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# No More Non-Competes

## The Era of Employee Non-Compete Agreements May Be Coming to an End

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In the United States, as many as one in five employees (some 30 million individuals) are currently subject to some form of “non-compete” agreement with their employer. Although the details can vary widely, such agreements typically restrict an employee from working for or starting a competing business for certain period, or within a certain area, following the end of their employment.

At a conceptual level, agreements to not compete are distinct from non-solicitation agreements, which prevent an employee from soliciting their employer's clients to another business. They're also distinct from confidentiality or non-disclosure agreements, which generally prohibit an employee from misusing (i.e. stealing) an employer's confidential or proprietary data. All three types of agreements are often combined into a single document.

### ARE THEY ENFORCEABLE?

For decades, there has been a debate over whether non-competition agreements can or should be enforced against former employees. On the one hand, proponents argue that such agreements can be necessary for protecting trade secrets and other proprietary information when hiring and training new employees. On the other, critics argue that non-compete agreements are usually more about limiting employees' freedom than protecting the legitimate interests of a business.

In Alaska, courts have historically taken a moderate approach to enforcement. The Alaska Supreme Court has held that reasonable non-competition agreements are enforceable but has cautioned that such agreements must be “scrutinized with particular care because they are often the product of unequal bargaining power.” *Wenzell v. Ingrim*, 228 P.3d 103, 110 (Alaska 2010).

### FEDERAL CHANGE MAY PROHIBIT ENFORCEMENT

However, the enforceability of non-competition agreements may be coming to an end.

In January the Federal Trade Commission, or FTC, proposed a new rule to end the enforcement of employee non-compete agreements across the

United States. The proposal is currently scheduled to be open for public comment until March 20.

If adopted, the rule would prohibit any contractual term between an employer and a worker that “prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.”

The rule would apply to both current and future contracts and would prohibit employers from claiming or representing to an employee that they were bound by such an agreement. The proposed rule also prohibits “de-facto” non-compete agreements, which are agreements that have the practical effect of preventing an employee from leaving (for example, by requiring the employee to re-pay exorbitant training costs upon departure).

**A POTENTIAL EXCEPTION EXISTS**

Relevant to contractors, the FTC's rule would include an exception for non-compete clauses between the seller and buyer of a business. This exception would be available where the party restricted by the non-compete clause was an owner, member, or partner holding at least a 25 percent ownership interest in a business entity. Of course, such arrangements would remain subject to applicable anti-trust law.

If adopted, the financial penalties for violations could be steep. Employers should therefore review their current employment contracts and be aware of any contract that contains a buried non-compete paragraph or provision within the body of a larger agreement.

**WATCH FOR NEW DEVELOPMENTS**

Over the next year, expect a pitched battle over the proposal. For its part, the FTC claims the proposed rule would increase workers' earnings in the United States by between $250 billion and $296 billion per year. The US Chamber of Commerce, on the other hand, has argued that the FTC has no constitutional authority to regulate non-compete agreements between private parties, absent clear authorization from Congress. The Chamber has vowed to “oppose the proposed regulation with all the tools at our disposal, including litigation.”

At this point, it is too soon to know how the proposed rule will resolve. However, employers of all sizes would be well-advised to keep an eye on developments and remain prepared to comply with any changes to the law that might come.

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