



LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

January 9, 2023

FTC PROPOSES SWEEPING BAN ON NON-COMPETES

The Federal Trade Commission (FTC) rung in the New Year by proposing a nationwide prohibition on non-compete agreements between employers and their employees. On January 5, 2023, the FTC voted 3-1 to propose a rule that would prohibit all employers from limiting employees from working for their competitors after leaving employment. Why are these employment agreements any of the FTC's business? The Commission – whose mission is to protect consumers – reasoned that these agreements are unfair competition because they “block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand.” The Agency estimated that the new rule could increase worker earnings by \$300 billion a year.

Specifically, the proposed rule would make it illegal for an employer to:

- Enter into or attempt to enter into a noncompete with a worker;
- Maintain a noncompete with a worker; or
- Represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

The new rule would apply to independent contractors and anyone who works for an employer, whether paid or unpaid. It would also require employers to rescind existing non-competes and proactively inform workers that they are no longer in effect.

In general, the proposed rule would not prohibit non-solicitation agreements (which prevent former employees from soliciting or performing services for certain clients or customers) and non-disclosure agreements (which protect confidential information). However, these types of agreements would be prohibited if they are so broad as to effectively function as non-compete. The rule also has an exception for non-compete agreements entered in connection with the sale of a business.

The FTC has invited public comment on the proposed rule for the next 60 days, after which the Commission will publish a final rule. The rule will go into effect 180 days after the final rule is published. We fully expect that the business community will mount legal challenges to the FTC's authority to issue such a sweeping rule.

If you have any questions about the potential impact of the proposed rule, please contact Al Vreeland at 205-323-9266 or avreeland@lehrmiddlebrooks.com.