

**JANUARY 11, 2023**

For more information,
contact:

Amanda Sonneborn
+1 312 764 6940
asonneborn@kslaw.com

Peter J. Wozniak
+1 312 764 6948
pwozniak@kslaw.com

King & Spalding

Chicago
110 N Wacker Drive
Suite 3800
Chicago, IL 60606
Tel: +1 312 995 6333

FTC Proposes Nationwide Ban on Non-Competes

On January 5, 2023, in a dramatic and far-reaching agency action, the Federal Trade Commission (FTC) published a **notice** of proposed rulemaking, effectively banning all non-compete agreements, nationwide. The FTC's proposed rule, issued over the dissent of Commissioner Wilson, follows on the heels of recent FTC enforcement actions and the FTC's November 10, 2022 "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act."

The FTC's proposed rule declares non-compete clauses to be "unfair methods of competition" in violation of Section 5 of the FTC Act. It would prevent "employers from entering into non-compete clauses with workers," and would require "employers to rescind existing non-compete clauses."

Broad Scope of FTC's Proposed Non-Compete Ban

The FTC's proposed rule is an outright prohibition on all non-compete clauses, and covers:

- All employers, in all industries
- All categories of workers, including employees and independent contractors
- All job titles and positions, including non-supervisory roles
- All staffing levels, from entry-level workers to C-suite executives
- All income levels and compensation arrangements, including hourly and salaried employees

The lone exceptions to the FTC's proposed rule are franchisor/franchisee relationships, and non-compete agreements entered into by individuals in connection with the sale of a business.

Ban on "De Facto Non-Compete Clauses"

The FTC's ban is explicitly directed at "non-compete clauses," defined by the FTC as "a contractual term between an employer and a worker that



prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." According to the FTC, the ban "would generally not include other types of restrictive employment covenants—such as non-disclosure agreements ('NDAs') and client or customer non-solicitation agreements."

However, regardless of the label or terminology used in the agreement to describe a provision, the FTC's proposed rule also bans any post-employment restrictive covenant if the restriction is "written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer."

The FTC provides no guidance regarding compliance with this aspect of its proposed rule, including how "broadly" a provision would need to be drafted to run afoul of the rule, what it means for an individual to be "effectively" precluded from working, or what the "same field" does and does not entail.

Impact of Proposed Rule: Rescission and Notification Obligation

The FTC's proposed rule would immediately invalidate all existing non-competes clauses for both current and former employees, would prohibit employers from enforcing any non-competes, and would prohibit employers from imposing or entering into new non-compete agreements. Other contractual terms are permitted to remain intact.

The FTC's proposed rule goes further than upending existing arrangements, as it also imposes an additional obligation on employers to affirmatively rescind all presently effective non-compete clauses. Moreover, to comply with the FTC's proposed rule, within 45 days of rescinding non-competes for all current and former employees, employers will be required to **individually** notify all employees **in writing** "that the worker's non-compete clause is no longer in effect and may not be enforced against the worker." Written notice can be provided electronically or in hard copy, and the FTC's proposed rule provides "model language" which can be used to notify employees. Employers are permitted to provide notice using different language than the FTC's "model language," so long as the "notice communicates to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker."

The FTC's proposed rule requires that individual written notice also be given to former employees, "provided that the employer has the worker's contact information readily available." The FTC provides no guidance on what is meant by "readily available."

Intersection with State Law

At present, three states (California, North Dakota and Oklahoma) already ban non-compete agreements. The other 47 states enforce non-competes to varying degrees, according to the individual state law tests for their enforceability (and the enforceability of other post-employment restrictive covenants).

The FTC's proposed rule would eliminate that state-specific variability, in favor of a single nationwide rule. To that end, the FTC's proposed rule would supersede any inconsistent state law ("State statute, regulation, order, or interpretation") on the subject. Only state law providing *more* protection to workers than the proposed rule would survive.

Next Steps for Proposed Rule

The FTC is seeking public comments on the proposed rule for 60 days, and the proposed rule would become effective 180 days after the final rule is published. The FTC is likely to receive a substantial amount of commentary on the proposed rule, and it may be revised before becoming effective. Moreover, the proposed rule will almost certainly be subject to legal challenge on a number of fronts.



Next Steps for Employers

In the meantime, we recommend that employers develop a plan for complying with the FTC's proposed rule.

- Identify all current and former workers who are subject to non-compete clauses (or similar post-employment restrictive covenants).
- Review existing agreements in their entirety to determine whether any post-employment restrictive covenants could be deemed *de facto* non-compete clauses.
- Prepare rescission language and develop a distribution plan to provide individual written notice to current and former workers regarding the rescission of non-compete clauses.
- Plan for compliance going forward, including assessing and revising existing agreements/templates to eliminate non-compete clauses and *de facto* non-compete clauses.

Employers should also consider additional steps, short of non-compete clauses or *de facto* non-compete clauses, to protect their legitimate interests in trade secrets and confidential information.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MIAMI	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	