

CLIENT ALERT

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1

Federal Trade Commission Proposes Rule to Ban Non-Compete Clauses

联邦贸易委员会提议禁止竞业禁止条款

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On January 5, 2023, the Federal Trade Commission (“FTC”) issued a notice of proposed rulemaking (“NPRM”) to ban the use of non-compete clauses with all workers. Although not yet enforceable, the proposed rule marks a dramatic departure from the current regulatory landscape, which is primarily dictated by state law. A non-compete clause is a contractual term that prohibits an individual from competing against the other party—either by working for or starting a competing business—for a certain period within a given geographic area. If finalized and enforced as-is, the proposed rule’s categorical prohibition of non-compete clauses would set a national standard, resulting in the preemption of the vast majority of states’ current regulation of non-compete clauses and abrogating decades of case law.

2023年1月5日，美国联邦贸易委员会发布了一则计划禁止竞业禁止条款的通知（以下简称“拟定规则”），以禁止对所有劳动者使用竞业禁止条款。虽然该计划尚未进入实施阶段，但是该拟定规则与现有的法规下由州法律主导的监管范围大相径庭。竞业禁止条款是一种合同条款类型，禁止个人在规定的时段以及特定的地理区域内，无论是通过为竞争对手工作或是创办竞争企业的方式，与另一方竞争。如果该拟定规则最终定稿，并且按原样执行，那么该拟定规则中所述的禁止竞业禁止的条款将被设定为一项国家标准，从而取代美国绝大多数州目前对竞业禁止条款的规定，并废除数十年的案例法

The Proposed Rule’s Significance

该拟定规则的重要性

As written, the proposed rule would declare non-compete clauses an unfair method of competition for an employer to enter into or attempt to enter into with a worker. The proposed rule broadly defines non-compete agreements as “a 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.”

按照书面规定，该拟定规则将把竞业禁止条款作为一项雇主订立的或试图与雇员订立的不公平竞争的方法。该拟定规则将竞业禁止协议广义地定义为“雇主和劳动者之间的一项合同条款，该条款禁止劳动者在与雇主结束雇佣关系之后寻找或接受某项工作或创办某类企业。”

Generally, other restrictive covenants, such as non-disclosure agreements and non-solicitation agreements, are not prohibited under the proposed rule. While most would assume this would

mean that employers could still contract with employees to ban them from soliciting clients, customers, and employees, the proposed rule deploys a functional test to determine whether a specific covenant is a non-compete clause. Meaning even non-solicitation provisions could come within the scope of the NPRM because the NPRM aims to ban any agreement that 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.”

一般来说，该拟定规则不禁止其他限制性协议，例如保密协议或禁止招揽协议。虽然大多数人认为这意味着雇主仍然可以与劳动者订立合同，禁止他们招揽客户、顾客和员工，但该拟定规则采用了功能性测试的方式来决定特定的协议条款是否属于竞业禁止条款。这意味着，禁止招揽协议也可以被纳入该拟定规则的范围，因为该拟定规则旨在禁止任何“具有禁止劳动者在与雇主结束关系后寻求或接受某项工作或创办某类企业的效果”的协议。

For example, the NPRM identifies a non-disclosure agreement written so broadly to effectively preclude the worker from working in the same field after the conclusion of the worker’s employment with the employer as a functional non-compete that would violate the proposed rule. The proposed rule also prohibits contractual terms between an employer and a worker that requires the worker to reimburse the employer or a third party for training costs if the worker’s employment terminates within a specified time in situations where the payment is not reasonably related to the expenses the employer incurred to train the worker.

例如，该拟定规则将一份含有禁止劳动者在离职后从事相同行业的条款的保密协议视为一份功能性的竞业禁止协议，从而违反了拟定规则。该拟定规则同时禁止雇主与雇佣之间签订如果雇员在特定时间内离职，则需雇员支付雇主或第三方相关培训费用的合同，前提是这笔需支付的费用与雇主提供的培训无法合理关联。

Further extending the proposed rule’s scope, the ban on non-compete clauses would apply to all workers. “Worker” is broadly defined as “a natural person who works, whether paid or unpaid, for an employer” and expressly includes, without limitation, “an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer.” Because the ban on non-compete clauses is categorical, the proposed rule treats all workers the same, no matter the worker’s salary or position within the business.

在拟定规则下，禁止竞业禁止的条款范围进一步扩大，包括了所有的劳动者。在拟定规则下，“劳动者”被广义地定义为“一个为雇主的自然人，不论是否支付工资”并且明确包括但不限于以下人员：“雇员，独立合同工人，外聘人员，内部实习人员，志愿者，学徒工人，或为客户提供服务的独资经营者。”由于对竞业禁止条款的禁止是绝对的，该拟定规则对所有劳动者一视同仁，不考虑劳动者在企业中的职位或工资待遇。

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Although the scope of the proposed rule is extensive, there are two notable exceptions. First, a non-compete clause may still be used to prevent a person from selling a business, selling all of the person's ownership interest in the industry, or selling all or substantially all of the operating assets of a business from competing with the purchasers of the business. For this exception to apply, the restricted party must be an owner, member, or partner holding at least 25% ownership interest in the business entity. Second, the term "worker" does not include a franchisee in a franchisor-franchisee relationship.

尽管该拟定规则的涵盖范围极广，但是其提供了两个例外情况。第一，竞业禁止条款仍可用于防止某人出售企业、出售其在该企业中的的全部所有权权益，或出售企业的全部或大部分经营资产，使企业的购买者无法与其竞争。要适用此例外，受限方必须要在企业中拥有至少25%的所有权权益。第二种例外情况是，该拟定规则下的“劳动者”不包括在特许权人-加盟商中的加盟商

If the NPRM goes into effect, it will prohibit an employer from: 如果该拟定规则正式生效，其将禁止雇主的以下行为：

- (1) entering into or attempting to enter into a non-compete agreement with a worker;
与劳动者订立或尝试订立竞业禁止协议；
- (2) maintaining a non-compete agreement with a worker; or
维持与劳动者现有的竞业禁止协议；或
- (3) representing to a worker, under certain circumstances, that the worker is subject to a non-compete agreement.
在特定情况下向劳动者表示该劳动者受竞业禁止协议的约束。

The proposed rule would require employers that entered into a non-compete clause with workers before the rule's compliance date to rescind those non-compete clauses. Compliance with the proposed rule would also require an employer to provide written notice to its workers that the rescinded non-compete clauses are no longer in effect and may not be enforced against the workers. The proposed rule would also supersede any inconsistent state statute, regulation, or rule, unless that state statute, regulation, or rule affords workers greater protections. Thus, the proposed rule would create a national regulatory floor while allowing states to provide additional protections for workers.

该拟定规则将要求雇主取消在计划生效日期之前与劳动者签署的竞业禁止条款。此外，对该拟定规则的遵循还包括要求雇主向其劳动者提供书面通知，告知劳动者已废除的竞业禁止条款将不再有任何效力，并且不得对该劳动者执行。该拟定规则将同时取代所有不一致的州内法律，法规以及规则，除非现有的州法律，法规以及规则提供了劳动者更多的保护。因此，该拟定规则将创建一个全国性的监管规则，同时允许各州为劳动力提供额外的保护。

The Rulemaking Process and Expected Challenges

规则制定过程以及预期挑战

While the substance of the proposed rule provides a dramatic departure from the current regulatory landscape, it is not yet enforceable. The NPRM is just an initial step in the rulemaking process. The FTC will soon publish the NPRM in the Federal Register, which will trigger a 60-day public comment period. The NPRM invites public comment on specific questions, including whether franchisees should be covered in the definition of "worker" under the rule, low-and high-wage workers should be treated differently under the rule, and whether senior executives should be exempted from the rule.

虽然拟定规则的实质内容与当前的法律监管格局有很大不同，但它尚未具有可执行性。该拟定规则的颁布只是规则制定过程中的第一步。联邦贸易委员会将很快在《联邦记事》上公布该拟定规则，这将开启60天的公众评论期。该拟定规则邀请了公众就具体问题发表意见，包括特许加盟商是否应包括在该拟定规则下“劳动者”的定义中，低工资和高工资的劳动者在该拟定规则下是否应被区别对待，以及高级管理人员是否应得到该拟定规则的豁免。

Following the notice-and-comment period, the FTC will publish a final rule. The final rule could differ from the proposed rule based on the received public comments. After the final rule's publication, employers will have 180 days to rescind current non-compete clauses and provide the required notice to workers. Upon the expiration of the 180-day compliance period, the FTC could commence enforcement.

在通知和公众评论期后，联邦贸易委员会将颁布最终规则。根据在评论期收到的公众意见，最终规则将与拟定规则有所不同。在最终规定颁布之后，雇主将有180天的时间来取消现有的竞业禁止条款并且向劳动者提供所需的通知。在180天的遵循期过后，联邦贸易委员会可以开始执行该规则。

However, the proposed rule could face delays beyond the rulemaking process. Any final rule is expected to face intensive legal challenges. These legal challenges primarily center around whether or not the FTC possesses the authority to impose such a sweeping regulation of non-compete agreements in the employment setting.

然而，该拟定规则可能会在规则制定的过程中面临延误。任何一项最终规则都将预计面临大幅度的法律挑战。这些法律挑战主要集中在联邦贸易委员会是否有权在当前的就业环境中对竞业禁止协议实施如此全面的监管。

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Immediate Considerations for Employers 雇主的即时考虑

Although the proposed rule is not yet finalized or enforceable, there are immediate actions employers can take to prepare for the changing regulatory landscape. First, concerned parties may submit vigorous comments explaining the potential costs and adverse effects of the proposed rule on their business. In encouraging stakeholders to submit a public comment, Commissioner Christine S. Wilson emphasized in her dissenting statement regarding the NPRM that “this solicitation for public comment is likely the only opportunity they will have to provide input not just on the proposed ban, but also on the proposed alternatives.”

虽然该拟定规则尚未最终确定或执行，但雇主可以立即采取行动，为不断变化的监管环境做好准备。首先，利益相关方可以提交有力的评论，解释拟定规则将对其业务所产生的潜在不利影响。为了鼓励利益相关方提交公众意见，联邦贸易委员会专员 Christine S. Wilson 在她关于对拟定规则的反对声明中强调，“这次征求公众意见可能是雇主唯一的机会，他们不仅可以就拟议的禁令规则提供意见，还可以就拟议规则的替代方案提供意见。”

Employers also can review their existing agreements with workers to assess their exposure to the proposed rule. That review should account for all restrictive covenants, including non-disclosure agreements and nonsolicit agreements, to assess whether such covenants effectively preclude the worker from working in the same field after the conclusion of the worker’s employment with the employer, therefore operating as a functional non-compete that would violate the proposed rule.

雇主还可以审核其与劳动者们的现有协议，以评估这些协议在拟定规则中的风险。该审查应考虑到所有限制性协议，包括保密协议和禁止招揽协议，以评估这些协议是否禁止劳动者在与雇主结束雇佣关系后在同一领域工作，从而在拟定规则下将被视作一种违反拟议规则的功能性竞业禁止条款。

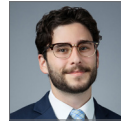
Dickinson Wright attorneys closely monitor the FTC’s actions regarding its regulation of employers’ dealings with their workers and are available to discuss how these regulations could impact your business. Additionally, Dickinson Wright attorneys stand ready to assist in preparing a public comment for submission on this proposed rule.

迪克森律师事务所的律师们正密切关注着联邦贸易委员会对拟定规则的相关行动，并且愿意与您讨论这些规定将如何影响您的业务。此外，本所也将随时准备协助客户提交对该拟定规则的公众评论。

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