

# An Update on the FTC's Proposed New Non-Compete Rule As Comment Period Closes and the Recent Memo from the NLRB Declaring Non-Compete Agreements Unlawful

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Earlier this year, the Federal Trade Commission (FTC) [proposed](#) a new rule that would ban non-compete clauses in employment contracts. The agency's comment period closed on April 19, 2023 with more than 26,000 comments received. It will certainly take time for the FTC to review the comments and make changes before adopting a final rule, and even then the rule won't go into effect until 180 days later. As a result of the number of comments, the FTC's vote on the rule has been pushed back until at least April 2024. Fortunately, this gives employers more time to prepare for the anticipated rule.

In yet a further attack on non-compete clauses, on May 30, 2023, National Labor Relations Board (NLRB) General Counsel Jennifer A. Abruzzo released Memorandum 23-08, which follows the FTC's recent proposal to ban most non-compete restrictions, with very limited exceptions. The memo states that absent narrowly tailored provisions for "special circumstances," the "proffer, maintenance, and enforcement" of non-compete agreements tend to infringe on employees' Section 7 rights to engage in protected concerted activities under the Act. As a result, the NLRB takes the position that non-compete agreements are unlawful. Although this memo is not the law, it lays the roadmap for cases the NLRB intends to prosecute.

Employers in the senior housing industry frequently come across non-compete clauses in employment contracts, and there are naturally questions about the FTC's proposed ban, anticipated challenges in court, and how the new rule might impact the daily operations of assisted living facilities.

# What Senior Housing Industry Employers Need to Know about the Proposed Non-Compete Rule

In addition to banning non-compete clauses outright, the proposed new [rule](#) would prohibit:

- contractual terms in employment contracts that would prevent workers “from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer.”
- other contractual terms that would constitute a de facto non-compete clause. For example, it would prohibit a non-disclosure agreement that is written so broadly it would effectively preclude an employee from remaining in the same field after departing a job.

The proposed rule would still allow reasonable non-disclosure, confidentiality, and non-solicitation agreements, as well as prohibitions on concurrent employment, so employers still have many legal avenues to reasonably protect their businesses.

## Prohibition on Charging for Training Costs

The proposed rule would also enjoin “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.”

The FTC is including this kind of contract term in the proposed rule because it functions as a non-compete clause. Employers should be aware that if they charge training reimbursement costs to terminated employees, they may attract some unwanted regulatory or legal attention — especially if the training was conducted in-house.

## How Senior Housing Industry Employers Can Prepare for Changes to Non-Compete Agreements

The FTC's announcement opens a public comment period, and there will likely be substantial commenting that will undergo review before the final rule is adopted. The proposed rule could be amended as a result of the public comments, but most likely the final adopted rule will be similar to the proposed one. Therefore, employers should watch the proposed rule carefully, and begin reviewing and revising their existing [employment contracts](#) accordingly.

Business owners and operators must consider carefully the restrictions needed to protect their enterprises, and explore how confidentiality, non-disclosure, and non-solicitation agreements can serve those ends.

Under the proposed rule, employers will need to give employees notice within 45 days of rescinding non-compete clauses, and they will also have to notify former employees who were subject to non-competes. The proposed rule includes language that employers can use for these notifications.

If you would like more guidance about navigating the FTC's proposed rule change and how it affects your employment contracts, please contact author [Andrew Berns](#).