

FTC Proposes Ban on All Employer Noncompetes

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The Federal Trade Commission (FTC) just announced a sweeping proposed new rule, which if it makes it through the regulatory process, would significantly interfere with the employment relationships of an estimated 30 million Americans.

By current estimates, the rule would impact approximately one in five employees who are bound by terms of employer noncompete agreements. In the Tech industry, it is estimated that one in three employees would be affected.

The proposed rule would ban any noncompete agreements that prevent workers from moving to another company or starting a business in the same field. It would apply only to employees, not owners/partners who have noncompetes tied to the sale of a business interest. It requires employers with noncompete clauses with paid staff and independent contractors to rescind such agreements *and* the employers must tell current and former employees they have stopped enforcement.

The rule also targets other employment contract terms such as nondisclosure requirements, that are broadly written, and requires employees to repay training costs if they leave their employment too soon.

The notice of proposed rulemaking is out for public comment, which is the first step in the regulatory process.

This and other rule changes have been brewing since President Joe Biden called on the FTC to regulate noncompete contracts in a July 2021 executive order, citing the unfair use of any clauses that limit worker mobility. Labor unions strongly favor these measures. The U.S. Chamber of Congress strongly opposes it.

Claiming that employers' use of noncompetes to restrict workers' mobility significantly suppresses worker's wages, the FTC justifies this broad rule, in part, based on the FTC's estimate that the rule "could" increase wages by \$300 billion a year. In addition, the FTC believes noncompetes inhibit business innovation, including stopping entrepreneurs from starting competing businesses.

The proposed rule does not give a private right of action to workers, only the FTC could go after violators.

The sole Republican FTC commissioner opposes it as beyond the rulemaking authority of the commission and because of the potential for unintended consequences. At least one study, in the financial services sector, showed the negative unintended consequences of suspending noncompete

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provisions included higher fees and broker misconduct.

It is expected that this use of the FTC's rarely used rule-making power will trigger legal challenges that could take years. In the meantime, Congress, which is supposed to set U.S. antitrust policy, has clear authority to regulate the bullying business tactics that led to this rule. A recent U.S. Supreme Court decision in *West Virginia v EPA*, 597 U.S. ____ 2022 WL 2347278 (June 30, 2022), appears to call into question whether the FTC has authority to issue such a wide sweeping rule.

We will keep you advised of the path of this troubling rule and others that are threatened. The Chairman of the FTC stated that they see this rule as an important first step of imposing new market wide rules.