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FTC Proposes Rule to Ban Most Non-Compete Clauses

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By Bob Griffin

The Federal Trade Commission has issued a proposed Rule that would ban most employee non-compete clauses in the country. If the Rule as written goes into effect, it will prohibit employers from entering into non-compete clauses with workers, and require employers to rescind existing non-compete clauses. The Rule would further prohibit employers from representing to a worker that the worker is subject to a non-compete clause, unless the employer has a good faith basis to believe such a clause would be enforceable. This means that an employer could be in violation of the Rule by threatening to enforce a non-compete clause, advising a worker against pursuing a job opportunity due to a non-compete clause, or simply telling the worker that they are covered by a non-compete clause.

The Rule defines “worker” broadly to include both employees and independent contractors. The Rule as written does not include franchisees, nor would it generally apply in the context of a sale of a business, except with regard to a seller who owns less than 25% of the business.

Under the Rule, employers would be required to rescind non-compete clauses within 180 days after publication of the final Rule in the Federal Register. They would also be required to provide notice that a clause has been rescinded to not only a current worker, but also a former worker, provided that the employer has the former worker’s contact information readily available. The Rules includes model language that would satisfy this notice requirement, and establishes a safe harbor whereby providing the worker with the required notice will satisfy the Rule’s rescission requirement.

In its notice of proposed rulemaking, the FTC states that the Rule would not generally apply to nondisclosure agreements (“NDAs”), non-solicitation agreements (which prohibit a worker from soliciting specific customers post-employment), or training-repayment agreements (“TRAs”) (which require a worker to pay for training costs if the worker’s employment terminates within a certain period of time.) The Rule provides, however, that it would apply to such an agreement if it is so broad that it has the effect of prohibiting a worker from seeking other employment or operating a business post-employment. Examples of such a prohibited agreement would be an NDA that is so broadly worded that it effectively precludes a worker from working in the same field post-

employment, or a TRA that would require a worker to repay an amount which is not reasonably related to the actual cost of training.

The FTC is seeking comments regarding the proposed Rule as well as about possible alternatives to it, including whether non-compete clauses with senior executives should be subject to a different standard than those with other workers. Accordingly, it is possible that the final Rule will be different from the proposed Rule. It is also possible that the final Rule will face legal challenges, including whether the FTC has the authority to engage in this type of rulemaking, or whether the promulgation of the Rule represents an impermissible delegation of legislative authority.

Employers who have non-compete clauses with their workers should take the opportunity to consider the measures they may need to implement in order to comply with the Rule, if and when it goes into effect. Employers may also wish to consider possible alternative ways to protect the investments they have made in developing a customer base and training workers. These might include additional measures to protect their trade secrets, which the FTC has recognized as a lawful alternative to non-compete clauses. Some states, such as North Dakota, already have a general prohibition against non-compete agreements.

Employers may also wish to consider submitting comments to the FTC. The public comment period is likely the only opportunity employers will have to provide input not just on the proposed Rule, but also on proposed alternatives. The deadline for comments will be 60 days after the proposed Rule is published in the Federal Register.

The full text of the Rule may be found [here](#).

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all types of employment questions, including questions related to the proposed Rule. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

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