

FTC Proposes National Ban on Noncompete Clauses

On January 5, 2023, in an announcement that could have sweeping implications for employers across the country, the Federal Trade Commission (FTC) proposed a [new rule](#) that would ban employers from imposing noncompete clauses on their workers and invalidate all existing noncompetes currently in effect. The proposed rule would apply to independent contractors and anyone else working for an employer, whether paid or unpaid. The proposed rule would also require employers to rescind existing noncompetes and actively inform workers that these restrictions are no longer in effect.

Scope

The FTC's proposal, if finalized, would invalidate any noncompete clause, defined 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."

While the FTC's proposal does not apply to other contractual restrictions, such as nonsolicitation, confidentiality, and nondisclosure agreements, it contains a "functional test" for any contractual term that acts as a de facto noncompete clause (i.e., one that has the effect of prohibiting a worker from seeking or accepting employment with another employer).

The proposed rule contains an exception to the ban on noncompetes for agreements entered into by a person selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity. Moreover, the FTC is seeking public comment on whether further exceptions should be included in the final rule, such as for senior executives or high-wage workers.

Timing and Effect

Comments on the proposed rule are due to the FTC in 60 days, after which the FTC may adopt a final rule. Even if the FTC eventually adopts a final rule and regulation, the proposal is likely to trigger legal challenges to the agency's authority for adopting such a rule. Nevertheless, employers should prepare for the possibility of a broad ban on worker noncompetes. Indeed, even if the rule is not ultimately adopted, the FTC recently brought several enforcement actions under Section 5 of the Federal Trade Commission Act (FTCA), which bans unfair methods of competition against employers utilizing noncompetes.

Perkins Coie will continually monitor the FTC rule-making process and provide further updates as the situation develops.

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