

FTC Extends Comment Period on Proposed Ban of Noncompete Agreements

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The Federal Trade Commission (FTC) continues to pursue its campaign against noncompete clauses. On January 5, the FTC voted 3-1 to publish a [notice of proposed rulemaking](#), which, if implemented, would bar employers from entering into noncompete agreements with their workers and require employers to rescind existing noncomplete restrictions with current and former workers. Originally, the deadline for submitting comments was March 20, but recently, the FTC voted 4-0 to extend the public comment period for an additional 30 days following numerous requests from the public. As such, the FTC will now accept comments on the proposed rule until April 19.

Although all four current commissioners voted to approve the extension, Commissioner Christine S. Wilson — the sole Republican — filed a [concurring statement](#) regarding the extension. Commissioner Wilson explained that because of the number of requests the FTC received to extend the comment period by 60 days and the fact that the proposed rule “is a departure from hundreds of years of precedent and would prohibit conduct that 47 states allow,” she would have supported a longer, 60-day extension. Commissioner Wilson additionally encouraged the public to submit comments on the proposed rule.

To date, the FTC has received over 16,000 comments related to the proposed rule, a number that will surely climb over the next month.

Scope of the Proposed Rule

The proposed rule supersedes state laws that are less protective of employees, but it keeps in effect state law that provides employees greater protection. The proposed rule excludes franchisees from the definition of “worker” and has a single, limited exception that applies to the sale of a business.

First, the FTC’s proposed rule would effectively ban worker noncompete provisions by deeming them an “unfair method of competition” under Section 5 of the FTC Act. The proposed rule would make it unlawful for employers to enter into or keep in place any noncompete provisions with current or former workers. Noncompete provisions are defined as contract terms that “prevent workers from seeking or accepting employment” or “operating a business” after their employment with the employer ends.

The proposed rule does not apply to customer or employee nonsolicitation provisions or generally to confidentiality

or nondisclosure agreements. The proposed rule applies a functional test for determining whether a clause is covered by the rule. A provision is considered a “de facto” noncompete provision if 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.” The proposed rule includes as an example of a de facto noncompete term 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.”

The proposed rule defines the term “worker” very broadly to include 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.”

Notice Obligations Imposed by the Proposed Rule

If the rule becomes effective, employers who have existing noncompete provisions that violate the rule would be required to affirmatively rescind existing noncompete clauses with current workers and give individualized notice to workers that they are no longer subject to the noncompete clause. Employers would also be required to rescind noncompete clauses in effect with former workers, and give former workers notice of such rescission, so long as the employer has the former worker’s contact information readily available. Employers would be prohibited from representing to a worker that the worker is covered by a noncompete clause when the employer has no good faith basis to believe the worker is subject to an enforceable noncompete clause.

Exception for Sale of Business

The proposed rule provides a single, limited exception related to the sale of a business. The exception provides that the rule “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.” The exception applies, however, only to a person who owns at least a 25% ownership interest in a business entity at the time the person enters into the noncompete clause. The proposed rule is unclear as to whether the exception applies to existing noncompete terms applied to future sales of a business or only to noncompete terms entered into at the time of the sale.

Relation to State Laws

The proposed rule provides that it supersedes any state statute, regulation, order, or judicial interpretation that is inconsistent with the proposed rule. A state statute, regulation, order, or interpretation is not inconsistent with the proposed rule, however, if it provides greater protections to workers than the proposed rule. As a result, the proposed rule would essentially set a floor for worker protection against noncompete agreements, but also keep in effect state and federal law that provides workers greater protection.

Public Comment

The FTC’s extended comment period on the proposed rule runs until April 19. The FTC has asked specifically for comments on several different alternatives to this noncompete ban, such as whether noncompete clauses

between employers and senior executives should be subjected to a different rule than noncompete clauses between employers and other workers. The FTC also seeks comments on the possible benefits and costs of the proposed rule, the impact of the proposed rule on businesses, and possible compliance costs if implemented. Commissioner Wilson's recent and original statements seek to strongly encouraged commenters to submit their views on the proposed rule.

Compliance Date

The proposed rule would establish a separate effective date and compliance date. The proposed rule's effective date will occur 60 days after the final rule is published in the *Federal Register*. The compliance date will occur 180 days after the final rule is published in the *Federal Register*.

The time between the effective date and compliance date marks the "compliance period" during which employers will need to be prepared to comply with the proposed rule's provisions by the compliance date.

Effect on Congress

The FTC's proposed rule has also sparked movement within Congress. In response to the proposed rule, Senator Chris Murphy (D-CT) reintroduced the [Workforce Mobility Act](#) (Act), which was cosponsored by Senators Todd Young (R-IN), Tim Kaine (D-VA), and Kevin Cramer (R-ND). This Act had been previously introduced to Congress in 2018, 2019, and 2021, but stalled each time. The Act, like the proposed rule, seeks to ban the enforcement of noncompetes across the United States. However, the Act differs from the proposed rule in many ways. Of note, the Act would not retroactively ban noncompete agreements, whereas the FTC proposed rule would apply to all existing and future noncompete agreements.

The Act is currently sitting in committees for additional review.

What Does This Mean for Employers?

Employers should carefully monitor the status of the proposed rule. It will likely face significant legal challenges, and its fate is far from certain. Employers should consider, however, conducting an audit of their noncompete agreements and practices with respect to such agreements to determine whether and to what extent they may be impacted should the proposed rule become the law of the land.

For example, employers who have previously relied primarily on noncompete restrictions to prevent unfair competition or theft of trade secrets may consider strengthening or modifying their nonsolicitation and nondisclosure restrictions. Specifically, employers should evaluate their confidentiality agreements, which are often very broad, to evaluate the risk that they may be considered "de facto noncompetes" that are invalidated by the proposed rule and ensure that they comply with the antitrust laws. Employers may also consider conducting an audit to evaluate and identify vulnerabilities within their organization in the event key current and former employees suddenly have unenforceable noncompete restrictions. Having a contingency plan in place now would save resources and potentially prevent significant impacts to the bottom line.

Additionally, although Section 5 of the FTC Act applies to "persons, partnerships, or corporations," its definition of

the term “corporation” covers only entities “organized to carry on business for its own profit or that of its members.” Therefore, arguably, the proposed rule would not apply to nonprofit entities. The courts, however, apply a fact-sensitive analysis, suggesting that the nonprofit legal status of an entity is not dispositive of Section 5’s applicability. Further, the FTC can also challenge noncompetes under other antitrust statutes, such as the Sherman Act. Nonprofits should tread carefully given the other tools available to the FTC and other state and federal authorities and the apparent skepticism of noncompetes.

Should the proposed rule be adopted in its current state, this will also place much greater importance on policing corporate confidential and trade secret information, as companies would lose the ability to prevent former employees from immediately going to work for a direct competitor. This provides additional incentive for companies to proactively take stock of their confidentiality practices and agreements to ensure they are fully prepared in the event the proposed rule is implemented in its current form by the FTC.

If you have any questions, comments, or concerns about the proposed rule and its implications, Troutman Pepper’s [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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