Fox Horan & Camerini

Employment Update

U.S. Federal Trade Commission Proposes Ban on Non-Compete Agreements in Employment

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I. The Proposed Rule

On January 5, 2023, the U.S. Federal Trade Commission ("FTC")[1] proposed a rule imposing a nationwide ban on the use of non-compete agreements in employment. The proposed rule would:

- Ban employers from entering or enforcing non-compete agreements with workers, including employees and independent contractors;
- Require employers to (1) rescind existing non-compete agreements, and (2) notify the affected workers that their non-compete agreements no longer are in effect; and
- Under certain circumstances, prohibit an employer from representing to a worker that the worker is subject to a non-compete agreement.

With limited exceptions for franchisor-franchisee agreements and certain agreements preventing certain sellers of business interests from competing, "the proposed rule would ***categorically ban*** employers from using non-compete clauses with workers."[2] The proposed rule would apply without regard to a worker's earnings, a worker's job function, or an employer's size.[3]

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1. The FTC is the regulatory agency charged with protecting the public from deceptive or unfair business practices and unfair competition. For more information, *see* https://www.ftc.gov/about-ftc/mission.

2. FTC Notice of Proposed Rulemaking for Non-Compete Clause Rule, accessible at https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf, at p.121.

3. The proposed rule would apply to all workers, including senior executives. The FTC, however, has sought public comment as to whether senior executives should be exempt from the ban or subject to a different standard. Thus, there is a possibility that the FTC's final rule will have a more limited scope. *See* Section II *below*.

Importantly, the proposed rule would allow employers to continue using other types of agreements – such as non-disclosure, non-solicitation, and non-recruitment agreements – to protect their business interests. If, however, employers apply such agreements so broadly that they function as "de facto" non-compete agreements, those agreements would violate the proposed rule.

II. Request for Comment and Anticipated Challenges

It is uncertain whether the FTC will adopt the proposed rule in its current form. The FTC signaled its openness to less restrictive alternatives by requesting public comment on various elements of the proposed rule, including (1) whether to apply different standards to different categories of workers, and (2) whether employers have reasonable alternatives to non-compete agreements to protect their business interests, including their trade secrets and other confidential information. There is a 60-day period for public comment, ending on March 10, 2023.

After the FTC issues its final rule, there likely will be legal challenges delaying – or, ultimately, barring – its implementation and enforcement. The U.S. Supreme Court has narrowly interpreted regulatory agencies' rulemaking power, setting the stage for a protracted legal fight.[4]

III. What Employers Should Do Now

Employers should prepare for the possibility that they will need to rescind their non-compete agreements. As an initial step, employers should identify all existing non-compete agreements with current and former workers. Pending the finalization (or elimination) of the FTC's rule, employers also should consider whether alternatives to non-compete agreements – such as non-disclosure, non-solicitation, and non-recruitment agreements – would be sufficient to ensure that their business interests remain protected.

Although the FTC's final rule would apply nationwide, employers must continue to be mindful of existing state laws banning or limiting the use of non-compete agreements in employment. California, North Dakota, and Oklahoma already ban almost all non-compete agreements. At least eleven states and Washington, D.C. have limited the use of non-compete agreements based on a worker's earnings or other factors. Accordingly, it is important that employers evaluate the applicable state law before entering or attempting to enforce non-compete agreements.

Fox Horan & Camerini LLP
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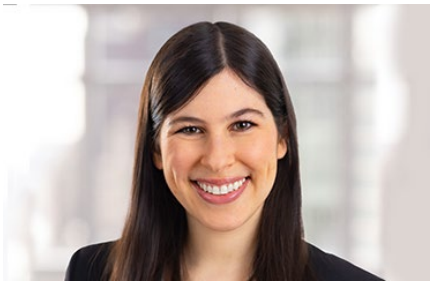
4. *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (identifying "particular and recurring problem" of "agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted"); *Nat'l Fed. of Independent Business v. OSHA*, 142 S. Ct. 661 (2022) (administrative agencies "possess only the authority that Congress has provided"); *see also AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (unanimously rejecting FTC's authority to seek certain relief absent express congressional authorization).

If you have any questions about this *Employment Update*, please contact:



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Fox Horan & Camerini LLP is a full service law firm based in New York City that has been serving clients for more than half a century. Our Employment Practice Group has extensive experience counseling employers regarding employment matters, drafting and negotiating contracts, and litigating disputes involving non-compete agreements. We are closely monitoring the progress of the FTC's proposed rule and stand ready to assist with any inquiry relating to non-compete agreements, the available alternatives, and other employment matters. For more information regarding our services and attorneys, contact us today.

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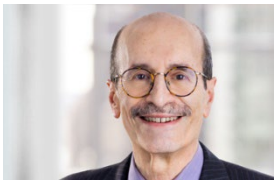

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