

White & Case Non-Compete Resource Center (NCRC)

What you need to know about the current issues surrounding the enforceability of employer-employee non-compete provisions and the FTC proposed non-compete rule.

Although antitrust enforcers' concern for anticompetitive effects in labor markets has been escalating for some time (read our 2022 article about labor market developments [here](#)), the focus on perceived anticompetitive effects of employer/employee non-compete provisions has recently become much more acute:

Proposed FTC Rule Banning Non-Competes

On January 5, 2023, the U.S. Federal Trade Commission announced a **Notice of Proposed Rulemaking (NPR)** that would **ban non-compete clauses in employer-employee contracts**. (You can read the FTC's FAQs press statement [here](#)).

The **key features** of the NPR are:

- **The proposed rule is broad.** It would prohibit employers from imposing non-competes on workers (including independent contractors and unpaid workers), and the ban would extend to all contract provisions that create "de facto" non-compete clauses; *i.e.*, any other contractual clause that may have the "effect" of prohibiting workers from seeking or accepting other employment. This means that **an NDA that has the "effect" of limiting a worker's mobility may also be banned.** (Proposed Rule § 910.1(b)(1)-(2) is [here](#).)
- The rule **would apply retroactively**. Should the rule be enacted in its current form, not only would preexisting non-compete agreements become unenforceable, but the rule would also require employers to proactively *rescind* the non-compete, *i.e.*, to tell individual employees that such provisions no longer applied. ****The proposed rule would not affect any other provisions negotiated for in exchange for the non-compete, like a severance package.** (Proposed Rule § 910.2(b) is [here](#).)
- There is a **narrow exception to allow non-competes in "sale-of-business" agreements**, but the exception only applies where the individual has **at least 25% ownership** in the business. (Proposed Rule § 910.3 is [here](#).)
- It would **supersede all contrary state laws**.

If issued, what happens if you **violate the rule**?

- The proposed rule provides that the use of non-competes is an "unfair method of competition" that violates Section 5 of the FTC Act. Violations of the FTC Act can result in fines, penalties, and other injunctive relief.

What happens next with the proposed FTC rule?

- The process to implement a rule can take quite a while. It is **open to public comment until at least March 10, 2023**. Public comment can be made [here](#). Thousands of comments have already been lodged. One leading theme has been the adverse impact on the protection of intellectual property (IP) and the absence of any IP exception to the proposed non-compete ban.
- The proposed rule is an extreme departure from historic business practice and even broader than the EU principle of free movement between countries and jobs—but without the EU structure that allows non-competition clauses, limited in geography and time, for certain classes of employees (e.g., key-person and IP related) that are compensated separately (e.g., garden-leave).

While the vote to issue the rule had three votes by the Democrat-appointed commissioners, **Commissioner Christine Wilson dissented**. Commissioner Wilson's dissent, (which you can read [here](#)), notes that the proposed rule would be a "radical departure from hundreds of years of legal precedent." It also explains that the appropriateness of non-compete clauses deserves a "fact-specific inquiry" and that enactment of the proposed rule would have "a much larger raft of unintended consequences."

Recent Wave of FTC Enforcement Actions Against Worker Non-Compete Agreements

The FTC's proposed new rule announcement came within 24 hours of the FTC signaling its intention to achieve its anti-non-compete clause views through enforcement.

- On January 4, 2023, the FTC announced that it had **filed suits—for the first time—to stop companies from enforcing non-compete restrictions**. The FTC's press release is [here](#).
 - The suits involved three companies with non-competes for a range of workers, including low-wage workers, which lasted for one to two years. As a result of the suits, the companies were ordered not to enforce the non-competes, as well as put other remedies into place, such as providing notice for the next 10 years to employees that they may freely seek any job following their employment.
- In these actions, the **FTC sued under Section 5 of the FTC Act**, which governs unfair methods of competition. The FTC argued that the non-competes harmed employees because they result in lower wages, lower salaries, and less favorable working conditions. The FTC also argued that the non-competes harmed new competitors in the glass food and beverage containers industry, noting that the non-competes would impede entry and expansion of new competitors in a concentrated market.

Both the rulemaking and enforcement actions are **in line with the FTC's November 2022 policy statement** ([here](#)) announcing that the FTC would **invoke Section 5 to challenge conduct beyond that covered by the Sherman Act**.

White House and Antitrust Enforcers' Commentary on Non-Competes

In the midst of these events, individual enforcers at both the FTC and the Antitrust Division of the Department of Justice, as well as at the White House, have been vocal about their perceptions and goals for the future of non-compete enforcement:

- A comprehensive listing of public statements by the DOJ Antitrust Division on employer-employee non-competes is [here](#);
- A comprehensive listing of public statements made by FTC officials on non-competes is [here](#);
- And see our article covering what the July 9, 2021 Executive Order 14036 says about non-competes, [here](#).