BERGER SINGERMAN

CLIENT ALERT NOTIFICATION

Client Alert: Federal Trade Commission Proposes New Rule for Nationwide Ban on Noncompete Clauses in Labor Contracts

On January 5, 2023, the Federal Trade Commission (commonly known as the "FTC") issued a Notice of Proposed Rulemaking to ban the use of noncompete clauses by employers nationwide. True to their name, noncompete clauses block workers from working for competitors, or starting a new competing business, after employment ends for a set period.

The FTC's proposed noncompete ban comes just one day after the agency took legal action against three companies and two individuals in connection with noncompete restrictions that were imposed on thousands of workers. This proposed rule is part of a larger trend by the federal government to more vigorously regulate employment relationships and labor markets in the United States.

What Is the Proposed Rule?

This proposal is the FTC's latest effort in its broader initiative to reinvigorate Section 5 of the Federal Trade Commission Act, which seeks to prohibit "unfair or deceptive acts or practices in or affecting commerce."Through this rule, non-compete clauses would be considered an "unfair method of competition" and therefore unlawful under the Act.

Specifically, the proposed rule would make it unlawful for employers to enter into or maintain noncompete agreements with their workers, and it would require employers to void any such agreements that already exist within 180 days of the date the rule is published in the Federal Register. Notably, the rule would apply broadly to all workers, whether paid or unpaid; by its definition, "workers" would include employees, independent contractors, interns, volunteers, apprentices, and sole proprietors. In total, the FTC estimates that approximately 30 million Americans would be impacted nationwide.

The proposed noncompete ban would generally not apply to other types of employment restrictions, such as non-disclosure agreements to protect confidential information. However, it's important to keep in mind that other types of employment restrictions could be subject to the rule if they are so broad as to be considered noncompete.

What Happens Next?

The FTC's Notice of Proposed Rulemaking—which passed by a 3-1 vote—is just the first step in the rulemaking process. Following publication of the proposed rule in the Federal Register, the FTC will hold a mandatory 60-day public comment period. Afterward, the FTC will review the comments and may make changes, in a final rule, based on the comments and the FTC's further analysis of this issue.

What Does This Mean for Your Business?

Employers should assess their current and anticipated use and enforcement of noncompete agreements and consider how the implementation of the proposed rule would affect their business and compliance obligations. Based on this assessment, and in the short term, employers should consider whether to submit comments to the proposed rule. As noted, all comments must be made within 60 days of the publication of the rule in the Federal Register to be considered by the FTC. For more information on relevant considerations for your business, please contact Leonard K. Samuels, Andrew B. Zelman, Marianne Curtis or Nikki Branch.