



# The Federal Trade Commission Is Taking Aim at Employer Non-Competition Agreements

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# Topics Covered Today

- The Origins of the FTC's Proposed Non-Compete Rule
- The FTC's Authority to Promulgate the Rule
- The Ins and Outs of the Proposed Non-Compete Rule
- What Could Happen Next in the Rulemaking Process?
- What Should Organizations Do Now to Protect Against Unfair Competition?
- Q & A

# The Origins of the FTC's Proposed Non-Compete Rule

## What is the FTC?

- Independent agency that enforces consumer protection and competition laws.
- Enforces Section 5 of the FTC Act, which provides:
  - Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, hereby declared unlawful. 15 USC § 45(a)(1).
  - Section 6g
  - FTC at one point was rule making machine, especially on consumer protection.
  - Called out as “Nation’s Nanny” by the *Washington Post*.

# The Origins of the FTC's Proposed Non-Compete Rule (Cont.)

## What is the FTC?

- Congress passed Magnuson Moss Act
  - Made it much more difficult for the FTC to promulgate consumer protection rules.
  - Two schools of thought on competition
    - Authority remains untouched
    - None
  - No competition rule making in 50 years

# The FTC's Authority to Promulgate the Rule

## What entities are in the FTC's jurisdiction?

- Some entities that would be employers under the Proposed Rule are outside the FTC's "unfair methods of competition" jurisdiction.
- Entities outside the FTC's jurisdiction include:
  - National banks, savings and loan institutions, and federal credit unions
  - Common carriers
  - Air carriers
  - Persons subject to the Packers and Stockyard Act
  - An entity that is not organized to carry on business for its own profit or that of its members

# The FTC's Authority to Promulgate the Rule

## What changed?

- Focus on antitrust issues in labor markets
  - No poach agreements
- Focus on labor markets in mergers
- Gig economy
- Focus on non-economic issues
- Expansion of unfair methods of competition
- Biden executive order
- Directed the FTC to consider rule making on non-compete

# The Ins and Outs of the Proposed Non-Compete Rule

## What does the Proposed Rule provide?

- Three critical components
  - Prohibit employers from entering into non-compete clauses with workers.
  - Requires express notice to current and former employees.
  - Requires employers to rescind existing non-compete clauses.

# The Ins and Outs of the Proposed Non-Compete Rule (Cont.)

## What is a non-compete clause under the Rule?

“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 Ins and Outs of the Proposed Non-Compete Rule (Cont.)

## 99% of U.S. employees affected!

- Rule applies to all “workers.”
- A “worker” is “a natural person who works, whether paid or unpaid, for an employer.”
- Includes an “independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer.”

# The Ins and Outs of the Proposed Non-Compete Rule (Cont.)

## Which employers are affected?

- An “employer” means “a person, that hires or contracts with a worker to work for the person.”
- Rule excludes a business that is a franchisee, but someone who works for a franchisee or franchisor is still a “worker.”
- In other words, the franchisee-franchisor relationship is not affected but, Rule still protects “workers” of those entities.

# The Ins and Outs of the Proposed Non-Compete Rule (Cont.)

## Notice requirements

- Employers must provide individual, written notice—not general notice—that non-competes are no longer in effect.
- Notice must be given to both current and former employees subject to non-compete clauses.
- Rule provides model language.

# The Ins and Outs of the Proposed Non-Compete Rule (Cont.)

## Exceptions to the rule

- Does not apply to non-competes entered into with respect to selling a business or one's entire ownership, or all operating assets.
- Consistent with exceptions in non-compete states like California.
- Rule preempts inconsistent state laws, but not laws that are more restrictive.

# What Could Happen Next in the Rulemaking Process?

## Course of the rulemaking

- Comments due March 20, 2023 (had been March 10)
- Final Rule issued after that
  - May be narrower—NPRM mentions some alternatives
  - More highly compensated employees treated differently
  - Ban or rebuttable presumption
  - Not effective for 90 days
- Will be challenged

# What Could Happen Next in the Rulemaking Process? (Cont.)

## Bases for challenge

- FTC lacks authority to promulgate this rule
  - Lack of statutory authority
  - Major Question Doctrine
    - *WV v. EPA*
  - Non-delegation Doctrine
- Rule not supported by record, arbitrary
  - FTC has little experience with non-competes

# What Should Your Organization Do to Protect Itself?

## Three common alternatives to non-competes

- Non-disclosure agreements
- Non-solicitation agreements
- Training cost repayment agreements



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# What Should Your Organization Do to Protect Itself? (Cont.)

## Why should organizations think about this now?

- *Post hoc* rescission of non-competes in effect prior to the rule
- Prohibitions of “*de facto*” non-compete clauses

# What Should Your Organization Do to Protect Itself? (Cont.)

## What is a *de facto* non-compete?

- Broad and unusual non-disclosure agreements
- Unreasonable training cost repayment obligations
- Non-solicitation agreements that prohibit activity throughout an industry

# What Should Your Organization Do to Protect Itself? (Cont.)

## How to narrowly tailor non-disclosure agreements

- Reasonable definitions of “confidential information”
- Add acceptable carve-outs to the definition of “confidential information”

# What Should Your Organization Do to Protect Itself? (Cont.)

## How to narrowly tailor non-solicitation agreements

- Tether the obligation to confidential information
- Limit the obligation to customers for which the employee had access to confidential information
- Add reasonable temporal limitations

# What Should Your Organization Do to Protect Itself? (Cont.)

## When are training repayment obligations enforceable?

- The repayment obligation is no more than the cost incurred by the employer
- The repayment obligation is not disproportional to the compensation paid to the employer

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**Questions?**

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# Speakers



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Len Gordon, chair of Venable's Advertising and Marketing Group, is a skilled litigator who draws on his significant experience working for the Federal Trade Commission (FTC) to protect his clients' interests and guide their business activity. Len regularly represents companies and individuals in investigations and litigation involving consumer protection and antitrust issues with the FTC, state attorneys general, the Department of Justice (DOJ), and the Consumer Financial Protection Bureau (CFPB).



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