

FEDERAL TRADE COMMISSION NON-COMPETE BAN MAY HAVE BROADER RAMIFICATIONS; NON-DISCLOSURE AGREEMENTS COULD GET CAUGHT UP IN NEWLY PROPOSED RULE

The Federal Trade Commission has released a proposed rule that would ban companies from using non-compete agreements for future employees and rescind existing non-compete agreements that are in effect for current employees.

FACTS: The Federal Trade Commission (FTC) released a Notice of Proposed Rulemaking (NPRM) prohibiting employers from imposing almost all non-compete clauses upon their employees.¹ Such clauses in employment agreements prevent individuals from going to work for competing employers or starting their own competing businesses for a set length of time after their employment ends. The FTC cited Section 5 of the FTC Act, which bans unfair methods of competition, as granting it the authority to pursue the promulgation of such a rule.

The FTC states that non-compete clauses significantly reduce employees' wages, stifle new businesses and new ideas, exploit employees, and hinder economic liberty. Based upon such concerns, the FTC has proposed a rule concerning non-compete clauses. According to the FTC:

- The rule would provide that non-compete clauses are an unfair method of competition. As a result, the rule would ban employers from entering non-compete clauses with their workers, including independent contractors.
- The rule would require employers to rescind existing non-compete clauses with workers and actively inform their employees that the contracts are no longer in effect.
- In the proposed rule, for which the agency invites comment, the FTC estimates that the rule would:
 - Increase workers' earnings by nearly \$300 billion per year
 - Save consumers up to \$148 billion annually on health care costs
 - Double the number of companies founded by a former worker in the same industry
- The proposed rule seeks public comment on a number of topics, in particular:
 - Whether franchisees should be covered by the rule
 - Whether senior executives should be exempted from the rule, or subject to a rebuttable presumption rather than a ban
 - Whether low- and high-wage workers should be treated differently under the rule²

ANALYSIS: The Federal Trade Commission's reliance upon Section 5 of the FTC Act is an attempt to get around its lack of any constitutional or statutory authority to issue such a rule and, in attempting to do so, the agency is improperly usurping the role of Congress. This rule would not only prohibit such clauses from prospective agreements, but also invalidate such clauses in millions of existing contracts in the U.S. that courts, scholars, and economists have found entirely reasonable and beneficial for both businesses and employees. Non-compete clauses, when properly used, encourage investment in employees and help to protect intellectual property. Forty-seven states permit non-compete clauses, which have traditionally been an issue of state law.

1. <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>
2. https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf

The FTC's blanket ban on non-compete clauses is so vastly overbroad that the unintended consequences cannot be overstated. Non-disclosure agreements (NDAs) would be barred under the rule to the extent an NDA results in a similar outcome to that of a non-compete clause. This would create a great amount of uncertainty regarding what would and would not be acceptable when it comes to an NDA, especially when it is to be decided by a judge or jury which may not have the expert knowledge in a subject area to make an informed and objective determination of what is reasonable. Even if an NDA has been crafted for the specific purpose of protecting proprietary information, documents, and/or data, it could be barred if it has the effect of operating as a non-compete clause.

Congress never granted the FTC the statutory authority to issue rules regulating competition, such as the contractual relationship between employers and employees. Rather, Congress granted the FTC limited and targeted statutory authority to issue rules to protect consumers, such as to prevent fraud and false advertising. The FTC's authority with respect to competition issues is limited to adjudicating individual cases where the FTC must consider the factual context and reasonableness of conduct in each such matter.

Even advocates for action in this area, such as Sen. Chris Murphy (D-CT), recognize that the FTC does not have the authority to act in such a manner. Sen. Murphy noted when introducing legislation related to non-compete agreements in the 117th Congress: "All four of us are very excited about the FTC's decision to move forward, but we'd like to give them clear statutory authority," said Murphy, whose proposed Workforce Mobility Act in the 117th Congress was co-sponsored by Sens. Todd Young (R-IN), Tim Kaine (D-VA), and Kevin Cramer (R-ND).³ The FTC has not attempted to promulgate a competition rule for decades, across administrations of both parties. In the past, Congress has been able to curb FTC's excesses with appropriations riders that prevent the agency from enforcing rules that it has passed that are beyond its scope.

In 2021, the U.S. Supreme Court recognized the important constitutional limitations on the ability of executive agencies to issue major rules such as that proposed by the FTC without clear guidance from Congress. In *AMG Capital Management v. FTC* 593 U.S. ___ (2021), the Supreme Court unanimously rejected the FTC's claims that it could interpret its own statutes to claim broad authority. In cases involving other agencies, courts have invoked the major questions and non-delegation doctrines to strike down agency excesses and to preserve the role of elected officials in addressing important issues.

Courts should not enforce unreasonably restrictive non-compete clauses and they typically do not. In a vast majority of cases, reasonable, procompetitive non-compete clauses are upheld, whereas unreasonable, anticompetitive ones are struck down. The FTC, by meddling in an area where it is not authorized by law nor does it have sufficient expertise, is positioned to inject itself into private contracts and inflict chaos.

For more information about this, please go to the FTC's proposed rulemaking here:
<https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking>

LEGAL SYMPOSIUM: The 2023 NWRA Legal Symposium: "Protecting The Rights of the Waste & Recycling Industry" will be held Thursday, May 4, from 8:30 a.m. – 12:30 p.m. CT in Room 291 of the New Orleans Convention Center. Hear from industry attorneys on occupational safety and health, wage and hour, and environmental compliance capped off by a general counsel round table. Register here: <https://www.wasteexpo.com/en/conference-and-events/Workshops.html>

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3. <https://news.bloomberglaw.com/daily-labor-report/ftc-noncompete-proposal-breathes-new-life-into-lawmaker-efforts>