

FTC Non-Compete Proposal

- The FTC proposal would broadly prohibit most non-compete agreements (i.e. agreements that block a person from working for a competitor or starting a business after employment ends). It would ban:
 - Any “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,” and
 - Any “contractual term that is a de facto non-compete clause because it has 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.”
- It would apply to employees, independent contractors, interns, volunteers, and other types of workers (regardless of position, compensation, skill, etc.)
- No federal law expressly bans the use of non-competes in this way.
 - The FTC majority now claims it has the authority to declare certain conduct unlawful under the FTC Act, which prohibits unfair methods of competition.



Exception for Sales of Businesses

- The ban on non-competes is not absolute.
- An exception would apply in scenarios in which:
 - The non-compete applies to a person who is selling a business, disposing of all of the ownership interest in a business, or selling all or substantially all of a business' operating assets, and
 - That seller is an owner, partner, or member with at least a 25% ownership in the business at the time the non-compete is entered into.
- The rule arguably does not apply to sales in which a seller (i.e. the person restricted by the agreement) is not a “worker,” but the FTC may view things otherwise.
- Questions – Is this exemption broad enough? Should it be revised, expanded, or clarified? Should other exemptions be added (perhaps for senior level or highly compensated employees)?



Other Employment Agreements

- Not all types of restrictive covenants are prohibited by this proposal.
- The proposal does not reference or restrict the use of other types of restrictive employment covenants ... unless they are so "unusually broad in scope that they function as [non-competes]."
 - The notice specifically mentions non-solicitation and non-disclosure agreements as covenants that would typically not be affected.
 - Agreements could still be used to "affect the way that a worker competes with their former employer after the worker leaves their job," but not to prevent a former worker from competing with a former employer altogether.



Effect on Existing Non-Competes

- Employers would be required to rescind any prohibited non-competes in effect within 180 days of the final rule's issuance.
 - They must also notify any impacted workers (including current and former employees) that the non-compete agreement is no longer in effect, and such notices must be individualized.
 - The proposal includes safe harbor/model notice text.
- The proposed rule would preempt any state-level measure that is inconsistent with the new framework.
 - More restrictive state laws would be allowed.



Recent History

- Non-competes have increasingly come under scrutiny from policymakers (state and federal, Republicans and Democrats).
 - The enforceability of non-competes varies state to state.
 - A reasonableness test applies in addition to any statutory restrictions.
 - Three states (CA, ND, and OK) prohibit their use in most instances.
 - Twelve jurisdictions (CO, DC, IL, ME, MD, MA, NV, NH, OR, RI, VA, and WA) ban their use based on worker earnings or similar factors.
 - Most of these laws were passed in the last decade, and several restrict non-competes in additional ways.
 - In 2023, 25 bills have been introduced in 13 states so far.
 - The FTC has been examining their use over the last several years, and there have been bipartisan federal bills as well.



Comment Period & Next Steps

- Comments are due to the FTC by March 20.
- The promulgation of a final rule seems likely, but it is uncertain how the regulation might be revised and whether it will ever take effect due to the near-certainty of legal challenges.
- IIABA has received helpful input to date and welcomes more. Big “I” comments on the rule could address:
 - Whether the FTC possesses the authority to act in this way;
 - Modifying and expanding the business sales exception (e.g. lowering the 25% threshold); and
 - Adding new exemptions for certain types of workers based on job function, salary, type of compensation, occupation, etc. [*The FTC has asked for input on this issue.*]

