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

The Federal Trade Commission's Proposed Non-Compete Ban Adds to Legal Pressure on Employers

Article By:

Anthony J. Judice

Michael G. Nicolella

The Federal Trade Commission has taken the most recent swing in the ongoing fight with non-compete clauses. The news that the FTC desires to prohibit employers from requiring employees to execute non-competition agreements restricting them from working for competing businesses, and require employers to rescind existing non-competes, brings a new focus to restrictions on their enforceability trending in courthouses and state capitals. The FTC's proposal faces immediate legal challenges—the U.S. Chamber of Commerce calls it "blatantly unlawful" and "is confident that this unlawful action will not stand"[1]. Meanwhile, the FTC says about 20% of American workers are bound by non-competes that hurt wages, competition, and innovation, and claims its rule could increase annual wages by up to $298 billion.[2] Companies that rely on these agreements to protect their investments in their human capital—and workers whose ambitions are throttled—should closely watch this fight.

The Proposal is Flexible (or Vague):

On Thursday, January 5, 2023, the FTC proposed adding a new subchapter addressing "Non-Compete Clauses" to the Code of Federal Regulations' "Rules Concerning Unfair Methods of Competition." The proposed rule, available here, states it is an "unfair method of competition" for an employer to enter into or maintain "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."[3]

The rule also prohibits an employer from telling a worker they are subject to a non-compete clause without a "good faith basis to believe that the worker is subject to an *enforceable* non-compete clause".[4] This appears to allow some non-compete clauses to be enforceable. But the rule gives employers no savings clause for non-competes with employees or independent contractors.[5] It exempts only non-competes with someone who owns at least 25% of a business they are selling, or with a franchisee.[6]

The rule has a non-exclusive functional test for whether a contractual term is a non-compete clause, for example if:

- "[a] non-disclosure agreement … 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"; or
- "[a] contractual term … requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker."

The rule does not spell out any of the geographic restrictions or timeframes courts typically use to analyze whether a noncompete is unreasonably broad. And it allows the FTC and courts to decide that other facts support—or rebut—an argument that a contractual term prevents a worker from taking other employment or operating a business. It's plainly foreseeable that the rule could cause a broad array of employment-related contractual terms to be treated as disguised non-compete clauses, without considering the employer's intentions. Employers and workers will dispute these interpretations for years to come.

If the proposed rule becomes effective, it would supersede lax state laws, and employers would quickly need to individually notify current and former workers who are subject to non-competes that the employer has rescinded these provisions.[7]

The Proposal Faces Many Challenges:

The proposed rule is subject to a 60-day public comment period before the FTC may publish a final rule that would become effective 180 days later. There is virtually no chance that this actually will occur within that timeframe, given the challenges this rule will face in a Federal court system that is actively reexamining its precedent on agency jurisdiction and rulemaking authority—and can put the proposed final rule on hold until it makes a final decision on its legality. We expect a historic legal fight.

Should You Do Anything Now?

For now, Pennsylvania courts may enforce non-compete agreements that are (i) incidental to an employment relationship between the parties and supported by consideration, (ii) reasonably necessary to protect the employer's legitimate interests; and (iii) reasonably limited in duration and geographic extent[8]. These questions are nuanced and specific to each employment relationship. If you are an employer who is concerned about whether your noncompete will be enforceable, or currently is enforceable, qualified legal counsel can help you mitigate the loss of a noncompete you rely on to protect your business.

Qualified legal counsel can also assist employers with protecting their confidential or proprietary information and trade secrets by strategizing steps they can take to address security measures. This can be accomplished by restricting employee access to information and trade secrets on a need to know basis, and updating confidential information agreements accordingly.

Until this rule is effective, Pennsylvanians wishing to contest their non-compete agreements must rely on legal precedent set by the courts. Unlike many other states, Pennsylvania has no statutes or regulations that address non-compete agreements. But Pennsylvania courts often view non-compete agreements as trade restraints that undercut former employees' ability to earn a living[9]. In Pennsylvania, the party seeking to enforce a non-compete agreement must show that it is entitled enforcement as a matter of equity, which can be a high bar for them to clear[10].

As you can see from the FTC's blanket attempt to regulate non-competes, and Pennsylvania's common law approach to them, winning the argument over whether one is enforceable requires skilled legal counsel – and could soon get more complicated.

FOOTNOTES

[1] https://www.uschamber.com/finance/antitrust/the-ftcs-noncompete-rulemaking-is-blatantly-unlawful

2 https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking

3 Proposed 16 C.F.R. § 910.2(a).

4 Id. (emphasis added).

5 See proposed 16 C.F.R. § 910.1(c) (defining "Employer" as one that hires or contracts with a worker another to provide work), (d) (defining "Employment" as "work for an employer") and (f) (defining "Worker" as a "natural person who works, whether paid or unpaid, for an employer", including without limitation "an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer").

6 See proposed 16 C.F.R. § 910.1(d), (f).

7 Proposed 16 C.F.R. §§ 910.4, 910.2(b)(2).

8 Rullex Co., LLC, 232 A.3d 620 at 624-625.

9 Rullex Co., LLC v. Tel-Stream, Inc., 232 A.3d 620, 624-25 (Pa. 2020)) (citing Hess v. Gebhard & Co., 808 A.2d 912, 917 (Pa. 2002))

[1] Hess, 808 A.2d at 917.

Nathan M. Sainovich also contributed to this article.

©2025 Strassburger McKenna Gutnick & Gefsky

National Law Review, Volume XIII, Number 11

Source URL:https://natlawreview.com/article/federal-trade-commission-s-proposed-non-compete-ban-adds-to-legal-pressure-employers