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A Knockout Punch or Much Ado About Nothing?

Federal Trade Commission's Proposed Non-Compete Ban

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Stephen T. Paterniti

Jackson Lewis P.C. • Boston

Stephen.Paterniti@jacksonlewis.com

Erik J. Winton

Jackson Lewis P.C. • Boston

Erik.Winton@jacksonlewis.com

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The end of non-compete agreements?

- Federal Trade Commission
 - January 5, 2023 Proposed Rule
 - Stated Policy Reasons



Federal Trade Commission Proposed Ban of Non-Compete Agreements

- History/How did we get here?
 - March 2016 – Treasury Report
 - April 2016 – White House Executive Order
 - May 2016 – White House Report
 - October 2016 – White House “State Call to Action”
 - January 2020 – FTC Public Workshop
 - July 2021 – White House Executive Order
 - November 2022 – FTC Policy Statement
 - January 4, 2023 – FTC Enforcement Actions



Federal Trade Commission Banning Non-Compete Agreements

- What is in the proposed rule?
 - Contract terms that prohibit workers from seeking or accepting employment or operating a business after the worker's current employment concludes
 - Includes “de facto” non-competes, i.e. certain non-disclosure of confidential information terms and training cost repayment terms
 - Requires employers to rescind all non-compete clauses
 - Narrow sale of business exception
- Why does the proposed rule matter? Non-competes protect:
 - Trade secrets, confidentiality, data
 - Contracts and customers
 - Prospects, opportunities, pursuits
 - Physical property and work product
 - Investments/acquisitions of businesses



Federal Trade Commission Banning Non-Compete Agreements

- When might the rule go into effect?
 - Employers would have 180 days after the final rule is published to comply
 - Recission notices must be sent on paper or in a digital format like email or text message
 - NOTE: The U.S. Chamber of Commerce intends to sue the FTC if it finalizes the proposed rule
- How does the rulemaking process work?
 - The proposed ban is open for public comment until March 20, 2023
 - Encouraging comments – including on alternatives
 - Next, the FTC could re-open the comment period, issue a different proposed rule, or finalize the rule.
 - FTC must consider comments



February 16, 2023 Public Forum

- Panel Discussion
- Public Comments
- FTC Closing Comments

Expected Challenges

- FTC Authority
- Injunctions



Meanwhile ... Workforce Mobility Act of 2023

- Are There Any Differences?
- What are its Chances of Passing?
- Comparison of FTC to WMA



Recent State Law Legislation Regarding Non-Compete Restrictions

- Dozens of states considering legislation
- Examples: MA and IL
 - Salary thresholds
 - Notice Requirements
 - Caps on temporal and geographic restrictions
 - Garden Leave

What Should Employers Do Now/Steps To Take Regarding State Laws



Take aways ...

- Consider risk tolerance
- Pay attention to temporal, geographic and functional scope in a restrictive covenant
- Think carefully about whether to use a true non-compete covenant
- Use separate, severable sections
- Narrowly tailor confidentiality provisions
- Analyze consideration options



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Questions?

Thank you.