

“Audacious” Federal Trade Commission Proposed Rule Banning Non-Compete Agreements is Now Subject to Public Comment

On January 5, 2023, the Federal Trade Commission (“FTC”) proposed a rule that would ban non-compete agreements nationwide, as we wrote about in our recent [alert](#). The proposed ban has been called “the most audacious federal rule ever proposed” representing a “breathtaking power grab over Noncompete Agreements,” among many other strong descriptions from legal pundits and commentators. In light of the virulent response to the proposed rule, and the historic consequences to employers and businesses in all industries if enacted, the FTC is seeking public comment [here](#) with your concerns about the real-world implications of the proposed rule. The current deadline to submit your comments is March 20, 2023.

At last look, there were 5,379 comments regarding the proposed new rule that, if adopted, would make it unlawful for an employer to:

1. Enter into or attempt to enter into a non-compete agreement with a worker;
2. Maintain a non-compete agreement with a worker; or
3. 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would also be required to individually notify each affected worker in writing that their non-compete agreement is no longer in effect within 45 days of it being rescinded.

In addition, the proposed 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.

If you would like to learn more about the FTC’s proposed ruling or preemptive measures your business can take in anticipation of the rule’s potential adoption, please contact [Thomas Muccifori](#) Chair of Archer’s [Trade Secret Protection and Non-Compete Group](#) at 856-354-3056 or tmuccifori@archerlaw.com

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