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January 2023

FTC Proposes Noncompete Ban

More than a year and a half after President Biden directed the Federal Trade Commission (FTC) to consider rulemaking with regard to noncompetition agreements, the agency has taken bold action, announcing on January 5 that it is proposing a new rule that would ban employers from using such agreements with employees.

The FTC is seeking public comments on the proposed rule, which could result in modifications. However, the current proposal would strip employers of any ability to use noncompetes. It would make it illegal for an employer to enter into or attempt to enter into a noncompete with an employee, maintain a noncompete with an employee, or represent to an employee that he or she is subject to a noncompete agreement.

The current version of the proposed rule does not include any exemptions for highly compensated employees or any other category of highly valued employees.

The rule goes even further, in that it would require employers to rescind existing noncompetition agreements and expressly inform employees of the rescission. The rule would also apply to independent contractors.

The FTC states that the proposed rule would not cover other types of employment restrictions, such as nondisclosure agreements and, presumably, nonsolicitation agreements. However, those types of restrictions could be subject to the rule if they are so broad in scope that they function as a noncompetition agreement.

Public comments on the rule will be due 60 days after the Federal Register publishes it. The FTC will then review the comments and may make changes in a final rule.

The proposed rule comes on the heels of recent FTC legal actions against three companies and two individuals that prohibited the companies from imposing and enforcing noncompete restrictions on employees. These lawsuits, the FTC's first intended to stop the enforcement of noncompete restrictions, along with the proposed rule, demonstrate the agency's continued effort to aggressively push antitrust enforcement in labor markets.

FOR MORE INFORMATION

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