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FTC Seeks to Ban Employee Non-Competes

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By a 3-1 party line vote on January 5, 2023, the Federal Trade Commission ("FTC") issued a Notice of Proposed Rulemaking ("NPRM"), setting forth proposed new rules that, if adopted after a 60-day notice and comment period, would ban nearly all employment non-competition agreements and would require the rescission of existing non-competes. The NPRM was issued one day after the FTC published consent orders resolving unprecedented allegations that three companies' employment-based non-competition agreements were "unfair" and thus violated the FTC Act. Under the FTC's proposal, all non-competition agreements, except for those entered into by the owner of at least a 25 percent ownership interest in a business being sold, will be prohibited. The NPRM requests comments on the proposed rules as well as on possible alternatives ranging from partial bans based on worker income levels to the adoption of a rebuttable presumption of illegality for non-compete agreements.

In the FTC's view, non-competition agreements are pervasive, binding nearly 20 percent of American workers. The FTC believes non-competes are inherently exploitive and coercive, and have a universal tendency to generate negative consequences affecting consumers, workers, and other market participants, as reduced labor mobility from non-competes increases competitive concentration, forecloses the ability of competitors to access talent, depresses new business formation, and reduces innovation.

Importantly, the FTC's NPRM does not propose to ban or limit the use of customer and employee non-solicitation agreements between employers and employees. Thus, regardless of the outcome of the FTC's NPRM, employers will still be able to enter into non-solicitation agreements with employees. These do not prevent the employees from competing with their former employer, but restrict their ability to try to take other employees, or the employer's existing customers, with them.

The FTC's proposal goes beyond President Biden's campaign trail pledges and his 2021 Executive Order on Promoting Competition in the American Economy (which we previously wrote about here), in which he called on the FTC to promulgate rules that curtail the unfair use of non-competes. In barring non-competes categorically, the FTC's proposal would lump non-competes in the same bucket of *per se* illegal agreements as naked agreements between competitors to fix prices. Commissioner Christine Wilson (R) issued a strong dissent to the NPRM. In it, she characterized the proposal as the summary condemnation by the FTC majority of "conduct it finds distasteful" through the invocation of "nefarious-sounding adjectives" like "exploitive and coercive."

The proposed ban on non-compete clauses will generate many comments and, we anticipate, a strong dissent among the business community. Among other issues, comments will likely address: whether such a broad proscription affecting nearly 20 percent of the nation's employees should be considered by Congress and not an independent agency; whether the FTC's sweeping proposal impermissibly (or at least unwisely) encroaches upon the prerogatives and experience of state courts and legislatures in balancing the needs of employers against the interests of their employees, including decades of caselaw defining what are unconscionable contract restrictions; whether the evidentiary record and experience of the FTC with non-compete clauses is too abbreviated to recommend such a sweeping prohibition; whether (as the FTC majority claims) existing trade secret laws and non-disclosure agreements will adequately protect employers from opportunistic hiring by competitors, or instead will incentivize employers to decrease employee training and investment; and proposed alternative restrictions on the use of non-competes, short of a complete ban.

As drafted, the NPRM would have broad consequences for employers. As just one example, the proposed rules would preserve non-competes between the buyer and seller in connection with the sale of a business—acknowledging that the buyer of the business should be protected from the seller being able to recapture the goodwill it just sold—but would ban non-compete agreements between the buyer and any former employees of the acquired business. Buyers in a transaction could view this as leaving them with diminished protection of the assets they are acquiring.

If you have any questions regarding the topics discussed in this article, please contact **Brian K. McCalmon** at bmccalmon@vedderprice.com, **Alex C. Weinstein** at aweinstein@vedderprice.com, or any Vedder Price attorney with whom you have worked.