

FTC Announces Vote on Rule to Ban Noncompetes

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The Federal Trade Commission (FTC) has [announced](#) that the commission will vote April 23 on its proposed rule to ban noncompete agreements. While the final rule may differ from the [Notice of Proposed Rulemaking](#) issued in January 2023, the agency confirmed that the rule “would generally prevent most employers from using noncompete clauses.” The agency intends to vote at an open meeting, which will be available via webcast on the [FTC's website](#).

The initially proposed ban would have barred employers from entering into noncompete agreements with their workers and would have required employers to rescind existing noncompete restrictions with current and former workers. The 2023 proposal would have superseded any state laws that are less protective of employees, while leaving intact state laws that provide employees greater protection. The FTC's earlier proposal excluded franchisees from the definition of “worker” and had a limited exception for certain equity holders associated with the sale of a business. The FTC received [more than 26,000 comments](#) related to the proposed rule during the public comment period.

Troutman Pepper reported on the proposed ban when it was introduced in [January 2023](#), including its [ramifications for state litigation](#), and again when the comment period was extended in [March 2023](#).

Scope of the Proposed Rule

The FTC does not intend to publish the current proposal until the date of its vote, April 23. However, it has announced that the proposed rule would prevent most employers from using and enforcing worker noncompete provisions. It is likely that the “ban” would make it unlawful for employers to enter into, or keep in place, any noncompete provisions with current or former workers. The FTC describes noncompetes as harmful because they are “often exploitative[,] … suppress[] wages, hamper[] innovation, and block[] entrepreneurs from starting new businesses.” Presumably, noncompetes would be deemed an “unfair method of competition” under Section 5 of the FTC Act.

Many state attorneys general have also been active and interested in preventing enforcement of employee noncompetes. It is likely that the FTC's ban will serve as the impetus for more activity in this area. Personnel from the federal and many state antitrust enforcement agencies have made clear that they believe that there are less restrictive ways to protect trade secrets and confidential information.

The 2023 proposal defined noncompete provisions as contract terms that “prevent workers from seeking or accepting employment” or “operating a business” after their employment with the employer ends. It did not, however, ban employee or customer confidentiality, nondisclosure, or nonsolicitation agreements. Given the

FTC's position that worker misclassification could constitute an unfair method of competition, it is likely that the ban will continue to define the term "worker" very broadly. The 2023 version would have covered any "natural person who works, whether paid or unpaid, for the employer," including "independent contractors, externs, interns, volunteers, apprentices, or sole proprietors who provide a service to a client or customer."

No Public Comment Period

The FTC announced that it will not provide for a public comment period related to the April 2024 version of its noncompete ban. The agency's press release states that it will not accept additional public comments "[g]iven the extremely high volume of public input already received and given that the public comment period on the proposed rule closed in April 2023."

The FTC's decision not to accept additional public comment suggests that the 2024 version of the noncompete ban will not be broader in scope than its 2023 proposal. Employers should carefully monitor the FTC's vote and any resulting rule. The rule will likely face significant legal challenges, and its fate is far from certain.

Troutman Pepper will continue to monitor the developments and progress concerning the proposed rulemaking and how it will impact employers and their operations. If you have any questions, comments, or concerns about the proposed rule and its implications, our Labor + Employment and Antitrust attorneys are available to guide you through these issues and evaluate the best strategy for your business.

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