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FTC Proposes New Rule to Ban Non-Compete Clauses

On January 5, 2023, the Federal Trade Commission ("FTC"), the U.S. antitrust and unfair competition regulator, issued a Notice of Proposed Rulemaking ("NPRM") for a new rule, to be called "the Non-Compete Clause Rule," that would ban employers across the United States from entering into, attempting to enter into, or maintaining, Non-Compete agreements with employees and independent contractors, whether paid or unpaid. A copy of the NPRM can be found [Here](#).

The proposed rule is part of an initiative by the FTC to reinvigorate section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce" and represents a major regulatory move by the FTC to eliminate a mainstay practice of tech industry and other sector employers to limit employee mobility ranging, as the FTC put it, from hairdressers to doctors. The FTC estimates that the Non-Compete Clause Rule would positively affect the career opportunities of 30 million American employees and independent contractors and raise wages nationally by up to \$300 billion per year.

Specifically, the NPRM proposes amendments to Title 16, Part 910, Code of Federal Regulations that would:

- apply to every type of business entity employer: corporations, limited liability companies, partnerships, limited partnerships and others;
- impose a functional test for whether an agreement or agreement clause was a Non-Compete in terms of effectively preventing an employee from leaving his or her place of employment and seeking or accepting employment with another employer in the same field (or starting a competing business), and prohibit its effectiveness as unfair competition (the FTC points out that, for example, Non-Disclosure Agreements, or "NDAs," are not

technically subject to the proposed rule, but could be treated as prohibited if their functional effect was that of a Non-Compete);

- require employers as of 180 days from publication of the final rule to rescind existing Non-Compete agreements, whether embedded in an employment or consulting agreement or standalone, and affirmatively notify employees within 45 days of rescission that they are no longer bound by them;
- preempt state laws to the extent inconsistent (states currently have different standards for the enforceability of Non-Competes in terms of time duration, scope, geographical coverage and other factors);
- permit an exception, consistent with many states' existing laws, for Non-Competes given in the course of a sale of stock or assets, on the theory that non-competition from the seller is one of the things that an M&A acquirer is bargaining for in entering into the transaction.

We have reported in the past year-and-a-half on the newly activist merger review policies of the Biden administration under FTC Chair Lina M. Khan and Department of Justice ("DoJ") Antitrust Division Chief Jonathan Kanter after decades of a relatively "laissez faire" treatment of proposed M&A activity. See, "FTC and DoJ Launch Effort to Restrict Anticompetitive Mergers," "FTC Restores Restrictive Prior Approval Merger Review Policy," and "FTC Sets Ambitious M&A Enforcement Agenda," and discussed the FTC and DoJ's power to review and block mergers in our "Mergers & Acquisitions VIII: Antitrust Merger Control and Clearance," all available at [Kurtin PLLC Mergers & Acquisitions](#). In the same activist spirit, the FTC is now taking aim at the widespread use of Non-Competes to limit employee liberty and mobility. Public Comments on the NPRM are open until March 10, 2023.

Actionable Activity: The 180-day rescission of Non-Compete from publication of final rule requirement the FTC is proposing is a short threshold, given the millions of contracts potentially affected. Employers across all sectors should audit their employment, consulting and other similar contracts to identify Non-Competes that may have to be nullified 180 days from rule publication and the affected employee or independent contractor notified within 45 days after that, and be prepared to alter those forms of agreements going forward should the Non-Compete Clause Rule go into effect. There may be no private right of action under FTC Act s. 5, ***but there will be under every employment or consulting agreement containing a Non-Compete clause.***

For additional information, to comment on the NPRM or for information on our professional services, please visit our website at the link below and contact us at info@kurtinlaw.com or +1.212.554.3373.

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