

FTC Moves to Ban Non-Compete Agreements

Businesses have used non-compete agreements, with varying degrees of success, for years, but the end may be near for these contracts. On Jan. 5, 2023, the U.S. Federal Trade Commission proposed a regulation that would prohibit the use of most non-compete agreements.

Arguing that they interfere with the proper functioning of labor markets, suppress wages and reduce productivity, the FTC proposed a set of rules that would:

- Declare attempted or actual use of non-compete agreements by employers to be an unfair method of competition prohibited by federal law.
- Require employers to rescind existing non-compete agreements with current and former employees (if they have their contact information) within 180 days after the rules take effect.
- Require them to notify those employees in writing within 45 days after rescinding the agreements that they are no longer bound by them.
- Supersede state laws that are less restrictive.

The proposal contains model wording for employers to use in the employee notices. Non-compete agreements restricting business sellers who hold at least a 25% ownership interest in the business being sold would be exempt from the ban.

After a public comment period, the FTC will either adopt the proposal as is or propose modifications. However, business groups have condemned it, indicating that any final rules will face legal challenges.

The FTC is already taking action outside the proposed rule. The day before announcing the proposal, the commission settled legal actions against three companies. The settlements included bans on entering non-compete agreements with new employees and on enforcing existing agreements. The accompanying news releases made it clear that the FTC will impose more individual bans.

The FTC is not alone in fighting non-compete agreements. More than a dozen states have laws banning or significantly restricting their use. In other states, courts have restricted them without legislation.

The next steps for employers

With these agreements under a state and federal microscope, employers should prepare now for a potential ban. Some steps you may want to consider are:

- **Reviewing current and past agreements.** Your ability to enforce them will vary by state. Consider whether your agreements with current and former employees would survive court challenges.
- **Preparing to change employment offers.** The proposal has made headlines and it isn't even law yet. Prospective employees may know about it and will balk at being asked to sign non-compete agreements.
If you feel that your business still needs them, tailor them so their geographic reach and duration are not overly broad. Also, avoid using them at all with lower-paying jobs.
- **Considering other approaches.** Think about what your business really needs to protect. If the actual concern is former employees taking your clients with them to a competitor, consider short-term, geographically limited non-solicitation agreements. Conversely, if the concern is a former employee sharing your trade secrets with a competitor, a non-disclosure agreement may be appropriate.
You may ultimately decide that the business needs non-compete agreements, but do so only after carefully considering alternatives and legal counsel.

Whether or not the FTC's proposal takes effect, it is clear that regulators will scrutinize non-compete agreements for possible overreach and abuse.

You should expect that it will become more difficult to enforce these agreements. Now is the time to plan for business without them.

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