

THE REVIEW OF
**BANKING & FINANCIAL
SERVICES**
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS
AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 40 No. 3 March 2024

NON-COMPETITION AGREEMENTS – THEIR FINAL ERA?

Non-competition agreements in the U.S. are facing a seismic shift. The proposed ban by the Biden administration and growing state-level restrictions highlight a trend favoring employee mobility. In this article, the authors describe the evolving trends and how employers can adapt by their strategies to protect their interests in a changing employment landscape.

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Historically, non-competition agreements were widely accepted and enforced as a means of protecting an employer's legitimate business interests and have been used to limit employee mobility across almost all industry sectors in the United States (with the notable exception of legal practice, where lawyers have largely banned non-competition agreements due to the rationale that they unfairly limit client choice of legal counsel). In recent years, however, non-competes have begun to fall out of favor at an ever-increasing rate as the employment law landscape continues to trend in favor of employees. This article provides an overview of the current status of federal and state law and overall trends.

THE FEDERAL TRADE COMMISSION'S PROPOSED BAN BOMBSHELL

In 2023, the Biden administration came out strongly against non-competition agreements, and made waves last year when the Federal Trade Commission proposed a ban on almost all non-competition agreements between employers and their workers.¹ The proposed ban applies

¹ FTC Non-Compete Clause Rulemaking, Jan. 5, 2023, Matter No. P201200, <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

to both employees and independent contractors, and applies regardless of income level access to sensitive information, or seniority.² The FTC reasoned that non-competes prevent workers from freely switching jobs, which blocks workers from pursuing better opportunities and working conditions, limits worker earning potential, and prevents employers from hiring the best available talent.³ The FTC thus contends that the proposed ban would promote greater dynamism, innovation, and healthy competition.⁴

MORE STATES JOIN THE TREND OF LIMITING NON-COMPETITION AGREEMENTS

While the FTC is not expected to vote on the proposed ban until April 2024, many states have already enacted legislation specifically addressing the enforceability of non-competes, either heightening the standard in which non-competes are scrutinized or

² FTC Proposed Rule §910.1.

³ FTC Non-Compete Clause Rulemaking, Jan. 5, 2023, Matter No. P201200, <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.

⁴ *Id.*

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