

How Employers Should Prepare For The FTC's New Non-Compete Rule

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On January 5, 2023, the Federal Trade Commission (FTC) [proposed](#) a new rule that would ban non-compete clauses in employment contracts. Many employers may need to revise their employment contracts and send notifications to current and former employees if the rule is adopted. The changes will likely elicit major challenges in court.

Right now, the FTC is seeking public comment on the proposed rule, which would prevent employers from entering into non-compete agreements with workers, and nullify existing non-competes.

Here is an overview of the proposed changes and how employers can best prepare for the likely adoption of the new rule.

What 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 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.

Timeline

The comment period is open through March 20, 2023. It will take time for the FTC to review the comments and make changes before adopting a final rule. Once finalized, the rule will go into effect 180 days later. If employers begin acting now, they will have plenty of time to adjust and adapt.

If you would like more guidance about navigating the FTC's proposed rule change and how it affects your employment contracts, please contact author [Tim Ford](mailto:tford@einhornlawyers.com) at tford@einhornlawyers.com.