with competitors. Accordingly, for many years, the majority of courts recognized advantages to non-competes and held that reasonable non-competes do not violate the antitrust laws. Some states have specific laws relating to permissible length and conditions of non-competes, which this proposed rule would expressly supersede.

However, recent years have seen increased concerns from regulators and legislators that non-compete and other labor restrictions may unduly restrict employees' mobility, and lead both to reduced ability of employees to negotiate wages and depressed wages across many industries. A March 2022 Treasury Department report concludes that economic evidence shows that restrictions on labor competition, including non-competes, have led to a decrease in wages of “roughly 20 percent relative to the level in a fully competitive market.” March 2022 Treasury Report, *The State of Labor Market Competition* available at [THE STATE OF LABOR MARKET COMPETITION \(treasury.gov\)](#). The FTC estimates that the impact of the proposed rulemaking will “increase workers' total earnings by \$250 to \$296 billion per year.” Part VII.B.1, January 5, 2023 Notice of Proposed Rulemaking available at https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf.

Such concerns have led to several years of increased antitrust enforcement focused on labor markets, beginning with the [2016 DOJ/FTC HR Antitrust Guidance](#), which defined naked no-poach/no-hire agreements as illegal per se and kicked off a wave of more aggressive prosecution of such agreements, as well as some follow-on civil class actions. With respect to non-competes, some states and municipalities have also passed laws prohibiting non-competes for low-wage earners, including Illinois, Maine, Maryland, New Hampshire, New York, Rhode Island, Virginia, Washington, and the District of Columbia. At the federal level, the FTC just announced consent decrees with three different companies using non-competes: [Prudential Security](#), which provides security guards to companies, and [O-I Glass](#) and [Ardagh](#), which produce glass food and beverage containers. These recent actions, the new Proposed Rule, and the FTC's November 2022 [Policy Statement](#) further explaining and defining what it views to be the scope of its authority to prosecute unfair methods of competition under Section 5 of the FTC Act, likely signal an even greater uptick in scrutiny and enforcement related to restrictive practices in labor markets.

As with all proposed rules, there is a period for public comments. Interested stakeholders can submit comments either individually or jointly with other companies or trade groups within 60 days of the publication of the Proposed Rule in the Federal Register.

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