



PHILLIPS LYTLE LLP CLIENT ALERT

COMMERCIAL LITIGATION

JANUARY 2023



Proposed FTC Rule Would Ban Most Noncompete Agreements

On Jan. 5, 2023, the Federal Trade Commission (FTC) proposed a new rule that would ban noncompete clauses in nearly all employment contracts and invited public comment on the proposal.

THE PROPOSED RULE

Currently, states take differing approaches to regulating noncompete agreements. California, for example, has largely prohibited them. New York, on the other hand, will generally enforce noncompete agreements, subject to certain limits, so long as they are narrowly tailored and protect a legitimate interest of the employer.

The proposed rule would add part 910 to title 16 of the Code of Federal Regulations to regulate noncompete agreements nationwide. The proposal defines a noncompete clause¹ as “a contractual term between an employer and a worker that prevents 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 proposal specifies that the definition includes contractual provisions that have the effect of a noncompete clause, even if they are not explicitly framed as such. For instance, a nondisclosure agreement “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” will qualify as a noncompete clause for purposes of the rule.

Moreover, the proposal includes a requirement that employers must rescind existing noncompete agreements and individually notify current and former workers that noncompetes are “no longer in effect and may not be enforced.”

The proposed rule contains only a narrow exception for certain noncompete clauses in the context of a sale of a business—the exception would apply, for example, where the seller of a business agrees not to compete with the buyer. In such a case, the noncompete would be exempt from the rule and would remain enforceable.

The FTC said the proposed rule is based on a preliminary finding that noncompete agreements, which typically prohibit employees from working for competitors or starting competing businesses for a period of time after the end of the employment contract, are an unfair method of competition in violation of the Federal Trade Commission Act.

In a press release titled FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition², the FTC said its rationale for the proposal is that noncompete clauses suppress wages, hamper innovation and keep entrepreneurs from starting new businesses. The agency estimated that the new rule could increase wages by almost \$300 billion per year.

¹ <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking>

² <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>



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PUBLIC COMMENT ON THE PROPOSED RULE

Before taking effect, the proposed rule will be subject to a public comment period, following which the FTC may make changes to the proposed rule. Public comments will be due 60 days after publication of the proposed rule in the Federal Register. The [Notice of Proposed Rulemaking](#)³ is available at the FTC's website.

If you have any questions about the effect of the proposed rule on your business, or if you would like assistance preparing and submitting public comments on the rule, please contact Ryan, Lucas, any of the attorneys on our [Commercial Litigation Practice Team](#), or the [Phillips Lytle attorney](#) with whom you have a relationship. ■

Additional Assistance

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³ https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf



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