Federal Trade Commission Proposes an End to Employer Non-Competition Agreements

ROBERT E. GREGG, JENNIFER S. MIRUS, NICOLE S. SCHRAM | 01.11.23

On January 5, 2023, the Federal Trade Commission (FTC) announced a new rulemaking proposal which could put an end to employment noncompete agreements, a tool the FTC considers an unfair restraint of trade. Under the proposed rule, employers may not enter into noncompete agreements with employees, enforce existing noncompete agreements, or imply that an employee is subject to a noncompetition provision. Nondisclosure and nonsolicitation agreements that would effectively operate in an anti-competitive manner could also be prohibited. The proposed rule would also apply to prohibit noncompete agreements with independent contractors doing work for a company. It would not, however, prevent noncompete agreements between the buyer and seller of a business or the buyer and seller of significant ownership interests in business entities.

In announcing the proposed rule, FTC chair Lina Kahn stated, "*The freedom to change jobs is core to economic liberty and to a competitive, thriving economy. Noncompetes 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.*"

Is This a Surprise?

This is not completely unexpected news. For the past several years, there has been a slow erosion of the enforceability of noncompete agreements around the country. Certain members of Congress have, over time, voiced opinions that there should be a ban on noncompete agreements between companies and their workers, arguing they are an un-American interference with a free marketplace. Recently, that slow erosion has become more of a torrent. A growing number of states are passing restrictions on the scope of noncompete agreements or even banning them entirely. Further, the U.S.

government is now using federal regulations, such as Section 5 of the FTC Act which bans unfair methods of competition, to bring civil and criminal prosecutions against employers. In these enforcement actions, the federal government is arguing that companies are using their greater bargaining power to restrict the mobility of low-paid employees by requiring noncompete agreements, or that companies are artificially depressing employee wages by entering into mutual nonsolicitation agreements with competing companies, agreeing they will not hire each other's employees. On January 4, 2023, the FTC announced that three large companies had agreed to settle such cases, ending their noncompete practices. This FTC rulemaking proposal is just the most recent in an ongoing challenge to the use of noncompetition provisions.

Despite the uncertainty and disfavored status of noncompete agreements generally, employers in many states still find such agreements serve a useful purpose. Many employees abide by the legal restrictions to which they have agreed, and noncompete agreements tend to make former employees more cautious with regard to directly competing against their former employers, since noncompete litigation is expensive and time consuming.

Notwithstanding the "pros" of using noncompete agreements, some companies have voluntarily reduced their reliance on noncompete agreements over the past few years, finding they are not worth the effort. First, drafting and enforcing noncompete agreements can be complicated and expensive. The laws governing restrictive covenant agreements (including noncompete, nonsolicitation, confidentiality or nondisclosure agreements) vary greatly among the U.S. states, and the criteria that state courts use to determine whether these agreements are enforceable are constantly evolving. While Wisconsin law still allows noncompetes and Wisconsin court decisions have actually been slightly more employer friendly in the last decade than previously, state courts around the country are scrutinizing restrictive covenants more closely. Second, the use of noncompete agreements is increasingly complicated due to the increase in mobile employees. Companies have sometimes found that the noncompete their remote employee signed upon hire may be void the moment that employee relocates to another state. Third, requiring new hires to sign noncompetes may also deter candidates from accepting employment in this highly competitive labor market. Microsoft, in 2022, announced that it would no longer require noncompete agreements and would not enforce existing ones. Recruiting new employees was difficult and requiring a noncompete caused many qualified candidates to reject job offers. To Microsoft, the agreements became more of a detriment than a benefit to the company.

Is This the End?

The FTC has only announced its proposed rule. Now it will start the rulemaking process. The proposed rule must first be published in the Federal Register, then there is a 60-day period for public and industry comments. The FTC must consider these comments in

creating its final rule. The process is often extended as modifications are considered, and some final rules never materialize.

Expect a flood of opposition and challenges. A number of national industry associations immediately announced their opposition to the FTC proposal. There will be a great deal of opposition expressed during the comment period, and there will be significant lobbying efforts against the proposed rule. We also expect a legal challenge prior to and after any adoption of the rule by those arguing that the FTC has no authority to even engage in rulemaking and regulation on this topic. The U.S. Supreme Court's 2022 *West Virginia v. EPA* decision provides an argument that this proposed rule may exceed the FTC's delegated regulatory authority. Litigation could hold up implementation of any rule for a long time.

Is This Important to You?

In Wisconsin and other states where noncompetes are still valid and sometimes enforced, there is no current change. In the states which already ban noncompete agreements, this proposed new rule may not make much difference. However, this may be an appropriate time to reexamine any restrictive covenant agreements you have, since your workforce arrangements may have changed with increased remote and out of state employees and the courts and state legislatures are more carefully scrutinizing and limiting such agreements.

Those wishing to support or oppose the FTC's proposed rule can submit their comments at Regulations.gov. You may also contact the Boardman Clark Labor & Employment or Business Practice Groups for additional information, insight, or updates on this topic.

Authors

Robert E. Gregg
(608) 283-1751

Nicole S. Schram
(608) 286-7241

Jennifer S. Mirus
(608) 283-1799