

January 5, 2023

MEMORANDUM TO CLIENTS AND FRIENDS OF THE FIRM:

Re: Proposed Federal Rule Banning Non-Compete Agreements

The Federal Trade Commission (FTC) today proposed a rule banning the use and enforcement of non-competition agreements or non-compete provisions, in employment agreements. The proposal would require employers to notify employees subject to non-compete obligations that those obligations no longer apply, and would prohibit an employer from entering into a non-compete with an employee or from suggesting to a worker that they are bound under a non-competition obligation. As drafted, the ban would not be limited to employees, but would also affect independent contractors, volunteers and other workers, such as interns.

The FTC's proposed rule and its formal initiation of its rulemaking process can be viewed here: <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking>. The FTC's rulemaking process is, as always, governed by the Administrative Procedure Act of 1946. Consequently, the FTC is permitting the public to review and comment on its proposed rule, will reply to public comments, and may modify its proposed rule in light of comments it receives. The FTC's proposal would not take effect until 180 days after the final draft of its rule is published, and there may be more than one round of public comments scheduled. In short, the timeline to enforcement is unknown but will not occur anytime soon, if at all. Indeed, the FTC's proposed rule may be challenged in court, on claims that the agency has exceeded its authority in issuing the rule, and perhaps on other grounds. Historically, the U.S. Department of Labor and the U.S. Department of Justice are recognized as experts on rulemaking to govern the employment relationship. While the FTC's mandate under the Federal Trade Commission Act does extend to regulation of unethical business conduct and practices, the focus has been on consumer protection, not protection of employee rights.

Employment law is also heavily regulated by the states. In California, for example, non-competition and non-solicitation provisions have historically been broadly banned, except for very limited circumstances. In all states in general, restrictive covenants are disfavored and narrowly interpreted. However, non-disclosure and proprietary information agreements protecting an employer's trade secrets and proprietary business information, are permitted and if properly drafted, are enforceable in every state.

I invite you to contact me with any questions about the enforceability of non-compete agreements or other employment law matters.

Michael R. Geroe