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The Assault on Non-Competition Agreements Continues: Federal Trade Commission Proposes Historic Ban

The Federal Trade Commission ("FTC") took an unprecedented step today by proposing a new rule that, if approved, will ban employers from entering into non-competition agreements with their workers. Non-competition or "non-compete" agreements are defined in the rule as contractual terms that prevent a worker from seeking or accepting employment with another person or business following the end of the worker's employment with the employer. Today's proposed rule follows President Biden's July 9, 2021 Executive Order that, among other things, encouraged the FTC to take more aggressive action to curtail the use of non-compete agreements. Our Trade Secret Protection & Non-Compete Group has previously written about that Executive Order, state legislative efforts that have followed it, and predicted such further federal scrutiny of non-competes.

More specifically, this proposed rule would make it unlawful for an employer to:

- Enter into or attempt to enter into a non-compete agreement with a worker;
- Maintain a non-compete agreement with a worker; or
- Represent to a worker that the worker is subject to a non-compete agreement when the employer lacks a good faith basis to believe there is such an enforceable agreement.

These restrictions would apply both prospectively and retroactively to existing non-compete agreements, which employers would be required to rescind within 180 days of publication of the final rule. Employers would also be required to individually notify each effected worker in writing that their non-compete agreement is no longer in effect within 45 days of it being rescinded.

In addition to these restrictions, the proposed rule has wide breadth, defining "worker" to include traditional employees, as well as independent contractors, interns, externs, volunteers, apprentices, and sole proprietors providing a service to clients or customers. The rule would not apply to a franchisee as between the franchisee and a franchisor, nor would the rule apply in the context of a person selling a business entity, or all or substantially all of a business's assets.

Finally, the rule would apply to both explicit non-compete agreements and what the rule calls "de facto" non-compete clauses, or contractual clauses that have the practical effect of prohibiting a worker from seeking or accepting employment from another employer following the conclusion of the worker's employment. Illustrative examples of these provided in the rule include broad non-disclosure agreements that make it difficult for a worker to remain employed in their field, and contractual terms requiring the worker to pay the employer or a third-party training costs following termination of employment if such payment is not reasonably related to the employer's actual training costs.

The FTC has invited public comments on today's historic proposal, with comments due 60 days after the Federal Register publishes the proposed rule.

To learn more about the FTC's historic proposal or preemptive measures your business can take in anticipation of the rule's potential passing, please contact Christopher Terlingo at 856-673-7150 or cterlingo@archerlaw.com.

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