

FTC Proposed Rule Would Ban Non-Competition Agreements

By Karen Adinolfi

On Thursday, January 5, 2023, the Federal Trade Commission (FTC) published a proposed rule that would invalidate existing non-competition agreements and prohibit employers from entering into new non-competition agreements, with very limited exceptions. The agency's reasoning for the creation of this rule is that non-competition clauses are anti-competitive, keep wages low, hamper the development of new businesses and ideas, and exploit workers. The proposed rule follows a gradual constricting of employers' ability to enter into non-competition agreements with employees over the past several years, albeit mostly at the state level.

Specifically, the proposed rule provides as follows:

- It declares that non-competition agreements are an unfair method of competition.
- It bans employers from entering into non-competition agreements with their employees and independent contractors.
- It requires employers to rescind existing non-compete agreements or clauses within six months and actively inform their employees that the agreements or clauses are no longer in effect.
- It provides a specific exception for non-compete agreements entered into between a seller of a business and the buyer of that business.
- It would supersede all conflicting state laws or rules.

The proposed rule does not appear to affect confidentiality or non-solicitation agreements or clauses, so long as such agreements or clauses are not actually non-compete agreements.

Clearly, this rule poses a significant threat to a company's ability to maintain its confidential information and trade secrets, to maintain an advantage over competitors by protecting that confidential information and those trade secrets, and to be willing to make significant investments in employee training and product/business line development.

The FTC has asked for comments on the rule, including comments on whether 1) franchisees should be covered by the rule, 2) whether senior executives should be exempt from the ban or simply subject to a rebuttable presumption, and 3) whether low- and high-wage workers should be treated differently under the rule. The links below contain information on how to submit a comment during the comment period, which is scheduled to end on March 6, 2023. The links also contain a fact sheet and the text of the proposed rule. Businesses that routinely use non-compete agreements are encouraged to submit their comments as to the proposed rule. If you would prefer Roetzel to submit your comments to the FTC, feel free to reach out to us.

This rule is certain to draw opposition from the business community as well as challenges to the FTC's ability to promulgate such a rule. We will keep you posted on developments related to this proposed

rule but contact any of the listed Roetzel attorneys if you have specific questions. In the meantime, proceed as usual with your non-compete practices.

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