

FTC Seeks Public Comment on Potential Franchise Rule

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The Federal Trade Commission (FTC) made another move to protect two of the Biden administration's priority constituencies: small business and workers. This time, it targeted perceived unreasonable restraints in the franchise context. On March 10, the FTC asked for public comments related to how franchisors exert control over their franchisees and their workers.^[1] This request for information reflects continued efforts by the FTC to limit private businesses' use of noncompete agreements and other trade practices believed to unfairly affect employees.

Solicitation for Public Comments on Provisions of Franchise Agreements and Franchisor Business Practices

The FTC's March 10 solicitation for public comments on provisions of franchise agreements and franchisor business practices (the "request") reflects continued concerns about unfair and deceptive practices in the franchise industry. A spokesperson expressed the FTC's concerns plainly: "[I]n some instances, the promise of franchise agreements as engines of economic mobility and gainful employment is not being fully realized." According to the agency, "[The request is expected to] begin to unravel how the unequal bargaining power inherent in these contracts is impacting franchisees, workers, and consumers."

The request comes on the heels of the FTC's proposed new rule that would ban all noncompete clauses imposed by employers, as discussed in ["FTC Extends Comment Period on Proposed Ban of Noncompete Agreements."](#) Per the request, the FTC seeks public comment on its proposed rule and is interested in comments addressing "whether the proposed rule should also apply to noncompete clauses between franchisors and franchisees." To this end, the FTC's request seeks comment on several specific issues, including, but not limited to:

- Whether franchise agreements are negotiated between the franchisee and franchisor or whether they are presented to prospective franchisees on a take-it-or-leave-it contract;
- The types of unilateral changes made by franchisors during the course of the relationship;
- The prevalence of certain types of provisions in franchise agreements, such as no-poach provisions, provisions that impose maximum or minimum prices, and provisions that restrict where a franchisee may operate its business;
- How franchisors exercise control over wages and working conditions; and

- What types of payment and consideration franchisors receive from third parties.

The request for information on many of these topics is unsurprising given the current administration's initiatives, especially as to restraints that can affect wages and employment mobility. As addressed in "[Executive Order Throws Down the Gauntlet for a New Era of Antitrust Enforcement](#)," the administration has been keenly focused on protecting workers and small businesses from perceived overreach by big business. This focus was reflected in President Joe Biden's July 2021 executive order that more generally asked the executive departments of the federal government to enact initiatives to eliminate barriers to competition and later actions by the Department of Justice (DOJ). For example, in October 2022, the DOJ secured the first-ever criminal convictions against the parties to a no-poach agreement. It also filed several amicus briefs in civil matters in 2022 and argued that no-poach agreements should receive *per se* treatment under Section 1 of the Sherman Act.

Comments in response to the request may be submitted until May 9. Notably, the FTC included a reference to its request for comments in its franchise rule press release about its proposed industry-agnostic ban on noncompete clauses. The Biden administration's initiative to ban noncompete agreements is yet another example of its attempt to ban practices that it believes are harmful to employees.

Franchisors and franchisees should consider submitting comments to both the franchise rule and the proposed noncompete ban.

[1] Press Release: "FTC Seeks Public Comment on Franchisors Exerting Control Over Franchisees and Workers," available at

<https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-seeks-public-comment-franchisors-exerting-control-over-franchisees-workers>.

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