



## Coming Soon: A Nationwide Ban on Noncompete Agreements?

The Federal Trade Commission (FTC) [announced](#) new proposed regulations today that, if adopted, will ban the use of noncompete agreements for most workers nationwide. The proposed [Non-Compete Clause Rule](#) will prohibit all employers – regardless of size – from imposing covenants not to compete on employees and independent contractors, with no carve-out available that would permit the use of noncompetes with executives or other highly-compensated workers. The rule is not yet in effect, and if enacted, it will not prohibit the continued use of properly drafted non-disclosure and non-solicitation clauses under federal law.

In support of its proposed noncompete ban, the FTC [argues](#) that such restrictions “hurt workers and harm competition,” by significantly reducing workers’ wages, stifling new businesses and new ideas, and exploiting workers who lack economic bargaining power. The FTC also estimates that its new regulations could “increase American workers’ earnings between \$250 billion and \$296 billion” per year.

Not only do the proposed regulations prohibit employers from imposing noncompetes on newly retained talent, but they will also require employers to rescind covenants not to compete in employees’ and contractors’ existing agreements if those covenants are rendered unlawful under the new rule. Such rescission would have to occur within 180 days of the official publication of the final version of the FTC’s new rule in the Federal Register.

Importantly, the proposed regulations would not ban employers from using all forms of restrictive covenants with their workforces, assuming such covenants are otherwise permitted under applicable state and local law. For example, employers will still be permitted – at least at the federal level – to use non-disclosure clauses so

long as they are not written so broadly as to “effectively preclude the worker from working in the same field after the conclusion of the worker’s employment with the employer.” Similarly, customer non-solicitation clauses will remain available under federal law unless they have “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.” However, some states already limit or ban the use of these types of restrictive covenants in the employment setting.

The new proposed rule does contain a limited exception permitting the continued use of covenants not to compete in connection with the sale of a business or an ownership interest in a business. However, this exception is narrow, requiring that the person restricted by the noncompete clause to hold an ownership, partnership, or membership interest of at least 25% at the time he or she agreed to the noncompete covenant.

Employers should be asking whether the FTC’s proposed regulation will actually become law, and if so, when it will become effective. Time will tell. Once the proposed rule is published in the Federal Register (which has not yet occurred), interested stakeholders will have 60 days to submit comments on it. The FTC will then “review the comments and may make changes, in a final rule, based on the comments and on the FTC’s further analysis.” Compliance – both in terms of a prospective ban on future use of restrictive covenants not to compete and the retrospective rescission of existing noncompete agreements – will be required within 180 days after the date of publication of the Final Rule. Of course, the rule will undoubtedly be subject to myriad legal challenges, which could delay its implementation and/or enforcement for months or years to come.

### **Key Takeaways:**

1. The FTC will soon publish new proposed federal regulations banning the use of covenants not to compete for nearly all workers nationwide.
2. If enacted, the new regulations will force employers to rescind existing noncompetes in effect for employees and workers.
3. Non-disclosure and non-solicitation agreements will remain lawful – at least at the federal level – so long as they do not have the effect of preventing employees and contractors from working in the same field or industry altogether.

This client alert was drafted by [Randi Winter](#), a partner in the Spencer Fane Minneapolis office. For more information, click [here](#).