



The Federal Government Takes Aim at Non-Compete Agreements: What You Need to Know

January 12, 2023

* Although we will be providing legal information during this webinar, we will not be providing legal advice.

Agenda

Proposed Rule

The FTC proposes to ban non-compete agreements with workers

Enforcement Actions

The FTC cracks down on existing non-compete agreements

FTC's Proposed Non-Compete Ban: Overview

- The rule:
 - Proposes a categorical ban on worker non-compete agreements, with one exception
 - Covers virtually all workers, including independent contractors
 - Applies retroactively to non-competes already signed
 - Imposes strict notice requirements
- The FTC has invited comment on various alternatives to a complete ban
- There's significant uncertainty about what the final rule will look like and whether it will survive legal challenges

The Ban

1 Worker Non-Competes Prohibited

- "Non-compete" is any agreement that prevents worker from accepting new job or operating a business, no matter the label
- Requiring repayment of training costs is a "non-compete" unless payment is reasonably related to the costs incurred
- Exception: in the context of a sale of business, an employee who owns at least 25%

2 Retroactive

- Applies to all agreements going forward and existing agreements
- Within 180 days of the final rule's effective date, employers must rescind all existing non-compete clauses

3 Notice Requirements

- If company rescinds existing non-compete, it must provide notice to worker within 45 days of rescission that the non-compete is no longer in effect
- Notice must be provided to current and former workers who are still under a non-compete
- FTC provides model notice language that complies with the rule

Possible Alternatives to Complete Ban

Rebuttable Presumption

- Worker non-competes are presumed unlawful unless employer shows by clear and convincing evidence that:
 - the non-compete has no anti-competitive effect
- OR
- there's no other way to protect the company's legitimate business interest

Worker Position/Earnings

- Rebuttable presumption of unlawfulness for senior executives, highly skilled workers, and/or highly paid workers
- A rebuttable presumption could be based on
 - job function
 - earnings
 - combination of job function and earnings

Takeaway: Uncertainty Reigns

- We don't know what the final rule will look like. Complete ban? Alternative proposal? Something else?
- Whatever the final rule looks like, it will be challenged.
 - Does the FTC have the authority to issue the non-compete rule?
 - Because the rule has such great economic and political significance, is this an area where Congress (rather than an executive agency) must act?
 - Can the FTC invalidate private contracts retroactively?
 - Potential to end up in front of the Supreme Court
- Even if the categorical ban goes into effect and survives legal challenge, expect years of litigation trying to resolve ambiguities in the rule.

FTC Enforcement Actions

“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45.

O-I Glass, Inc.

- Prohibited over 1,000 employees from being connected, in any manner, with a business that sells products that are substantially similar
- Applied to “salaried employees who work with the glass plants’ furnaces and forming equipment and in other glass production, engineering, and quality assurance roles”

Ardagh Group S.A.

- Highly concentrated industry with substantial barriers to entry and expansion
- Prohibited over 700 employees from directly or indirectly performing similar services for any business in the US, Canada, or Mexico
- Two-year restriction

Prudential Security

- Security guards
 - Often paid hourly
 - Minimum wage
- 100-mile radius
- \$100,000 penalty
- Routine enforcement lawsuits
- Informed other security agencies about existence of non-competes

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Questions?



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