The Proposed Nationwide Ban on Non-Competition Agreements by the Federal Trade Commission

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On January 5, 2023, the Federal Trade Commission (FTC or Commission) issued a notice of proposed rulemaking that proposes to ban post-termination non-competition covenants between employers and employees.[1] The FTC's proposed rule would upend established legal precedent in the forty-six states that permit post-employment non-competition covenants that are appropriately tailored to protect the legitimate business interests of employers.[2] The FTC's proposed ban would apply both retroactively and prospectively, rendering tens of millions of existing post-termination non-competition covenants unenforceable.[3] Notably, the FTC's proposed rule would not apply to post-termination non-competition covenants between franchisors and franchisees.[4] But the FTC expressly requested comments on whether the ban should be expanded to franchise agreements.[5] The public comment period on the proposed rule ended on April 19, 2023. While the FTC could promulgate its new rule, or a

1. *See* Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition; Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).
2. *See infra* notes 10–31 and accompanying text.
3. *See infra* notes 80–84, 128 and accompanying text.
4. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3511 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).
5. Fed. Trade Comm'n, Public Forum Office of Policy and Planning, 184:9-20 (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2-16-23_-_federal_-_public_final_002.pdf.

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version of it, any day, the FTC is not expected to act until April 2024.[6] That said, the FTC, if it is going to act, will almost certainly act with sufficient time for the rule to become final before the 2025 Congress is seated and the 2025 Presidential term begins.[7] The rule is very likely to face significant legal challenges.

The FTC's proposed rule, as well as recent action by other federal agencies and some states,[8] potentially signals growing hostility towards post-employment non-competition covenants, particularly as applied to low-wage employees. The prospect of a federal ban on post-termination non-competition covenants and the prospect of more states banning post-termination non-competition covenants creates significant strategic issues for the many companies that have traditionally relied upon non-competition covenants as an important part of their business strategy and a key tool in their toolkit for protecting trade secrets and confidential information.

This article begins with an overview of the current landscape on post-termination non-competition agreements in the employment context, including state statutes that already have banned non-competition agreements and several notable cases in Delaware that some have interpreted as a pro-employee shift in how Delaware courts, which have a strong reputation as being "pro-business,"[9] approach non-competition agreements. Next, the article addresses recent FTC and other federal agency activity regarding non-competition agreements before turning to the FTC's proposed rule and the significant legal challenges that it likely will face if promulgated as proposed. Finally, the article concludes by addressing next steps in the FTC rulemaking process and the impact of the evolving, patchwork landscape for non-competition agreements on how employers can protect their legitimate business interests.

I. The Current State of Non-Competition Agreements

Historically, post-termination non-competition covenants were enforceable but were given heightened scrutiny relative to other contract terms. Courts recognized the significant public interest of protecting an individual's right to earn a living and other public policy concerns favoring employee

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6. Dan Papscun, *FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses*, Bloomberg L. (May 10, 2023), https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses; Josh Sisco & Nick Niedzwiadek, *Biden's Regulators Propose Banning Non-Competes*, Politico (Jan. 5, 2023), https://www.politico.com/news/2023/01/05/biden-ftc-regulations-employment-noncompetes-00076444.

7. As of the time of publication, President Biden and former President Trump are the likely candidates for the November 2024 presidential election, which is again expected to be a closely decided election. As such, the current FTC will seek to act with sufficient time for the rule to be finalized in case of a change of presidential administration or Congress.

8. *See infra* notes 15–75 and accompanying text.

9. *2019 Lawsuit Climate Survey*, *Ranking the States*, U.S. Chamber Institute for Legal Reform (Sept. 2019), https://instituteforlegalreform.com/wp-content/uploads/2020/10/2019_Harris_Poll_State_Lawsuit_Climate_Ranking_the_States.pdf.

mobility.[10] Hence, the common law has refused to enforce post-termination non-competition covenants to the extent that they were overly broad relative to the employer's legitimate business interests, such as protecting confidential information, trade secrets, goodwill, and customer relationships.[11] Courts consider the duration of the covenant and whether the geographic scope is appropriately tailored to the employer's legitimate business interests.[12] Courts balance those factors, as well as whether the particular non-competition limitation is injurious to the public and whether enforcement of the limitation would render it difficult for the former employee to make a living.[13] Although the specific tests, factors, and balancing differ by jurisdiction, some variation of the foregoing framework remains the law in the vast majority of states.[14]

In recent years, several states have adopted statutory bans on non-competition covenants for employees whose income falls below a certain threshold—for example, Colorado, Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Virginia, and Washington.[15] As an example of the particulars, Illinois amended its Freedom to Work Act in 2021, prohibiting employers from executing non-compete agreements for employees earning $75,000 per year or less.[16] As another example, Colorado, as of August 10, 2022, generally bans non-compete covenants except for "highly compensated employees," who are defined as employees earning at least $112,500, and, even then, the covenant must be narrowly tailored to protect trade secrets.[17]

Four states—California, Minnesota, North Dakota, and Oklahoma—have enacted outright bans for non-competition covenants in the employment context, with very limited exceptions.[18] The Minnesota ban enacted in 2023 broadly applies to non-compete agreements between employers and

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10. *See*, *e.g.*, Tradesman Int'l, Inc. v. Black, 724 F.3d 1004, 1013 (7th Cir. 2013); Ipsos-Insight, LLC v. Gessel, 547 F. Supp. 3d 367, 379 (S.D.N.Y. 2021); Latona v. Aetna U.S. Healthcare Inc., 82 F. Supp. 2d 1089, 1094 (C.D. Cal. 1999); Kinship Partners, Inc. v. Embark Veterinary, Inc., No. 3:21-CV-01631-HZ, 2022 WL 72123, at *10 (D. Or. Jan. 3, 2022).

11. *See*, *e.g.*, *Latona*, 82 F. Supp. 2d at 1094; Unisource Worldwide, Inc. v. Carrara, 244 F. Supp. 2d 977, 984 (C.D. Ill. 2003).

12. *See*, *e.g.*, Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1238 (11th Cir. 2009); Cap. One Fin. Corp. v. Kanas, 871 F. Supp. 2d 520, 530 (E.D. Va. 2012); PartyLite Gifts, Inc. v. MacMillan, 895 F. Supp. 2d 1213, 1218 (M.D. Fla. 2012); TrueSource, LLC v. Niemeyer, No. 19-CV-4121 (GRB) (RER), 2021 WL 9507721, at *2 (E.D.N.Y. Jan. 21, 2021).

13. *See*, *e.g.*, Cnty. Materials Corp. v. Allan Block Corp., 502 F.3d 730, 737 (7th Cir. 2007); Ciena Corp. v. Jarrard, 203 F.3d 312, 321 (4th Cir. 2000); Nouveau Riche Corp. v. Tree, No. CV08-1627-PHX-JAT, 2008 WL 5381513, at *5 (D. Ariz. Dec. 23, 2008).

14. *See generally* Brian M. Malsberger, Covenants Not to Compete: A State-by-State Survey (11th ed. 2017).

15. Colo. Rev. Stat. § 8-2-113 (2022); 820 Ill. Comp. Stat. Ann. 90/10 (2021); Me. Rev. Stat. tit. 26, § 599-A (2019); Md. Code Ann., Lab. & Empl. § 3-716 (2019); N.H. Rev. Stat. Ann. § 275:70-a (2019); Or. Rev. Stat. § 653.295 (2022); 28 R.I. Gen. Laws § 28-59-3 (2020); Va. Code Ann. § 40.1-28.7:8 (2020); Wash. Rev. Code § 49.62.020 (2020).

16. 820 Ill. Comp. Stat. Ann. 90/10 (2021).

17. Colo. Rev. Stat. § 8-2-113(b) (2022).

18. Cal. Bus. & Prof. Code § 16600; S. 3035, 2023 Leg., 93rd Sess. (Minn. 2023); N.D. Cent. Code § 9-08-06 (2017); Okla. Stat. tit. 15, § 219A (2014); D.C. Code § 32-581.

employees, as well as to non-compete agreements with independent contractors.[19] The law prohibits any agreement that

> restricts the employee [defined to also include independent contractors], after termination of the employment, from performing (1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer in a capacity that is similar to the employee's work for the employer that is a party to the agreement.[20]

The Minnesota law does not contain any exception for "C-suite" executives, high-wage employees, or knowledge workers.[21] The new law also contains restrictions designed to prevent employers from using choice of law or venue clauses to evade application of the ban for Minnesota employees or independent contractors.[22] The law does not prohibit non-compete agreements that are "agreed upon during the sale of a business" or "agreed upon in anticipation of the dissolution of a business."[23] The law also does not ban non-solicitation, non-disclosure, or confidentiality agreements.[24] Unlike the proposed FTC rule, the Minnesota statute is not retroactive and applies only to agreements executed on or after July 1, 2023.[25]

In 2023, several states, including Michigan, Iowa, and Massachusetts, have proposed bills that would restrict non-compete covenants, and the New York legislature has sent a bill prohibiting non-compete covenants to the governor's desk.[26]

Some states have seen increased activity by attorneys general or other state regulators seeking to limit post-termination non-compete agreements. For example, in 2016, Illinois Attorney General Lisa Madigan filed a lawsuit against Jimmy John's,[27] which alleged that the franchisor's alleged practice of requiring its franchisees' lower-level employees to sign broad non-compete agreements was unlawful.[28] Jimmy John's and the Illinois Attorney General settled the suit, and the settlement required all corporate and franchised stores to notify employees that the non-compete agreements were unenforceable, remove all mention of non-compete agreements in "new hire" packets, and pay $100,000 to the Attorney General's Office to educate

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19. S. 3035, 2023 Leg., 93rd Sess. (Minn. 2023).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. S. 304., 90th Gen Assemb. (Iowa 2023), S. 1192, 93d Gen. Ct. (Mass. 2023); S. 143, 102d Leg. (Mich. 2023); New York St. Assemb., A01278, (N.Y. 2023).
27. Press Release, Lisa Madigan, Illinois Attorney General, Madigan Announces Settlement with Jimmy John's for Imposing Unlawful Non-Compete Agreements (Dec. 7, 2016), https://ag.state.il.us/pressroom/2016_12/20161207.html.
28. Complaint at 2, People v. Jimmy John's Enters., LLC, Case No. 2016CH07746 (Ill. Cir. Ct. June 8, 2016).

the public on the enforceability of non-compete agreements.[29] As another example, in 2018, the Attorneys General for ten states and the District of Columbia requested information from eight fast-food franchisors about their use of non-competition covenants and "no-poach" agreements.[30] As a result, numerous franchisors agreed to cease using "no-poach" provisions in franchise agreements, which had prohibited franchisees in certain systems from hiring other franchisees' employees within the same system.[31] In short, post-termination non-competition agreements remain enforceable according to the traditional framework in about two-thirds of states, four states have adopted outright bans with only limited exceptions, and the remaining states have adopted more limited bans generally focused on protecting employees below certain income thresholds.

In addition to recent legislative activity, non-competition covenants have arguably faced greater scrutiny by some courts recently. By way of example, some courts have refused to enforce venue or choice of law provisions that would circumvent state statutes restricting non-compete agreements to the principal residence of the employee. Likewise, some courts appear less inclined to modify facially overly broad non-competition covenants to render them enforceable, *i.e.*, "blue-pencil," as they may have been in the past. A series of cases from Delaware, a jurisdiction that has traditionally been perceived as friendly to enforcement of non-competition covenants, provides a useful example of these issues.

First, in *HighTower Holding LLC v. Gibson*, HighTower Holding LLC (HighTower) requested a preliminary injunction against Gibson, alleging Gibson breached its non-compete agreement.[32] Delaware law governed the agreement.[33] Despite that provision, the Delaware Court of Chancery determined that Alabama law, rather than Delaware law, applied due to the stronger connection Gibson maintained with Alabama as a resident and

29. Press Release, Lisa Madigan, Illinois Attorney General, Madigan Announces Settlement with Jimmy John's for Imposing Unlawful Non-Compete Agreements (Dec. 7, 2016), https://ag.state.il.us/pressroom/2016_12/20161207.html.

30. Letter from 10 States' Attorney Generals Offices to Fast Food Franchisers (2018), https://www.attorneygeneral.gov/wp-content/uploads/2018/07/2018-07-09-NPNH_Letter_Redacted.pdf; Press Release, Gurbir S. Grewal, New Jersey Attorney General, AG Grewal Seeks Records from Eight Fast Food Companies About Use of Employee Non-Compete Agreements (July 9, 2018), https://nj.gov/oag/newsreleases18/pr20180709a.html.

31. *See*, *e.g.*, Press Release, Josh Stein, North Carolina Attorney General, Attorney General Josh Stein Reaches Settlement with Fast Food Chains to End No-Poach Agreements (Mar. 2, 2020), https://ncdoj.gov/attorney-general-josh-stein-reaches-settlement-with-fast-food-chains-to-end-no-poach-agreements/; Press Release, Josh Shapiro, Pennsylvania Attorney General, AG Shapiro Secures Win for Workers as Four Fast Food Chains Agree to End Use of No-Poach Agreements (Mar. 12, 2019), https://www.attorneygeneral.gov/taking-action/ag-shapiro-secures-win-for-workers-as-four-fast-food-chains-agree-to-end-use-of-no-poach-agreements; Rachel Abrams, *8 Fast-Food Chains Will End 'No-Poach' Policies*, N.Y. Times (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/business/fast-food-wages-no-poach-franchisees.html.

32. Hightower Holding, LLC v. Gibson, No. 2022-0086-LWW, 2023 WL 1856651, at *1 (Del. Ch. Feb. 9, 2023).

33. *Id.*

worker of that state.[34] The court determined Alabama's public policy against broad non-compete provisions, particularly for professionals, outweighed Delaware's interest in enforcing contracts.[35] Applying Alabama law rather than Delaware law, the court then held that the non-compete covenant was likely overbroad and unenforceable and therefore denied HighTower's motion for preliminary injunction.[36]

Second, in *Kodiak Building Partners, LLC v. Adams*, the Delaware Court of Chancery refused to enforce, or modify to render enforceable, a non-competition covenant that it deemed overly broad, even though the covenant took place in the sale of a business context.[37] Kodiak Building Partners, LLC (Kodiak) purchased Northwest Building Components, and in connection with the transaction, entered into a thirty-month non-compete covenant with Adams. The covenant restricted Adams from competing in Idaho, Washington, or within a 100-mile radius of any other location in which the seller or Kodiak and its portfolio companies sold products or provided services within the twelve months preceding the sale.[38] The court held that this provision was overly broad because Kodiak's legitimate business interests extended only to the goodwill and competitive space that it purchased in the sale, but the non-compete purported to restrict Adams's work related to all of Kodiak and its portfolio companies and in broader geographic markets than the seller had operated.[39] To be enforceable, the non-compete would have needed to be limited to the subject matter of the seller's business and the geographic area that the seller operated.[40]

The court refused to uphold the agreement that Adams made, stating that the terms of the non-compete were unreasonable and giving no weight to the contractual term that waived his right to challenge the enforceability of the non-compete.[41] The court reasoned that Delaware courts are required to scrutinize non-competition covenants as a matter of public policy regardless of a purported contractual waiver of that review.[42] The court also refused to blue-pencil the restrictive covenant, *i.e.*, it refused to modify the covenant to render it narrow and enforceable.[43] The court again noted public policy considerations, stating that "[w]here non-compete or non-solicit covenants are unreasonable in part, Delaware courts are hesitant to 'blue-pencil' such agreements to make them reasonable."[44] This decision is notable because the court held that (1) the non-compete was overbroad; and (2) it refused to

34. *Id.*
35. *Id.*
36. *Id.*
37. Kodiak Bldg. Partners, LLC v. Adams, No. 2022-0311-MTZ, 2022 WL 5240507, at *5 (Del. Ch. Oct. 6, 2022).
38. *Id.* at *2.
39. *Id.* at *8.
40. *Id.* at *11.
41. *Id.* at *5.
42. *Id.* at *6.
43. *Id.* at *4.
44. *Id.*

blue-pencil the agreement, even though the covenant was in the context of the sale of a business, which typically receives less scrutiny than covenants in the employment context.[45]

Third, in *Ainslie v. Cantor Fitzgerald L.P.*, the Delaware Court of Chancery again refused to enforce a non-compete covenant or to blue-pencil the covenant to render it enforceable.[46] Cantor Fitzgerald was a financial services firm, and its partnership agreement contained a one-year post-termination non-compete for its partners.[47] The partnership agreement also contained a "forfeiture-for-competition" provision, which generally provides former employees a choice: you may choose to compete, but if you do then you forfeit some form of compensation.[48] The court admonished Cantor Fitzgerald for failing to advance "a convincing rationale as to why this this broad and vaguely defined scope is necessary to protect Cantor Fitzgerald's good will and customer relationships."[49] Cantor Fitzgerald did not point to a legitimate business interest, and there was no indication that the plaintiff had access to proprietary information warranting the restrictions.[50] The court was particularly offput by the covenant's global geographic scope and reach of entities covered by the covenant, which prohibited work not just for competitors but also "any affiliated entity."[51]

Fourth, in *Intertek Testing Services NA, Inc., v. Eastman*, the court found a non-compete provision unenforceable.[52] Once again, the Vice Chancellor refused to blue-pencil the agreement to render it enforceable. Intertek claimed that Eastman violated a non-compete agreement after selling his business to Intertek and then investing and joining the board of his son's startup three years later. Intertek alleged Eastman's actions breached the non-compete agreement.[53] Similar to *Ainslie*, the court found that the global geographic scope of the non-compete was too broad and far exceeded any legitimate economic interest of Intertek.[54] The court also declined to enforce the non-solicitation and confidentiality provisions.[55] Again, the court relied on the principle that enforceability of non-competes requires the agreement to be tailored to a legitimate economic interest.[56]

Notably, *Ainslie* and *Kodiak* were decided by the same Delaware judge, Vice Chancellor Zurn, and *HighTower* and *Intertek* were decided by Vice

45. *Id.*

46. Ainslie v. Cantor Fitzgerald, L.P., No. 9436-VCZ, 2023 WL 106924, at *8 (Del. Ch. Jan. 4, 2023).

47. *Id.* at *1.

48. *Id.* at *20.

49. *Id.* at *18.

50. *Id.*

51. *Id.*

52. Intertek Testing Servs. NA, Inc. v. Eastman, No. 2022-0853-LWW, 2023 WL 2544236, at *1 (Del. Ch. Mar. 16, 2023).

53. *Id.*

54. *Id.* at *4.

55. *Id.*

56. *Id.*

Chancellor Will. The Delaware Supreme Court has yet to weigh in on the issues raised by these cases.[57] It remains unclear whether these cases signal a shift in Delaware jurisprudence towards a less pro-enforcement regime or whether they are simply outliers given how broad the covenants were written and the arguable lack of compelling legitimate economic interests to support that broad scope.

II. Non-Competition Agreements Face Enhanced Scrutiny by Various Federal Agencies and Congress

The FTC's proposed rule banning non-compete agreements has been several years in the making. In 2021, President Biden issued Executive Order 14036, titled "Promoting Competition in the American Economy," which included a directive encouraging the FTC to ban or limit employee post-termination non-competition agreements.[58] Following President Biden's directive, in November 2022, the FTC released a policy statement revitalizing Section 5 of the FTC Act, "which bans unfair methods of competition," and "explicitly noting that the Commission is obligated to protect workers from unfair methods of competition."[59] The policy statement declared that all previous FTC policy statements regarding the "scope and meaning of unfair methods of competition" were superseded or rescinded.[60] The FTC described competition to be unfair when "the conduct goes beyond competition on the merits."[61] Conduct is considered beyond competition of the merits when it is "(1) coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature; or (2) restrictive or exclusionary."[62]

On January 4, 2023, the FTC instituted enforcement proceedings against (i) Prudential Security, Inc. and Prudential Command Inc., (ii) O-I Glass, Inc., and (iii) Ardagh Group S.A., related to non-compete agreements.[63] The suits each claimed that the companies had violated Section 5 of the

57. Notably, the Delaware Supreme Court heard argument in the appeal of *Ainslie v. Cantor Fitzgerald L.P.*, on November 1, 2023; the Delaware Supreme Court had not issued a decision as of the date this article was submitted for publication. Cantor Fitzgerald, L.P. v. Ainslie, Case No. 162, 2023 (Del.).

58. Exec. Order 14036, 86 Fed. Reg. 36987 (July 14, 2021).

59. *Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, Fed. Trade Comm'n, at 3 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf.

60. *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission File No. P221202*, Fed. Trade Comm'n, at 1 (Nov. 10, 2022).

61. *Id.*

62. *Id.* at 9.

63. Press Release, Fed. Trade Comm'n, FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers.

FTC Act because their conduct constituted an unfair method of competition.[64] The enforcement proceedings targeted non-compete agreements with a range of workers, in "positions from low-wage security guards to manufacturing workers to engineers."[65] These lawsuits indicate that the FTC is interested in discontinuing non-compete agreements in a variety of sectors and salary brackets.[66] These actions marked the first time the FTC sued to halt unlawful non-compete restrictions.[67] Ultimately, the FTC and the parties entered into consent agreements, which ordered the companies to cease "enforcing, threatening to enforce, or imposing non-competes against any relevant employees."[68] Other relief ordered included banning communication on non-competes to employees; voiding and nullifying the challenged non-competes; and requiring the companies, for ten years, to provide clear notice that new employees may freely seek or accept a job that competes with the company.[69]

The FTC is not the only federal agency taking steps to limit non-compete agreements. Jennifer Abruzzo, General Counsel of the National Labor Relations Board (NLRB), published a memo, setting forth her view that the proffer, maintenance, and enforcement of non-compete provisions in employment contracts and severance agreements for non-management and non-supervisory employees violate the National Labor Relations Act (NLRA), except in limited circumstances.[70] The memo states that agreements "reasonably tend to chill" employees exercising their rights under Section 7 of the NLRA by making it harder for employees to seek different employment and, thus, according to the General Counsel's theory, discouraging them from engaging in conduct that might put their current employment at risk.[71] The memo also casts doubt on whether the protection of trade secrets could justify a non-competition agreement, particularly for "low-wage or middle-wage workers."[72] There are important limitations on the memo. Most notably, the General Counsel's memo does not recommend that the NLRB take a blanket-ban approach to non-competition covenants and would allow the use of narrowly tailored restrictive covenants in "special circumstances."[73] It is not clear how the "special circumstances" differ from current law, which already generally requires post-termination

64. *Id.*
65. *Id.*
66. *See id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. Memorandum GC 23-08, Jennifer A. Abruzzo, General Counsel of the National Labor Relations Board, Non-Compete Agreements that Violate the National Labor Relations Act (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national.
71. *Id.*
72. *Id.*
73. *Id.*

non-competition agreements be narrowly tailored, in subject matter and geographic and temporal scope, to protect employers' legitimate business interests.

The trend to curtail non-compete agreements has spilled over to Congress, which proposed at least four federal bills during 2023: (1) Workforce Mobility Act of 2023 (House of Representatives), (2) Workforce Mobility Act of 2023 (Senate), (3) Ensure Vaccine Mandates Eliminate Non-Competes Act (House of Representatives), and (4) Freedom to Compete Act (Senate).[74] Notably, the parallel Workforce Mobility Acts of 2023 would ban all employee non-competition agreements with limited exceptions.[75]

III. The FTC's Proposed Rule to Ban Non-Competition Agreements

On January 5, 2023, the FTC issued a notice of proposed rulemaking that would ban employers from requiring workers to sign non-competes and require recission of existing non-competes.[76] The FTC's press release accompanying the proposed rule states that its intent is to "promote greater dynamism, innovation, and healthy competition," which the agency contends is inhibited by non-competes that "block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand."[77]

The FTC issued the Notice of Proposed Rulemaking (NPRM) on a 3–1 Commission vote.[78] Commissioner Christine Wilson, the dissenting vote, issued a statement describing the proposed rule as "a radical departure from hundreds of years of legal precedent," despite "a lack of clear evidence" to support such a dramatic change.[79]

A. *The Proposed Rule*

The proposed rule would apply broadly—not just to all employees, but also to independent contractors and any individual who works for an employer,

74. Russell Beck, *65 Noncompete Bills in 24 States – And (Still) 4 Federal Bills*, Fair Competition L. (Mar. 20, 2023), https://faircompetitionlaw.com/2023/03/20/65-noncompete-bills-in-24-states-and-still-4-federal-bills; Workforce Mobility Act of 2023, H.R. 731, 118th Cong. (2023); Workforce Mobility Act of 2023, S. 220, 118th Cong. (2023); Ensure Vaccine Mandates Eliminate Non-Competes Act, H.R. 527, 118th Cong. (2023); Freedom to Compete Act, S. 379, 118th Cong. (2023).

75. Workforce Mobility Act of 2023, H.R. 731, 118th Cong. (2023); Workforce Mobility Act of 2023, S. 220, 118th Cong. (2023).

76. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3513 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

77. Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023) https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition.

78. *Id.*

79. *See Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, Fed. Trade Comm'n (Jan. 5, 2023) (dissenting statement of Commissioner Christine S. Wilson), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf [hereinafter Wilson Dissent].

whether paid or unpaid (e.g., externs, interns, volunteers, apprentices, or sole proprietors).[80] It also would apply not only to non-competes that expressly prohibit a worker from seeking or accepting certain employment after the conclusion of the worker's employment with the employer, but also to any contractual provision that functions as a *de facto* non-compete.[81] The proposed rule includes the following types of contractual terms that the FTC asserts may function as a *de facto* non-compete in certain circumstances:

- Non-disclosure agreements written so broadly that they effectively preclude the worker from working in the same field after the conclusion of the worker's employment;[82] and
- Contractual terms that would require the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified period, where the required payment is not reasonably related to the costs that the employer incurred for training the worker.[83]

There is substantial certainty about the scope of what precisely would constitute a *de facto* non-compete under the proposed rule.

The FTC's proposed rule would also require employers to rescind any existing non-competes within six months of the rule's publication and provide notice to employees "in an individualized communication" that such restrictions are no longer in effect and may not be enforced against the worker.[84]

The proposed rule would not, however, apply to concurrent-employment restraints—*i.e.*, restrictions on what the worker may do during the worker's employment with the employer.[85] It also would not apply to non-competes in the sale of a business context or between franchisors and franchisees (although their employees would be covered by the rule).[86]

B. *Public Forum and Public Comments*

On February 16, 2023, the FTC held a public forum on its proposed rule.[87] The FTC heard testimony from a variety of individuals, business owners, professionals, associations, and industry groups—speaking both in favor of and in opposition to the proposed rule.[88] While some commenters supported the proposed rule as a means to protect the rights of workers and promote

80. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3511 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. Press Release, Fed. Trade Comm'n, FTC to Host Public Forum Examining Proposed Rule to Ban Noncompete Clauses (Feb. 2, 2023).
88. Fed. Trade Comm'n, Public Forum Office of Policy and Planning (2023) https://www.ftc.gov/system/files/ftc_gov/pdf/2-16-23_-_federal_-_public_final_002.pdf.

employee mobility, others opposed such a broad rule, particularly as applied to executives, senior knowledge workers, higher-level employees, and highly compensated employees.[89] Some commenters stated that they believed that the FTC lacked the constitutional and statutory authority to adopt its proposed rule.[90]

The FTC also heard from representatives for franchisors and franchisees, as well as individual franchisees, who either agreed that the proposed rule should not extend to franchisor-franchisee agreements or urged the FTC to extend the rule to apply to such agreements.[91] FTC Commissioner Alvaro Bedoya noted at the conclusion of the forum that he looked forward to reading written comments on this particular issue, "listened very carefully to the remarks of the franchisees who spoke today and shared their experiences," and was "particularly keen to understand how non-competes affect franchisees and their ability to compete."[92]

Notably, the Franchise and Business Opportunities Project Group of the North American Securities Administrators Association, Inc. (NASAA) submitted a comment letter advocating that the FTC expand its proposed rule to ban all post-termination non-competition covenants in franchise agreements.[93] NASAA argued that the relationship between franchisees and franchisors is "not analogous to most business-to-business relationships" and that post-termination non-competition covenants have the "same negative effects on competition as non-compete clauses in the employment context."[94] While NASAA advocated for an outright ban on franchisor/franchisee post-termination non-competition covenants, it alternatively proposed that such covenants be "subject to a rebuttable presumption" that "they are unfair and prohibited."[95]

The public comment period closed on April 19, 2023.[96] At the close of the comment period, the FTC had received 26,813 comments.[97] Similar to the public forum, comments spanned the spectrum on the issue, with many advocating for less restrictive versions of the rule, *e.g.*, limiting the ban to workers below a certain income threshold or employee classification.[98]

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 184:9–20.
93. N. Am. Sec. Adm'rs Ass'n, Inc., Comment to Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Apr. 18, 2023), https://www.nasaa.org/wp-content/uploads/2023/04/NASAA-Comment-Letter-re-FTC-Matter-No-201200-4-18-2023.pdf.
94. *Id.* at 2.
95. *Id.* at 7.
96. Press Release, FTC Extends Public Comment Period on Its Proposed Rule to Ban Noncompete Clauses Until April 19 (Mar. 6, 2023) https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-extends-public-comment-period-its-proposed-rule-ban-noncompete-clauses-until-april-19.
97. *Id.*
98. *Id.*

C. *Next Steps*

As for next steps, the FTC may choose to promulgate the rule without changes, may choose to promulgate a revised rule, or may choose not to enact any rule. The effective date of any proposed rule would be 180 days from the date it is published in the Federal Register. Reporters, citing undisclosed FTC employees as sources, have suggested that the FTC is unlikely to issue a rule until April 2024.[99] It appears likely that the FTC will promulgate the rule or a narrower version of it—such as limiting the ban to workers earning below a certain income threshold—with sufficient time for it to be finalized before any potential change in administration as a result of the 2024 election. The FTC's proposed rule will face significant legal challenges, and it is likely that affected entities or trade associations will seek a stay pending the outcome of such litigation.

IV. The FTC's Proposed Rule Will Face Significant Legal Challenges

A. *Basis of the FTC's Legal Authority to Promulgate the Rule*

The FTC rooted its authority to promulgate a ban on non-compete agreements in Sections 5 and 6(g) of the Federal Trade Commission Act (the Act). The Act states that the FTC may "prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce."[100]

Under Section 5 of the Act, unfair methods of competition encompass all practices that violate the Sherman or Clayton Acts, as well as conduct that, if left unchecked, would grow into an antitrust violation and, more broadly, conduct that violates the spirit or policies underlying antitrust laws.[101] The FTC asserts that non-compete clauses are unfair methods of commerce because they restrict conduct and negatively affect competitive conditions. The FTC also claims non-competes are exploitative and coercive both at the time of contracting and upon employee departure.[102]

The FTC also relies on Section 6(g), which empowers the Agency to "make rules and regulations for the purpose of carrying out the provisions of [the FTC Act]."[103] The FTC asserts that it has broad authority to promulgate rules over unfair methods of competition and, more specifically, the

99. Dan Papscun, *FTC Expected to Vote in 2024 on Rule to Ban Noncompete Clauses*, Bloomberg L. (May 10, 2023), https://news.bloomberglaw.com/antitrust/ftc-expected-to-vote-in-2024-on-rule-to-ban-noncompete-clauses; Josh Sisco & Nick Niedzwiadek, *Biden's Regulators Propose Banning Non-Competes*, Politico (Jan. 5, 2023), https://www.politico.com/news/2023/01/05/biden-ftc-regulations-employment-noncompetes-00076444.

100. 15 U.S.C. § 45.

101. Non-Compete Clause Rule, 88 Fed. Reg. 3540, 3499 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

102. *Id.* at 3492.

103. 15 U.S.C. § 46(g).

power to ban all non-compete clauses.[104] The FTC cites *National Petroleum Refiners Ass'n v. FTC* (*National Petroleum*) to support its assertion of authority.[105] In *National Petroleum*, the FTC issued a rule declaring that the failure to post octane ratings on gasoline pumps was "an unfair method of competition" and an "unfair or deceptive act or practice."[106] A group of trade associations and gasoline refining companies challenged the FTC's statutory authority to promulgate such a rule. The D.C. Circuit held that the plain language of Section 6(g) authorizes the FTC to promulgate substantive Section 5 rules classifying "unfair or deceptive acts or practices" and "unfair methods of competition."[107] In a statement, Lina Khan, the current Chair of the FTC, asserted that the holding in *National Petroleum* "represents the current state of the law."[108] Further, Chair Khan stated, "Congress designed the FTC to be an expert administrative agency that could enforce the prohibition against unfair methods of competition through rulemaking as well as through case-by-case adjudication."[109]

B. *Legal Challenges to the Proposed Rule*

If the FTC adopts its proposed rule or even a less dramatic version of it, that rule will face significant legal challenges. Challengers to the proposed rule likely will rely upon the "meritorious challenges" identified by former FTC Commissioner Christine Wilson: (1) the FTC lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine applies and prohibits the FTC from enacting its proposed rule given the absence of clear congressional intent to delegate its authority; and (3) even if the FTC possesses the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine.[110] Additionally, challengers are likely to argue that the proposed rule constitutes (4) an unconstitutional taking under the Fifth Amendment, and (5) is otherwise arbitrary and capricious under the Administrative Procedure Act. A discussion of each argument is set forth below.

1. The Commission Lacks the Authority to Engage in "Unfair Methods of Competition" Rulemaking

First, critics of the ban argue that Section 6(g) does not provide the FTC with authority to engage in rulemaking regarding unfair methods of competition. Critics assert that the FTC Act's structure and history point to

104. Non-Compete Clause Rule, 88 Fed. Reg. 3540, 3499 n. 226 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).
105. *Id.*
106. *See* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).
107. *Id.*
108. *See Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Non-Compete Clauses*, Comm'n File No. P201200, Fed. Trade Comm'n (Jan. 5, 2023) (statement of Chair Lina M. Khan), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf.
109. *See id.*
110. Wilson Dissent, *supra* note 79.

the FTC's authority to promulgate only procedural rules—not substantive rules—regarding unfair methods of competition. Section 6(g) provides that the Commission shall have power "from time to time [to] classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[111] Section 6(g) does not mention unfair methods of competition or any other substantive authority of the Commission. For example, in its comment letter opposing the ban, the U.S. Chamber of Commerce (USCOC) argued that "classifying corporations" and other provisions of Section 6 are related to the Agency's authority to require reports from corporations and investigative powers.[112]

Section 5 of the FTC Act arguably does not authorize the FTC to promulgate substantive rules, but, rather, it outlines the FTC's procedures for case-by-case administrative adjudication.[113] Under Section 5, "Whenever the [C]ommission shall have reason to believe that any [person] has been or is using any unfair method of competition in commerce," the Commission "shall issue and serve upon such person . . . a complaint stating its charges."[114] That complaint initiates "administrative proceedings" before the FTC, which may require the violator to cease and desist the unlawful practice.[115] A complete ban would eliminate the traditional case-by-case analysis and bypass the fact-intensive adjudicative process. Absent explicit language in the FTC Act granting substantive rulemaking authority, critics argue that the adjudication process outlined in Section 5 is best read as specifying the *only* means of unfair methods of competition enforcement, and Section 6(g) is best understood as permitting the FTC to enact procedural rules to govern how it will carry out its adjudicative, investigative, and informative functions.[116]

Underscoring that perhaps it lacks statutory authority to issue substantive rules to regulate unfair methods of competition under Sections 5 or 6(g), in its more than 100 year history, the FTC has issued only two substantive rules relating to unfair methods of competition: (1) a substantive rule grounded solely in competition, but not enforced, and which was subsequently repealed;[117] and (2) the FTC's substantive rulemaking at issue in *National Petroleum Refiners Ass'n v. FTC*, which rules provided "greater specificity and clarify to the broad standard of illegally—'unfair methods of competition in commerce, and unfair or deceptive acts or practices in

111. 15 U.S.C. § 46(g).

112. *See* U.S. Chamber of Com., Comment to Non-Compete Clause Rule, 88 Fed. Reg. 3482 (April 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf.

113. 15 U.S.C. § 45(b).

114. *Id.*

115. *Id.*

116. *See* Maureen K. Ohlhausen & James F. Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, Truth on the Market (July 7, 2022), https://truthonthemarket.com/2022/07/07/pushing-the-limits-a-primer-on-ftc-competition-rulemaking.

117. Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994).

commerce'—which the agency is empowered to prevent."[118] Although the D.C. Circuit held in 1973 that the FTC had the power to promulgate the substantive rules at issue in *National Petroleum*, that ruling is now fifty years old and there is substantial uncertainty about whether courts today would reach the same result in light of the FTC Act's structure and plain language.

Furthermore, congressional action following *National Petroleum* creates further uncertainty about its continued validity. Two years after the D.C. Circuit's decision in *National Petroleum*, Congress enacted the Magnuson-Moss Act, which created special procedures for the FTC to exercise rulemaking authority under Section 18 of the FTC Act. The statute contains a provision disclaiming an intent to "affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce."[119] Former FTC Chairman Miles Kirkpatrick noted ambiguity as to whether Congress sought to clarify existing rulemaking authority under Section 18 or to grant substantive rulemaking authority to the FTC for the first time in Magnuson-Moss.[120]

Further, the FTC Act's legislative history suggests that Congress did not intend to grant the FTC substantive rulemaking authority to regulate unfair methods of competition. Records indicate that the House considered and rejected granting the FTC substantive rulemaking authority, the Senate never proposed it, and neither the Conference Committee report nor the final debates mentioned it.[121] In her dissenting statement, former Commissioner Wilson suggests that this ambiguity will be a starting point for challenges of the non-compete clause rule.[122]

2. The Major Questions Doctrine Addressed in *West Virginia v. EPA* Applies, and the Commission Lacks Clear Congressional Authorization to Ban Non-Competes Nationwide.

The FTC's proposed rule also may be challenged under the major questions doctrine. Under the major questions doctrine, courts reject claims of regulatory authority involving issues of "vast economic and political significance" when an agency has been unable to establish "clear congressional authorization" for the relevant power.[123]

In *West Virginia v. EPA*, the Supreme Court held that the Environmental Protection Agency exceeded its authority by promulgating emission

118. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

119. 15 U.S.C. § 57(a)(2).

120. *See* Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective*, 48 Antitrust L.J. 1561, 1561 (1979) ("One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC's rulemaking powers.").

121. *Id.*

122. *See* Wilson Dissent, *supra* note 79.

123. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2605–09 (2022) (quotation marks and internal citation omitted).

guidelines for power plants based in part on shifting electric energy generation from higher-emitting sources to lower-emitting ones.[124] The Court explained that an agency's exercise of statutory authority involves a major question where the "history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[125] Agency action triggers the application of the major questions doctrine if the Agency claims, among other things, the power to (1) resolve a matter of great political significance, (2) regulate a significant portion of the American economy, or (3) intrude in an area that is the particular domain of state law.[126]

The proposed rule likely meets all three triggers for the major questions doctrine. The proposed rule has a significant political impact and intrudes on areas that are the particular domain of state law because, among other reasons, the proposed ban would preempt state laws that currently and differently govern non-competes (as explained above in Part I). The FTC notes that the proposed rule would contain an express preemption provision that supersedes any state regulation or statute inconsistent with the proposed rule.[127] As discussed above, California, North Dakota, Oklahoma, and, most recently, Minnesota, are the only states that have adopted statutes rendering non-compete clauses void for nearly all workers.

The proposed rule also will have a significant economic impact and regulate a significant portion of the American economy. The FTC estimates that roughly thirty million workers are subject to a non-compete clause and that the proposed rule would increase workers' earnings by $250 billion to $296 billion a year.[128] Senators Elizabeth Warren (D-MA) and Richard Blumenthal (D-CT) and Representatives Pramila Jayapal (D-Wash.), Annie Kuster (D-N.H.), Ilhan Omar (D-Minn.), and Don Beyer (D-Va.) led over sixty of their colleagues in a letter to the FTC in support of the rule noting that non-compete agreements have stifled the economy and the job market.[129] Critics of the proposed rule also have pointed out the significant economic impact of the ban.[130]

As in *West Virginia v. EPA*, the FTC's unfair methods of competition rulemaking authority is based on alleged authority that has been used only

124. *See generally id.*

125. *Id.* at 2595 (quotation marks and internal citation omitted).

126. *Id.* at 2600–01 (Gorsuch, J., concurring).

127. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3515 (proposed Jan. 19, 2023) (to be codified at 9 C.F.R. pt. 910).

128. *Id.* at 3522.

129. Selected Senators and Representatives, Comment to Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Apr. 19, 2023), https://www.brown.senate.gov/imo/media/doc/lettertoftcinsupportofnoncompeterule.pdf.

130. *See* U.S. Chamber of Com., Comment to Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf.

on a limited basis.[131] The FTC must also contend with its history of asserting a lack of authority to promulgate substantive unfair competition rules and interpreting its rulemaking authority related to competition as merely procedural in nature.[132] If a court determines that the FTC's proposed rule seeks to regulate "a major question," then the FTC would be required to identify clear congressional authorization to ban non-compete clauses, which seems unlikely given the ambiguities concerning whether the FTC has any substantive rulemaking authority under Sections 5 or 6(g) of the FTC Act. As proposed, strong arguments suggest that the rule is subject to the major questions doctrine and that the FTC cannot establish clear congressional authorization to promulgate its proposed ban.

3. Assuming the Agency Does Possess the Authority to Engage in This Rulemaking, It Is an Impermissible Delegation of Legislative Authority Under the Nondelegation Doctrine.

Even if the FTC did have substantive rulemaking authority under Section 5 and even if the proposed ban survived a "major questions" challenge, the proposed rule would still be subject to a strong challenge under the nondelegation doctrine. The Supreme Court has held that Congress cannot delegate its legislative powers to administrative agencies or other entities. Thus, when Congress provides an agency with authority to regulate, Congress must establish "an intelligible principle to which the body authorized to fix [rules] is directed to conform."[133] Section 5(a) of the FTC Act provides the Commission with authority to prevent "unfair or deceptive acts or practices in commerce" and "unfair methods of competition."[134] While the FTC Act provides procedural requirements outlining the adjudication process,[135] Congress offered no substantive definition of unfair methods of competition or principle for the Commission to rely upon.

Critics argue that if the FTC can categorically ban post-termination non-competition covenants, then it can classify nearly any business practice as unfair, which means that there is no real restriction to what the FTC may do.[136] If the FTC can condemn ordinary business practices as unfair methods

131. *See* Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994); Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

132. *See* Note, *FTC Substantive Rulemaking Authority*, 1974 Duke L.J. 297, 305 n.36 (1974) (noting that FTC has previously determined that it only possessed the authority to promulgate rules related to Agency procedures, but not rules that carried with them the force of law).

133. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

134. 15 U.S.C. § 45(a)(1).

135. 15 U.S.C. § 45(b); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 533 (1935) (noting that the FTC was not given broad authority to promulgate regulations defining unfair methods of competition; rather, the Agency was created as a quasi-judicial body that would define such methods, "determined in particular instances, upon evidence, in light of particular competitive conditions").

136. *See* U.S. Chamber of Com., Comment to Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf.

of competition and expand past its traditional consumer welfare standard to pursue multiple goals, including protecting labor, which begins to extend the purview of the FTC and encroach on the responsibilities of other agencies. There are therefore strong arguments that if the Act can be read to permit the FTC to enact its proposed ban, then Congress impermissibly delegated legislative authority to the FTC.

4. Retroactivity may constitute an uncompensated, unconstitutional taking.

The proposed ban on non-competes also raises constitutional and fairness concerns due to its retroactivity. As it is currently proposed, "an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than the compliance date."[137] If the proposed rule is promulgated, the rescission requirement may eliminate rights to which employers and employees already agreed. For example, employers will have already bargained for and paid employees compensation assuming that non-competition agreements would be enforceable. Workers may also be asked to return severance payments or other compensation conditioned on agreeing to a non-compete.

Critics of the ban argue that the proposed rule undercuts strong reliance interests for both employers and workers, as well as buyers and sellers in the context of negotiated transactions, and undermines the benefit of the bargain obtained by parties for contracts agreed to in the past.[138] For example, in comments to the FTC, Emily M. Dickens, chief of staff, head of public affairs, and corporate secretary for the Society for Human Resource Management (SHRM), argued that the FTC's proposal would "deprive employers of existing contractual rights and obligations that were freely negotiated and entered into with their workers . . . . Voiding existing agreements will arbitrarily and unfairly result in a taking without due process and an unearned windfall."[139] Further, Supreme Court precedent makes clear that contract rights are property and that they cannot be taken without just compensation.[140]

Furthermore, the Supreme Court explained in *Bowen v. Georgetown University Hospital* that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express

137. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3513 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

138. *See* U.S. Chamber of Com., Comment to Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf.

139. *See* Soc'y for Hum. Res. Mgmt., Comment to Noncompete Clause Rule, 88 Fed. Reg. 3482.

140. *See, e.g.*, U.S. Tr. Co. of N.Y. v. New Jersey, 431 U.S. 1, 19 n.16 (1977); Lynch v. United States, 292 U.S. 571, 579 (1934) ("The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property . . . .").

terms."[141] The retroactivity component of the FTC's proposed rule therefore raises additional concerns about whether Congress actually delegated its authority to enact such a sweeping ban, in addition to raising direct constitutional concerns.

5. The Rule Is Subject to Additional Challenges Under the Administrative Procedure Act.

Pursuant to the Administrative Procedure Act (APA), agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" is deemed unlawful. An agency action is arbitrary and capricious if

> the Agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the Agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[142]

Various commenters have argued that the FTC's proposed rule does not meet the APA's standard for reasoned decision-making.[143] While the APA's standard of review is inherently deferential to agencies, there are serious questions whether the FTC has appropriately considered and analyzed the costs and benefits of its proposed rule, among other APA challenges.

V. Conclusion

For employers, including franchisors and franchisees, the loss of non-competition covenants would have significant consequences. Non-competition covenants are often used by employers to protect trade secrets and confidential information and to prevent employees from taking valuable knowledge and expertise to competitors. Without these covenants, employers may find it more difficult to protect their intellectual property or to run their businesses efficiently, and employers may be more vulnerable to competition from former employees.

While there is uncertainty about what rule the FTC will adopt, and perhaps greater uncertainty about whether that rule will survive judicial scrutiny, the evolving patchwork landscape for non-competition agreements means that, even regardless of the FTC's proposed rule, employers cannot safely rely on a single strategy or covenant to protect their legitimate

141. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

142. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

143. *See*, *e.g.*, U.S. Chamber of Com., Comment to Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf; Secs. Indus. & Fin. Markets Ass'n, Comment to Non-compete Clause Rule, 88 Fed. Reg. 3482 (Apr. 19, 2023), https://www.sifma.org/wp-content/uploads/2023/04/Notice-of-Proposed-Rulemaking-Federal-Trade-Commission-Non-Compete-Clause-Rule-88-Fed.-Reg.pdf.

business interests. A robust, multi-layered, belt-and-suspenders approach is required, particularly for key employees. Employers should also ensure that their trade secrets are identified and that reasonable steps are taken to ensure their secrecy, which is particularly important for those employers that historically eschewed a serious trade secrets regime and instead relied principally upon non-compete provisions.