

CLIENT ALERT

# FTC Proposes Bans on Non-Competes

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On January 5, 2023, the U.S. Federal Trade Commission (the “[FTC](#)”) proposed new rules (the “[Proposed Rules](#),” available [here](#)) that, if adopted, would generally prohibit employers from imposing new non-compete covenants on its employees and other individual service providers and render existing non-compete covenants invalid.

Specifically, the Proposed Rules provide that, pursuant to Section 5 of the Federal Trade Commission Act, it “is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.” The term “worker” is broadly defined to include any natural person who works for an employer (other than a franchisee in the context of a franchisee-franchisor relationship), including employees, independent contractors, externs, interns, volunteers, apprentices and sole proprietors who provide a service to a client or customer. The Proposed Rules provide an exception that would permit the imposition of a non-compete clause on a person who is selling a business entity (either through a stock or asset sale), or otherwise disposing of all of such person’s ownership interests in a business entity, but only where such person held at least a 25% ownership interest in the applicable business entity immediately prior to the sale or disposition.

The Proposed Rules define a “non-compete clause” to include any contractual term between an employer and a worker that prohibits or has the effect of prohibiting a worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment or engagement with the employer. The Proposed Rules also would prohibit contractual provisions that are functionally similar to non-compete clauses, citing two such examples: (i) a non-disclosure clause drafted so broadly that it effectively precludes the subject worker from working in the same field after

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the conclusion of his or her employment; and (ii) a requirement that a worker reimburse an employer or third-party for training costs if the worker's employment terminates within a specified period, unless the required payment is reasonably related to the costs the employer incurred for training the worker.

The Proposed Rules, if adopted, would be retroactive and would invalidate existing non-compete clauses (unless an exception applies), without affecting any other terms of the contract. The Proposed Rules would require employers to (i) rescind existing non-compete covenants by the compliance date (180 days from the date the final rule is published), and (ii) notify workers of the rescission within 45 days of the compliance date. These notices would need to be provided in an individualized communication to all then-current workers who are subject to non-compete clauses and also to former workers with non-compete clauses whose contact information is readily available to the employer.

The FTC is seeking public comment on a number of topics raised in the Proposed Rules, including whether senior executives and/or a broader category of highly paid or highly skilled workers should be subject to a different standard than other workers. We anticipate that the FTC will receive substantial comments on the Proposed Rules, including with respect to the broad application of the rules to all levels of workers, the limited scope of the sale-of-a-business exception, and the application of the rules to existing non-compete agreements. Legal challenges to the Proposed Rules and their implementation are likely as well. We are continuing to review and evaluate the Proposed Rules, the merits of expected legal challenges and the impact of the Proposed Rules if ultimately enacted, including on common alternatives to non-compete covenants such as garden leave and conditional payment of severance or deferred compensation.

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## FTC Proposes Bans on Non-Competes

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