

FTC Holds Public Forum on Proposed Rule Banning Use of Non-Compete Agreements, Seeks Written Comments

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On February 16, 2023, the Federal Trade Commission (FTC) held a public forum on its proposed rule that would, with limited exceptions, ban employers from using employee non-compete agreements and require rescission of existing non-compete agreements. President Biden highlighted the proposed rule during his State of the Union address last week. Public comments on the proposed rule are currently due by March 20, 2023.

ArentFox Schiff LLP previously published alerts on this proposed rule on January 6, 2023 (see [here](#) and [here](#)) and has continued to monitor developments. The proposed rule can be found [here](#).

The Proposed Rule

The FTC issued the Notice of Proposed Rulemaking (NPRM) on a 3-1 Commission vote. Commissioner Christine Wilson, the dissenting vote, described the proposed rule as “a radical departure from hundreds of years of legal precedent.” Notably, on February 14, 2023, Commissioner Christine Wilson announced her plan to resign from the FTC.

The NPRM has invited the public to submit comments on the proposed rule. In particular, the FTC seeks comment on the following topics:

- Whether a different standard should apply to non-competes that cover senior executives or other highly paid workers;
- Whether the rule should cover non-competes between franchisors and franchisees; and

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- Whether there are tools other than non-competes that employers can use to protect valuable investments that are sufficient for that purpose.

As we [noted in a previous alert](#), the proposed rule is unprecedented in its scope. The proposed rule would apply broadly to all employees of companies subject to FTC oversight, independent contractors, and any individual who works for a covered employer, whether paid or unpaid (e.g., externs, interns, volunteers, apprentices, or sole proprietors). The proposed rule would apply to non-competes and any contractual provision that functions as a *de facto* non-compete, such as a broadly-written non-disclosure agreement. The FTC's proposed rule would also require employees to rescind any existing non-competes within six months of the Rule's publication and provide notice to employees "in an individualized communication" that such restrictions are no longer in effect and may not be enforced against the employee. Though a number of states and local jurisdictions in recent years have passed laws restricting the use of non-competes, almost all have limited the restrictions to lower-wage workers or provided some exception for executives and similar positions, and almost all expressly state that they do not apply retroactively to non-competes already in existence.

Further (as we [noted in a previous alert](#)), in the franchise context, the proposed rule, if modified to apply to franchisor-franchisee relationships and adopted, could dramatically change the franchise landscape by opening the door for franchisees to trade on the franchisor's brand, goodwill, practices, trade secrets, and other confidential information. While the proposed rule expressly would not apply to franchise agreements, the FTC has requested public comments on whether the proposed rule should be broadened to cover non-competes between franchisors and franchisees.

The Public Forum

At the FTC's February 16, 2023, Public Forum for the Proposed Rule on non-competes, the FTC heard testimony from a variety of individuals, business owners, professionals, associations, and industry groups — speaking both in favor of and in opposition to the proposed rule. While some commenters supported the proposed rule as a means to protect the rights of workers and promote employee mobility, others opposed such a broad rule, particularly as applied to executives, senior knowledge workers, higher-level employees, and highly compensated employees. Some commenters noted that the FTC lacked the constitutional and statutory authority to adopt its proposed rule.

The FTC also heard from representatives for franchisors and franchisees, as well as individual franchisees, who either agreed that the proposed rule should not extend to franchisor-franchisee agreements or urged the FTC to extend the rule to apply to such agreements. FTC Commissioner Alvaro Bedoya noted at the conclusion of the forum that he looked forward to reading written comments on this particular issue, "listened very carefully to the remarks of the franchisees who spoke today and shared their experiences," and was "particularly keen to understand how non-competes affect franchisees and their ability to compete."

Next Steps

The deadline to submit written comments on the proposed rule is March 20, 2023. Numerous participants at the public forum requested that the FTC extend the comment period. The FTC will review the comments and may make changes in a final rule based on those comments. Any final rule will take effect 180 days after its publication. If the FTC adopts the proposed rule either in its current or a modified form, there will likely be significant legal challenges to the rule, including whether the

FTC exceeded its authority.

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