

THE FTC'S PROPOSED RULE TO BAN NON-COMPETES

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FEDERAL TRADE COMMISSION

- **Established in 1914 with passage of Federal Trade Commission Act**
- **“Empowered and directed to prevent” use of “unfair methods of competition”**
- **Formed in response to monopolistic practices**
- **Composed of five commissioners nominated by President and confirmed by Senate**
- **Usually in news for suing to block big M&A deals**



FTC AND EMPLOYMENT LAW

- **Also enforces FCRA, which puts restrictions on obtaining background checks**
- **And files no-poaching cases (with DOJ) based on anti-trust law**
- **Even before non-compete rule has been investigating employers with overly broad non-competes**
- **Issued proposed non-compete rule on Jan. 5, 2023**
- **Comment period extended to Apr. 19, 2023**



PROTECTING AGAINST UNFAIR COMPETITION BY FORMER EMPLOYERS

- **NDA's: Prohibit improper disclosure or use of confidential business information learned during employment for as long as information remains confidential**
 - **"Trade secrets" protected by Defend Trade Secrets Act and SC Trade Secrets Act**
 - **Trade secrets = propriety information subject to reasonable efforts to maintain secrecy**



PROTECTING AGAINST UNFAIR COMPETITION BY FORMER EMPLOYERS

- **Inventions assignment agreements:
Certain inventions developed during
employment are property of employer**
 - **“Holdover” inventions assignments:
Certain inventions developed during
employment and a specified period
of time after employment are
property of employer**



PROTECTING AGAINST UNFAIR COMPETITION BY FORMER EMPLOYERS

- **Non-solicitation agreements: Prohibit soliciting employees, customers, or suppliers of employer for specified period**
- **Non-competes: Prohibit working for businesses that compete with employer:**
 - **In specified position**
 - **In specified geographic area**
 - **For specified period**



CURRENT NON-COMPETE LAW

- **No national law**
- **Patchwork of state laws**
- **Three states prohibit non-competes**
- **11 states prohibit them for “low-wage” workers**
- **Why? Overused**
- **In most states, court rulings have set standards for enforceable non-competes**



IN SOUTH CAROLINA

- **Disfavored because restraint on trade**
- **But generally enforceable if:**
 - **Limited to what is necessary for protection of “legitimate interest” of employer**
 - **Reasonably limited as to time**
 - **Reasonably limited as to geographic area**
 - **Not unduly restrictive**
 - **Reasonable from standpoint of sound public policy**
 - **Supported by valuable consideration**



IN SOUTH CAROLINA

- **Construed against employer that wrote it**
- **Should be “narrowly tailored”**
- **Courts do not “blue-pencil” overly broad restrictions**
- **May enforce “step-down” provisions (alternative restrictions)**



FTC POSITION

- **30 M U.S. workers covered by non-competes**
- **53% of workers covered by non-competes are hourly**
- **Non-competes are unfair because they:**
 - **Inhibit worker mobility**
 - **Depress wages**
 - **Reduce business formation**
 - **Cause higher prices for goods and services**
- **NDA's and trade secret law can protect interests of employers**



PROPOSED RULE: NON-COMPETES WITH ANY EMPLOYEE WOULD BE VIOLATION OF FTCA

§ 910.2 Unfair methods of competition.

(a) *Unfair methods of competition.* It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.



ALSO DE FACTO NON-COMPETES (MAY INCLUDE SOME NDA'S AND NON-SOLICITATION AGREEMENTS)

(2) *Functional test for whether a contractual term is a non-compete clause.* The term non-compete clause includes a contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting 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. For example, the following types of contractual terms, among others, may be *de facto* non-compete clauses:

- i. A non-disclosure agreement between an employer and a worker that 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.



NOT JUST PROSPECTIVE—EMPLOYER MUST RESCIND ALL EXISTING NON-COMPETES

(b) *Existing non-compete clauses.*

(1) *Rescission requirement.* To comply with paragraph (a) of this section, which states that it is an unfair method of competition for an employer to maintain with a worker a non-compete clause, an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date.



NOTICE OF RESCISSION TO EMPLOYEES

(2) Notice requirement.

(i) An employer that rescinds a non-compete clause pursuant to paragraph (b)(1) of this section must provide notice to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker. The employer must provide the notice to the worker in an individualized communication. The employer must

(ii) The employer must provide the notice to a worker who currently works for the employer. The employer must also provide the notice to a worker who formerly worked for the employer, provided that the employer has the worker's contact information readily available.

(iii) The following model language constitutes notice to the worker that the worker's non-compete clause is no longer in effect and may not be



EXCEPTION FOR SALE OF BUSINESS

§ 910.3 Exception.

The requirements of this Part 910 shall not apply to a non-compete clause that is entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity's operating assets, when the person restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause.



EFFECT ON STATE LAW

§ 910.4 Relation to State laws.

This Part 910 shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with this Part 910. A State statute, regulation, order, or interpretation is not inconsistent with the provisions of this Part 910 if the protection such statute, regulation, order, or interpretation affords any worker is greater than the protection provided under this Part 910.



CONCERNS

- **Why would company innovate if employee can move to competitor and immediately start using what he/she learned?**
- **If employee is part of team and goes to competitor to do same thing, would hurt rest of team's ability to make living**
- **Doesn't distinguish between executives, engineers, and sales persons vs. others**



DISSENTING STATEMENT



Christine S. Wilson ✓

@CSWilsonFTC



Today, the FTC proposed a Non-Compete Clause Rule that bans essentially all non-competes, a radical departure from 100s of years of precedent. For many reasons, I dissent. I encourage all stakeholders to provide comments.



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

[ftc.gov](https://www.ftc.gov)

Dissenting Statement of Commissioner Christine S. Wilson Concerning the Notice of Proposed Rulema...



The FTC's Proposed

www.maynardnexsen.com

U.S. CHAMBER

↻ U.S. Chamber Retweeted



Suzanne Clark ✓ @SuzanneUSCC · Jan 22

...

As I wrote in an op-ed in the @WSJ, the @USChamber will go to court if necessary to stop the @FTC's legally baseless ban on noncompete clauses. Read more:



wsj.com

Opinion | The Chamber of Commerce Will Fight the FTC
We'll go to court if necessary to stop the legally baseless ban on



The FTC's Proposed R

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WHAT'S NEXT?

- **Comment period ends Apr. 19, 2023**
- **FTC will consider comments and may pare rule down before it's finalized**
- **Then likely 180 day enforcement period**
- **Once rule is final, it will be challenged in court**
 - **Remember DOL's 1996 Overtime Rule, struck down by courts?**
 - **And OSHA's 2021 COVID-19 ETS?**



LIKELY LEGAL CHALLENGES

- **Bases for legal challenges**
 - **FTC lacks authority to make rules on this issue**
 - **Unelected body trying to overturn state law and 100's of years of precedent on non-competes**
 - **... and invalidate contracts already negotiated**
 - **Major questions doctrine**
 - **On issues of major significance, agencies can't regulate unless Congress gives clear authorization**
 - **Non-delegation doctrine**
 - **Congress has never delegated to FTC authority to rule on non-competes**



CONGRESS IS TAKING CLOSER LOOK AT NON-COMPETES

- **Workforce Mobility Act**
 - **Similar to FTC's proposed rule**
 - **Reintroduced Feb. 1, 2023**
 - **Bipartisan and bicameral**
- **Freedom to Compete Act**
 - **Would prevent use of non-competes with non-exempt workers**
 - **Reintroduced Feb. 9, 2023**
 - **Bipartisan**



BOTTOM LINE

- **FTC rule and developments in Congress and state legislatures are wake-up call for employers that use broad non-competes**
- **In South Carolina can keep using for now, but make sure narrowly tailored**



QUESTIONS?

