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Federal Trade Commission Proposes Broad Ban on Non-Compete Agreements

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The Federal Trade Commission (FTC) has issued a Proposed Rule which, if implemented, would prohibit employers from entering into or attempting to enter into “a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.” Employers would also be required to rescind any existing non-compete agreements by providing individual notice to anyone currently subject to a non-compete, including former employees.

The Proposed Rule defines a non-compete clause 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,” but it also contains a functional test. According to the functional test, the FTC would deem any contractual term that has the effect of prohibiting a worker from seeking or accepting employment to be a non-compete clause. The FTC provides the following examples of terms which may be *de facto* non-compete clauses:

- i. 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.
- ii. A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker’s employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker.

It is also important to note that the FTC defines “worker” as anyone who works, paid or unpaid, for an employer. This would include unpaid interns and volunteers (who are rarely subject to non-compete agreements anyway), as well as independent contractors.

The Proposed Rule provides one exception. It does **not** apply to non-compete clauses that are entered into by individuals selling a business entity, otherwise disposing of all of their

ownership interest in the entity, or selling all or substantially all of the entity's assets, so long as that person is "a substantial owner of, or a substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause."

The Proposed Rule is open for comments through March 10, 2023. If the Proposed Rule becomes final, employers will have 180 days to comply and 45 days to notify workers with existing non-competes that those agreements are rescinded. The U.S. Chamber of Commerce has challenged the FTC's authority to implement this broad rule, and legal challenges will likely follow. In the meantime, employers should consult with their employment counsel to determine the best strategy moving forward.

Bodman's Workplace Law Group is available to assist employers with their labor relations strategy, collective bargaining, and defense of unfair labor practice claims. Bodman may not be able to respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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