THE FTC PROPOSES ENDING MOST NON-COMPETE AGREEMENTS

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The FTC is proposing a new rule that will end most Non-Compete Agreements. Non-Compete Agreements have existed for hundreds of years. The first known case challenging the enforceability of a Non-Compete Agreement was the Dyer Case in 1414 wherein John Dyer, an apprentice, promised his master tradesman that he would not work in the town for six months after his training. Although the judge refused to enforce the Non-Compete Agreement, it was only because the master tradesman failed to show up at the hearing. The first reported decision upholding the enforceability of Non-Compete Agreements came in 1621. Our current standard for enforceability came in a decision handed down in 1711 which stated that a Non-Compete Agreement would only be enforced if it was limited in time, scope and geography.

Over time, Non-Compete Agreements have become an industry standard for high level executives, medical professionals, and those involved in sales. However, rather than limiting its use to only those who could genuinely harm the legitimate interests of a business, some companies have taken too many liberties with who they require to sign a Non-Compete Agreement. In 2016, fast-food franchise Jimmy John's made national headlines after it was discovered that it was requiring low-level, minimum wage workers to sign Non-Compete Agreements as part of their new hire paperwork. The Jimmy John's Non-Compete Agreement prohibited its employees from working at any other business that sells "submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches" within three miles of any Jimmy John's location in the United States during their employment and for two years after termination. In a settlement agreement reached with the New York and Michigan State Attorneys General, Jimmy John's agreed not to enforce the Non-Compete Agreements and had to provide $100,000.00 for programs to raise public awareness regarding Non-Compete Agreements.

Largely as a consequence of the Jimmy John's cases, the Obama Administration called upon the legislature to pass a law that would ban Non-Compete Agreements nationwide. Unable to get legislation passed through the normal channels during the Obama Administration, President Biden urged the Federal Trade Commission ("FTC") to use its powers under Section 5 of the Federal Trade Act to deem Non-Compete Agreements unenforceable, arguing that they

constitute unfair competition. In response, on January 5, 2023, the FTC issued a Proposed Rule that would essentially ban Non-Compete Agreements in most instances, turning hundreds of years of precedent on its head.

The Proposed Rule categorizes Non-Compete Agreements as "unfair methods of competition," making it against federal law to enter into or maintain non-competes with employees, independent contractors, interns, or volunteers. The Proposed Rule will not only prohibit employers from entering into Non-Compete Agreements in most circumstances, it will also rescind all previously entered into Non-Compete Agreements, even ones that have been litigated in Court and where damage payments have exchanged hands. The Proposed Rule does contain an exception for franchisee-franchisor agreements as well as mergers and acquisitions. The Proposed Rule also does not prohibit Confidentiality Clauses and Non-Solicitation Agreements so long as such clauses are written narrowly enough that they do not fall within the definition of a non-compete.

The Proposed Rule is open for public comment for a period of 60 days, or until March 6, 2023. Upon the conclusion of the public comment period, the Proposed Rule, or some version of it, will be finalized and will go into effect 180 days later, which would be on or about September 2, 2023. Prior to or shortly after it becomes a law, the Rule will surely be subject to legal scrutiny. On a federal level, there will likely be differing opinions as to whether this type of restriction is within the power of the federal government under the Supremacy Clause, or if it is something reserved for the states under the Tenth Amendment. There will inevitably be challenges that reach the United States Supreme Court. However, until a court in your jurisdiction imposes a stay on enforcement, an employer will be bound by the Rule once it goes into effect.

What can an employer do now to prepare itself for this new Rule? First and foremost, if they oppose this Proposed Rule, in whole or in part, they should consider making their opposition known by making a public comment to the FTC. Secondly, if this new ban will greatly impact their business, they should consult with a lawyer now to consider launching a legal battle to challenge the FTC's authority to, in essence, create legislation. Thirdly, companies should look closely at their existing contracts to ensure that the restrictive covenants contained therein are narrowly construed enough to potentially fall within one of the exceptions to the Proposed Rule. Finally, employers should do a cost analysis to determine how this new rule will affect them and have a plan in place for how they will implement the rule once it goes into effect.