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Client Alert: FTC Proposes Nationwide Ban on Non-Compete Agreements

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W. Jan Pietruszka
Hugo S. "Brad" deBeaubien

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

In January 2023, the United States Federal Trade Commission (FTC), a federal agency whose stated mission includes "protecting consumers and competition by preventing anticompetitive, deceptive, and unfair business practices," issued a proposed rule which, if adopted, would operate as a broad prohibition on the use of non-compete clauses by businesses with their workers. Under the proposed rule, the term "workers" is defined broadly to include any "natural person" who works for an employer and includes employees, independent contractors, interns, apprentices, volunteers, and even sole proprietors who provide a service to a client or customer. The proposed rule would ban any contractual term that functions to prevent a worker from seeking or accepting employment or operating a business after separating from the employer.

Notably, the proposed rule specifically targets non-compete provisions but does not purport to ban non-disclosure or customer non-solicitation restrictions, which could remain in use by employers so long as they were not written in a way as to functionally operate as a non-compete. The proposed rule, if adopted, would require employers to rescind non-compete restrictions already in place and inform affected workers in writing that the restriction is no longer effective and will not be enforced. The rule would not, however, apply in the context of franchisee-franchisor relations or to sellers of a business provided they previously owned 25 percent or more of the equity—in which cases non-compete provisions may still be utilized.

The FTC is currently soliciting public comments on the proposed rule banning non-competes; the comment period is scheduled to close March 20, 2023. Among other issues, the FTC will likely be asked by the public to consider whether the proposed rule should also include exceptions for executives and individuals who are highly compensated.

Following the March 20, 2023, comment period closure, the FTC may proceed to publish a "final rule" either in the originally proposed form or some variation thereof. It would then be at least 180 days after publication of the final rule before it could take effect. However, upon publication of the final rule, a number of legal challenges to the rule are expected—including a fundamental challenge regarding whether the FTC has the authority to promulgate a rule of this kind preempting what has historically been addressed by the law of each state.

Accordingly, employers need not take any action at this time, as it is unclear when—or even whether—the

proposed rule or some variation of it will become law. Employers should, however, continue to monitor the progress of the FTC's proposed rule over the coming months and be on the lookout for Shumaker's Client Alerts detailing any future developments on this important subject.

To review the full text of the proposed rule, or to leave a comment for the FTC, please visit: https://www.regulations.gov/docket/FTC-2023-0007/document

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