



ALERTS

Federal Trade Commission Proposes Rule To Ban Non-Compete Agreements For Employees

January 6, 2023

Highlights

On Jan. 5, 2023, the FTC proposed a new rule that would ban non-compete clauses, preventing employers from entering into non-compete clauses and requiring employers to rescind existing non-compete clauses

Employers will have 180 days after the date of publication of the final rule to comply and must provide current and former employees notice that existing non-compete clauses have been rescinded within 45 days

The proposed rule would not apply to non-compete clauses entered into by a person who is a substantial owner, member or partner in the business entity at the time they enter into the non-compete clause and who is selling a business entity or selling all or substantially all of a business entity's operating assets

On Jan. 5, 2023, the Federal Trade Commission (FTC) proposed a new rule that would ban non-compete clauses. The proposed rule would prevent employers from entering into non-compete clauses with workers and would require employers to rescind existing non-compete clauses.

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The FTC's proposed rule would apply federal restrictions that largely mirror existing legislation in states such as California, North Dakota and Oklahoma. If the rule is adopted, employers will have 180 days after the date of publication of the final rule to comply (the compliance date).

Proposed Rule

The FTC's proposed rule would prohibit an employer from entering into or attempting to enter into "a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause." The rule also contains a "rescission requirement" which states that "an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date."

Definition of a Non-Compete Clause

The proposed rule defines a non-compete clause as 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." The proposed rule also specifically prohibits any employment agreements or other contracts between an employee and employer which function as a de facto non-compete clause. The rule would apply to any contracts, such as a non-disclosure agreement, which effectively preclude a worker from accepting employment or operating a business after the conclusion of the worker's employment with the employer.

Notice Requirement

The proposed rule requires employers to provide current and former employees notice that existing non-compete clauses have been rescinded within 45 days of the compliance date. The notice must be provided in writing via a letter, email or text message, and it must be an "individualized" communication. Employers would also be required to notify former employees for whom the company has contact information readily available.

Exceptions

The proposed rule would not apply to non-compete clauses entered into by a person who is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause and that person is:

- selling a business entity or otherwise disposing of all of the person's ownership in a business entity; or
- selling all or substantially all of a business entity's operating assets.

The FTC's proposed rule would, if adopted, pose new, burdensome and

potentially game-changing requirements on many employers across the country. The rule is not yet in effect, and the FTC's constitutional authority to implement the rule will likely be challenged in the coming months. The US Chamber of Commerce has already threatened to take legal action to fight the proposed rule. Regardless, employers should work with their counsel to follow this rule's progress closely and understand how this rule could impact their businesses moving forward.

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