



BELLNUNNALLY
ATTORNEYS & COUNSELORS

Imagining a World without Non-Competes

P r e s e n t e d b y :

K r i s H i l l

K a t i e B e a i r d

P a r t n e r s a t B e l l N u n n a l l y



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Kris is a trial lawyer who leads clients through complex and mission-critical business and employment disputes. He represents clients across the country in state and federal courts, appellate courts, and arbitration proceedings.



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Katie is a labor and employment attorney who regularly works with business managers, in-house legal departments and human resources managers to ensure compliance with a wide array of federal, state and local employment laws.



INTRODUCTION



FEDERAL TRADE COMMISSION PROPOSES FEDERAL BAN ON NON- COMPETE AGREEMENTS

JANUARY 5, 2023

Non-competes are “an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker”



HOW DID WE GET HERE



Sandwich "Artist"



Dog Walker



Nurses

INCREASED ODD AND OVERBROAD
NON-COMPETES OVER THE YEARS

The Proposed Ban is Not out of Left Field!

Nationwide trend of reining in Non-competes at the state level

**Outright Bans*: CA, OK, ND

**Low-wage employees*: OR, WA, DC (\$100K); MA, RI (non-exempt); NV (hourly); CO, IL, ME, MD, NH, VA

**Garden Leave*: MA, WA

**Termination without Cause*: MA, IL; PA (considered factor in enforcement); WA (must include severance)

2016: President Obama's administration called on state legislatures to abolish non-competes by issuing a "*State Call to Action on Non-Compete Agreements*"

2019: President Biden's pre-election platform included the following promises:

"[I will e]liminate non-compete clauses ... that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers."

"As president, [I] will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets"

July 2021: President Biden issued a sweeping Executive Order, directing the FTC to enact regulations to curb the effects of NCs and "other clauses or agreements that unfairly limit worker mobility"

2022-23: FTC has been laser-focused on pursuing enforcement actions against companies using overly broad non-competes



WHY NOW?

WHY?

ACCORDING TO FTC...



An estimated*
18%
of U.S. workers
are covered by
noncompetes.

That's 30 million people.

Researchers estimate that banning noncompetes nationwide may close racial and gender wage gaps by 3.6-9.1%. **



WHY?



The FTC estimates that banning noncompetes may:

- ▶ Increase workers' earnings by nearly \$300 billion
- ▶ Save consumers up to \$148 billion on health costs each year
- ▶ Double the number of companies in the same industry founded by a former worker

THE PROPOSED RULE



WHAT DOES IT BAN?

- CONTRACTUAL TERMS PREVENTING WORKER FROM SEEKING OR ACCEPTING EMPLOYMENT OR OPERATING A BUSINESS AT THE CONCLUSION OF THE WORKER'S EMPLOYMENT
- ALL WORKERS - NOT JUST E'EES
- FUNCTIONAL TEST



IS IT RETROACTIVE?

- YES
- REQUIRES INDIVIDUAL NOTICE TO ALL COVERED WORKERS WITH 180 DAYS' OF RULE BECOMING EFFECTIVE
- SUPERSEDES STATE LAWS



EXCEPTIONS?

- SALE OF BUSINESS
- SOME CONFIDENTIALITY AGREEMENTS
- SOME NON-SOLICITATION AGREEMENTS
- CONCURRENT EMPLOYMENT RESTRAINTS
- EMPLOYERS NOT COVERED BY FTC

> IS THIS REALLY HAPPENING?



Rule Drafted & Proposed -
JANUARY 2023



Accepting comments through
April 19 2023



Issue modified proposed rule or proceed with
rulemaking process



Publishing of Final Rule

WHAT ARE OUR OPTIONS?

Limited Non-Solicitation Agreements



Limited Confidentiality Agreements



Strategic Compensation Packages



Equity with Extended Vesting



Protecting Client Relationships





WHAT'S NEXT?



**LEGAL
CHALLENGES?**



**NEW
ADMINISTRATION
2024?**



**NEW RULE
BECOME THE
NEW NORMAL?**