

# Proposed FTC Rule Would Ban Employers From Using Non-Compete Agreements

## Labor & Employment Law Update

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Non-compete agreements – contract clauses, usually in employment agreements, that ban an employee from working in a certain industry, or in a certain geographic area for a period of time following termination of employment – have been under increasing scrutiny by state legislatures over the last several years. Many states, including Illinois, have banned their use for workers below certain income thresholds, for example.

Now, on the federal level, the U.S. Federal Trade Commission (FTC) has issued a proposed rule that would effectively ban non-compete clauses in the employment setting, including requiring rescission of existing non-compete agreements.

The proposed rule provides that it would supersede any state statutes. This is controversial. Post-employment restrictive covenants generally have been the subject of state law and it is questionable whether the federal government has the constitutional authority to regulate restrictive covenant law in this fashion. The U.S. Chamber of Commerce has issued a statement criticizing the rule as “blatantly illegal.”

The rule would not apply to non-solicitation clauses or non-disclosure clauses. This is an important exception. For most employers, their customer relationships and competitively sensitive business information are the main interests they seek to protect using restrictive covenants in employment agreements. Even if the new rule takes effect, and is upheld by the courts, employers would still be able to use non-solicitation and non-disclosure clauses to protect themselves against unfair competition.

The FTC published the proposed rule on January 5, 2023. The FTC is asking for public comment on the new rule no later than 60 days after the date of publication. If implemented, it would become effective 180 days after publication.

We will monitor the status of the proposed FTC rule and keep our readers apprised of any developments.