

FTC Proposes Rule Banning Non-Competes

By: Curry Sexton, Brenda Hamilton, and Mark Opara

The Federal Trade Commission (FTC) recently proposed a new rule that would ban employers from entering into non-competes with workers and require employers to rescind existing non-competes. The FTC is seeking public comment on the proposed rule, which is based on a preliminary finding that non-competes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act. Comments on the proposed rule will be due within 60 days of the Federal Register publishing the proposed rule, which is a date to be determined.

The proposed rule would generally prohibit employers from using non-competes and would make it illegal for employers to:

- Enter into or attempt to enter into a non-compete with a worker;
- Maintain a non-compete with a worker; or
- Represent to a worker, under certain circumstances, that the worker is subject to a non-compete.

The proposed rule would apply to independent contractors and anyone who works for an employer, whether paid or unpaid. It would also require employers to rescind existing non-competes and actively inform both current and former workers that they are no longer in effect within six months of the effective date of any final rule that is adopted.

Finally, the proposed rule states that it “shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with the proposed rule.

FTC Chair, Lina M. Khan, stated: “The freedom to change jobs is core to economic liberty and to a competitive, thriving economy. Non-competes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand. By ending this practice, the FTC’s proposed rule would promote greater dynamism, innovation, and healthy competition.”

The announcement of this proposed rule did not come unexpectedly. In July 2021, we published an article regarding an executive order (“President Biden Issues Executive Order Targeting Non-Compete Agreements”) issued by President Biden on July 9, 2021. Included among 72 directives in that executive order was President Biden’s directive that the FTC curtail or limit the use of non-compete agreements in the employment context.

President Biden’s order specifically stated: “To address agreements that may unduly limit workers’ ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”

In the event any final rule eventually goes into effect, there will undoubtedly be legal action challenging its enforceability and the FTC’s authority to implement a far-reaching rule without an act of Congress.

Please contact us with any questions about this proposed rule or if you need assistance preparing any

comments to submit to the FTC concerning the rule. We will keep you updated on further developments related to this proposed rule.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors, Curry Sexton (CSexton@sb-kc.com), Brenda Hamilton (BHamilton@sb-kc.com), Mark Opara (mopara@sb-kc.com), or any other shareholders in Seigfreid Bingham's Employment Law Group, including: John Vering, John Neyens, Shannon Johnson, or your regular contact at Seigfreid Bingham.