Published on *The National Law Review* https://natlawreview.com

# The Final Nail in the Coffin of Employee Non-Compete Provisions

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Non-compete provisions are facing a targeted attack from the Federal Trade Commission ("FTC") in its latest proposed rule issued on January 5, 2023. The sweeping attack purports to supersede less-restrictive State laws and challenge parties' freedom to contract, going so far as to invalidate existing and contractually agreed upon non-competition restrictions intended to protect employers' investments, trade secrets, and business interests by preventing unfair competition and misappropriation by competitors. In its press release, the FTC describes the proposed rule as intended to "ban employers from imposing noncompetes on their workers, a widespread and often exploitative practice that suppresses wages, hampers innovation, and block entrepreneurs from staring new businesses."

The FTC's cited authority for the proposed rule is Section 5 of the FTC Act which prohibits unfair methods of competition. According to the proposed rule that would apply to all industries and employers under the FTC's jurisdiction, non-compete provisions include all terms that would prevent a worker from "seeking or accepting employment with a person or operating a business" after the employment relationship ends and gives the example of an agreement that prevents a worker from working in the same field after leaving their current employer. The new rule, as proposed, applies to all "workers," defined to include independent contractors, interns, volunteers, and employees, among others. With very narrow exceptions, it declares that non-compete restrictions are an unfair method of competition and provides that existing non-compete provisions must be rescinded by the compliance date (180 days after publication of the final rule). Moreover, the FTC proposed rule "shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with this Part." The one exception carved out by the FTC is for non-competition agreements restricting a person selling their business entity or ownership in the entity.

In an environment where non-compete agreements have become increasingly difficult to enforce in many States, this global proposed declaration from the FTC presents a whole new set of challenges to employers seeking to protect their legitimate business interests. Existing non-compete laws are state-specific, with states like California prohibiting non-compete restrictions against former employees altogether and many other states like Colorado, Illinois, North Dakota, Virginia, and Washington, D.C. nearly completely banning such restrictions with only limited exceptions often tied to a monetary threshold such that only "high income" employees may be subject to such

restrictions. Many other states like Florida, North Carolina, and Tennessee have developed a robust body of caselaw defining the goal posts within which a non-compete restriction will be deemed enforceable, including case-by-case considerations of the time, scope and territory that is restricted as well as important public policy considerations of enforcement designed to fairly protect both employers' legitimate business interests and hold employees to fair restrictions on their post-employment behavior in their chosen industry. The proposed rule would decimate decades of developed state law specific to the industries and needs of that state. The proposed rule does not apply to other types of restrictions such as non-solicitation or non-disclosure agreements, so long as such restrictions are not considered to function as non-competition restrictions. It is unclear how the FTC will determine whether certain non-solicitation or non-disclosure agreements are so broad that they function as "de facto non-compete clauses."

The impact of such proposed rule, should it become final, could ring the death knell for employers and industries under the FTC's jurisdiction seeking to protect their investments in their most important resource—their people. It may likely have the same impact even those industries that do not specifically fall under the FTC's jurisdiction if relied upon as persuasive authority by a court. While nearly all industries are impacted by non-competition restrictions, technology and healthcare industries in particular rely upon non-competition agreements to foster innovation, and to ensure the protection of their confidential information and investment in employees who are highly trained and often substantially compensated.

Questions of the validity and enforceability of any such rule abound. Is it constitutional? What about the basic private right to contract? Does this proposed rule provide sufficient protections to employers and actually promote competition as the FTC has assumed? Does the proposed rule appropriately take into consideration the economic impact on affected industries, or does it overstate the impact on defined workers?

Public comment is being solicited for a limited period of sixty (60) days following publication of the proposed rule in the Federal Register. It is critical that interested parties, i.e., employers with existing non-competition covenants in their employment agreements or those planning to include such provisions in future agreements, closely monitor the proposed rule and take this opportunity to submit comments on the same.

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National Law Review, Volume XIII, Number 11