

Federal Trade Commission Proposes Rule Banning Non- compete Agreements Between Employers and Workers

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As I mentioned in a 2022 post, the Federal Trade Commission (FTC) has been considering a rule banning non-competes for a while now; President Biden has publicly voiced his support for the ban. The current proposal is based on the FTC's belief that non-competes violate anti-competition laws. The rule would supersede all state, local, and federal laws on this subject.

The rule has a sweeping definition of a non-compete: "a contractual term ... that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment." The rule outlaws other provisions which are not labeled "non-competes," too: if an agreement not to solicit the employer's customers or not to disclose the employer's information functions as a non-compete, it is illegal. The FTC rule also intends to forbid employee promises such as repayment of the employer's training costs if the employee worked for less than a certain period of time, where the repayment is not "reasonably related" to the employer's actual training costs.

The proposed rule would become final 60 days after it's published in the Federal Register. Employers would have 180 days after publication to comply. The rule states that employers would have until that time to rescind any existing non-competes (including those applicable to ex-employees).

This rule would upend centuries of state common law. Many of my clients have agreements that would disappear or change drastically. Drafting agreements to protect business and confidential information would become a whole different game. If you are in Delaware and would like to attend an in-person roundtable at which I'll speak about this topic, please reply to this email, and I will send you an invitation. If you can't attend, I am planning to record it; contact me for a copy of my remarks.