CARLTON FIELDS

FTC Proposes Nationwide Ban on Noncompete Agreements for All Employers: How to Comment on This Proposed Rule

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A new proposed rule from the Federal Trade Commission (FTC) seeks to ban all employers, on a nationwide basis, from entering into, attempting to enter into, maintaining, or representing to a worker that the worker is subject to, a post-employment noncompete agreement. The FTC is accepting comments to the rule through Monday, March 6, 2023. Below are suggested substantive topics for comments and how to submit them.

The proposed rule includes a ban on contractual terms that prevent workers, including employees and independent contractors, from "seeking or accepting employment with a person, or operating a business" after the worker's separation of employment.The proposed rule prevents employers from bypassing the ban in creative ways, like labeling a noncompete provision by another name.The proposed rule sets out a "functional test," which would be used to determine whether the subject provision, whatever it is labeled, is really a "*de facto*" noncompete clause. For example, an employer could not have a nondisclosure agreement written so broadly that it effectively precludes the worker from working in the same field. Employers could also not create financial penalties to prevent competition. For example, requiring a worker to pay for training costs, if the employment ends within a specified time, when the amount is not related to the costs actually incurred. The definition of a 'noncompete clause' in the proposed rule is also broad enough to prohibit clauses that restrict former employees from poaching an employer's current employees.

The proposed rule ignores the many legitimate business reasons employers require noncompetes with certain workers and independent contractors. These clauses protect trade secrets, confidential, and proprietary information essential to the success of a business.They protect the client relationships and goodwill a business has spent time and money building. And, they prevent independent contractors from working on projects and gathering knowledge to then engage in a

competing or similar business. An FTC Fact Sheet accompanying the proposed rule dismisses these legitimate business interests by pointing to employers in states that ban noncompetes as 'still flourishing' without further elaboration.

The enforceability of noncompetes is currently a question of state law. A few states already have significant restrictions on the use of noncompete covenants as the FTC Fact Sheet points out. California, which overall has employment laws that significantly favor employees, is among them. Most states, however, strike a balance between protecting employers and workers. They, at a minimum, have safeguards to ensure that a noncompete agreement/provision is for a legitimate business reason, is narrowly tailored to the employer's line of work or geographic market, and lasts only for a reasonable period of time.

Any final rule issued by the FTC would preempt state laws currently permitting noncompetes.The proposed rule only has a narrow exception allowing noncompete agreements entered into in connection with the sale of a business. They would only be available where the party restricted by the noncompete is an owner, member, or partner holding at least 25% ownership interest in a business entity.

The proposed rule comes on the heels of a July 9, 2021, Executive Order on Promoting Competition in the American Economy. The executive order encouraged the FTC to make it easier for people to switch jobs by banning or restricting noncompete agreements.

The FTC is a federal agency charged with promoting competition, including limiting, where possible, anticompetitive practices and mergers, and protecting consumers, including regarding unfair and deceptive trade practices. Restrictive covenants in employment agreements can raise antitrust concerns under Section 1 of the Sherman Act (15 U.S.C. § 1) or Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). Federal antitrust laws are supposed to focus on the effect of the restraint on competition in a particular market however, not on the impact of such covenants on the employee or employer.

Consistent with its rule-making guidelines, FTC is seeking comments on the proposed rule for 60 days after its January 5, 2023 publication, or until Monday, March 6, 2023. Comments can be submitted online, by mail, and in-person. To submit online go to https://www.regulations.gov. Be sure to follow the instructions on the web based form. By mail, send your comments to: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex C), Washington, DC 20580. Hand delivery can be accomplished at: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610, Washington, DC 20024.

Include with your comment a reference to: “NonCompete Clause Rulemaking, Matter No. P201200”. If by mail or hand delivery, also include it on the envelope. Submitted comments will be placed on the public record, so do not include any sensitive personal information.Trade secrets or any commercial or financial information should also be excluded. There is a way to request confidential treatment, through compliance with 16 CFR § 4.9(c), but the comment will only remain confidential if the General Counsel grants the request in accordance with the law and public interest.

In planning your comments, you can direct questions to: Shannon Lane, Office of Policy Planning, Federal Trade Commission, (202) 876-5651.

The Notice of Proposed Rulemaking posted by the FTC has suggestions for matters upon which you might want to comment: whether senior executives should be exempt from the rule or subject to a rebuttable presumption of unlawfulness rather than a ban; whether low-wage and high-wage workers should be treated differently under the rule, which some states already do; the breadth of the proposed definition of ‘noncompete clause’; whether ‘contractual term’ within the definition of ‘noncompete clause’ should expressly include employee handbooks and policies even where they are not contractual; your experiences with noncompete clauses; data relating to noncompete clauses and their effects on competition; whether it’s preliminary finding that employers have reasonable alternatives to noncompetes is correct; and whether it’s preliminary determination that noncompete clauses are an unfair method of competition is accurate.

As written, the proposed rule does not treat a franchisee in the context of a franchisee-franchisor relationship as a worker (but does include a person who works for the franchisee or franchisor). The FTC also wants public input into whether franchisees should be covered under the final rule.

The FTC indicates it is also open to comments on possible alternatives to the fundamental design of the proposed rule. Should the rule impose a complete ban on noncompetes or a rebuttable presumption of unlawfulness? If the presumption of unlawfulness were to be rebuttable, should employers be required to disclose the noncompete before making an offer? Should it ban noncompete clauses as to some workers and apply a rebuttable presumption of unlawfulness to employees who are exempt executives or learned professionals under the Fair Labor Standards Act or employees earning at least six figures? Should there be different standards for different categories of workers, using one or more thresholds based on a worker’s job functions, earnings, some other factor or some combination of factors?

Once any final rule is published, employers would have 180 days to rescind all existing noncompete agreements. Employers will be charged with providing individualized communication to all current and former workers who were covered by a noncompete agreement to advise that the noncompete is no longer in effect. The rule includes model language for this notice at 16 CFR § 910.2(b)(2)(C), which if used, would act as a safe harbor for the employer on the notice requirement.

Any final rule is very likely to be challenged through litigation at multiple levels. The U.S. Chamber of Commerce, saying the FTC does not have statutory authority for this rule, is already weighing a suit according to *The Wall Street Journal*. This could lead to a stay in any final rule becoming fully effective. Congress could also nullify it. This is the beginning of the rule-making process and it will be a long time before the final rule is published or goes into effect, let alone becomes enforceable.

As you await the final rule, and a determination of whether it is enforceable, consider that any noncompete clauses entered into may eventually become unenforceable. To that end, businesses should consider additional ways to safeguard their business, such as statutory protections (patents, copyright registrations), and review of trade secrets policies and procedures to identify them more clearly. Employment handbooks and policies should also be updated to ensure that employees understand their confidentiality commitments and what the company considers to be company property.

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