

FTC TAKES DIRECT AIM AT EMPLOYEE NON-COMPETE AGREEMENTS

Hodgson Russ Non-Compete, Non-Solicit, and Trade Secrets Alert
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Non-competes are on the chopping block with a [Proposed Rule](#) issued on January 5, 2023, by the Federal Trade Commission. The Proposed Rule would prohibit companies from entering into or enforcing non-compete agreements and it would also void existing non-competes.

Non-Compete Clauses Would Be Prohibited. Under the Proposed Rule, employers nationwide would be categorically banned from entering into non-compete clauses with “workers” at every level of the company. This includes employees, independent contractors, interns, externs, volunteers, apprentices, and sole proprietors providing a service to a client or customer. Employers would also be required to rescind existing non-compete clauses with current and former workers within six months of the Proposed Rule’s effective date, and provide notice that the non-compete agreement is no longer effective or enforceable. The Proposed Rule would supersede all state laws to the extent they are inconsistent with its provisions.

The Proposed Rule would also prohibit *de facto* non-compete agreements, that is, other types of agreements that effectively prohibit an employee from seeking or accepting employment with a person or operating a business after the conclusion of their employment with the employer. An example of this is a broad non-disclosure agreement between an employer and employee that effectively precludes the employee from working in the same field.

Customer Non-Solicit Clauses and NDAs survive. The Proposed Rule would not prohibit non-disclosure agreements (“NDAs”) nor customer non-solicitation agreements, because those types of covenants generally do not prevent a worker from seeking or accepting employment or operating a business after the conclusion of the worker’s employment with the employer.

Some Sale of Business Non-Compete Clauses Survive. Also not impacted are non-compete agreements in connection with the sale of a business or ownership interest in a business for persons with an ownership interest of 25% or more. Franchisee and franchisor non-competes are also not affected, but the Proposed Rule would bar non-compete clauses for people who work for the franchisee or franchisor.

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Comment Period is Open. The FTC is seeking public comment on all aspects of the Proposed Rule, including: (1) whether senior executives and other highly paid or highly skilled workers should be exempted from the rule; (2) whether workers should be treated differently under the rule based on their job duties, earnings, or other factors; (3) whether franchisees should be covered by the rule; and (4) whether “no-poach” agreements for employees should be barred. After the public comment period, the FTC will likely adopt a Final Rule, requiring an employer’s compliance with the rule within 180 days.

New York’s Stalled Efforts to Bar Non-Compete Clauses. The scheme of laws related to non-compete clauses is state-specific. As large employers know, the rules are different in California (essentially prohibiting non-competes) from New York. Notably, New York has a bill pending that would bar non-competes, but it has been dormant for some time. [NYS Senate Bill S6425B](#) was introduced in April 2021, but the last status was that it remained in the Labor Committee.

Takeaways. Legal challenges to the FTC’s latest attempt to ban non-compete agreements are certain. We will be watching and reporting on developments. If codified, the FTC’s Proposed Rule will significantly impact an employer’s ability to protect its legitimate business interests by entering and enforcing non-compete agreements with employees. Hodgson Russ’ team of business litigation, labor and employment, and corporate attorneys regularly counsels clients on all aspects of non-compete agreements, restrictive covenants, employment contracts, employee handbooks, and confidentiality and non-disclosure agreements, and assists clients in assessing and minimizing potential risks and legal exposures associated with employment agreements and other contracts. If you have questions about the Proposed Rule, please contact any member of our [Non-Compete, Non-Solicit and Trade Secrets Practice Group](#).