

Pursuit of “Unfair” Non-Competes Continues by FTC as Public Comment Period on Proposed Rule Draws Near

With less than two weeks left to submit public comments on the Federal Trade Commission's (FTC) proposed rule, the level of interest continues to increase following President Biden's mention of the rule in his recent State of the Union address. The deadline to submit public comments is March 20, 2023, but the FTC remains active in pursuing non-competes it considers unfair.

The Proposed Rule and Public Comments

The FTC's proposed rule would effectively prohibit the majority of non-competition clauses for all workers and require the rescission of existing clauses. To read more about the proposed rule, see Reinhart's [previous alert](#).

Public comments can be submitted by any organization or member of the public to help inform the FTC about opinion on its proposed action. The FTC has already received more than 14,000 public comments, far exceeding the number of comments the agency typically receives on its proposed rules.

As a part of the process, the FTC held a public forum on its proposed rule on February 16, 2023, where it heard testimony from employees, business owners and industry groups. The testimony was wide-ranging and contained both positive and critical commentary.

Notably, many of those expressing critical views did not completely oppose the rule but focused instead on the need to narrow its broad scope to address the needs of businesses to protect themselves with high-level employees.

After the testimony, FTC Commissioner Alvaro Bedoya made several telling remarks. First, he said it is a misconception to think non-competition clauses are only inappropriate for blue-collar workers. Second, he suggested that non-competition clauses with high-level executives impede competition and stunt innovation and new business. Third, he underscored his view that the rule is necessary because of the difficulty employees may face in challenging such clauses in court. His comments suggest that the FTC may not significantly narrow its proposed rule.

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Once the public comment period ends, the FTC will review the comments and consider whether to revise its rule or publish it as written. The FTC has no set deadline for publication of any final rule. However, once published, the rule will likely face legal challenges.

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What the FTC and Congress Are Doing

Separate from the proposed rule, in early January, the FTC filed complaints against several companies for the unlawful use of non-competition clauses with employees under *existing* rules, asserting generally that the use of non-competition clauses with employees amounts to “unfair trade practices” under Section 5 of the FTC Act. On February 23, the FTC announced it had voted to finalize proposed consent orders with two of those companies, who agreed not to enforce the non-competition clauses and to provide notice to certain employees.

The FTC’s actions suggest that it will continue to target non-competition clauses, regardless of whether its proposed rule goes into effect.

In addition, a bipartisan group of Congress members introduced the Workforce Mobility Act on February 1, 2023. The legislation would prohibit non-competition clauses with a broad group of employees and give the FTC authority to take action against unlawful non-competition clauses.

What Should Employers Do

Employers who wish to submit comments on the FTC’s proposed rule should do so soon. They should also continue to monitor changes at the FTC and in Congress related to the increased scrutiny of non-competition clauses, carefully review and revise their non-compete clauses to ensure they are as narrow as possible, and only impose such restrictions on employees who pose a competitive risk.

Please contact [Matt DeLange](#), [Lynn Stathas](#), [Michael Gentry](#) or your Reinhart attorney if you have any questions, need help reviewing a non-compete agreement or would like to submit a public comment to the FTC.

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