

advisory

FEDERAL TRADE COMMISSION (“FTC”) PROPOSES SWEEPING NEW RULES REGARDING NON-COMPETITION AGREEMENTS

Background

In recent years, there has been an increasing trend amount state legislatures toward placing limits on, and in a few states banning, non-competition agreements (“NCAs”) between companies and their employees. The rationale for such restrictions has been that employees need to have the ability to earn a living and their employers’ interests are adequately protected by confidentiality and non-solicitation agreements.

New Rules Proposed by the FTC

On January 5, 2023, the FTC proposed sweeping new rules that go well beyond many state law restrictions. The rules will be controversial and the FTC announcement calls for a 60-day public comment period and a 180-day period after the final rules are issued for employers to comply. The rationale behind these rules is that NCAs violate existing law because they constitute an unfair method of competition in or affecting commerce and are therefore unlawful.

The proposed rules essentially ban all NCAs between an employer and its “workers.” It is important to note that (i) the term “worker” includes employees, independent contractors, interns and others; and (ii) the ban covers both prospective NCAs and existing NCAs covering present and former workers. It is also worth noting that, historically, restriction on NCAs did not cover NCAs entered into in connection with the sale of a business. However, proposed rules also apply in the context of the sale of a business unless the “worker” signing the NCA owns at least a 25% interest in the business being sold. While they do not impact non-solicitation and non-disclosure agreements per se, there is language that says that unusually broad non-solicitation and non-disclosure agreements that essentially function as NCAs will likewise be banned.



The proposed rules require an employer to give written notice to current workers and former workers who are still subject to an NCA that such agreements are no longer in effect and will not be enforced by the employer.

Some Practical Take Aways

These rules will be controversial and are likely to result in substantial public comment. The FTC apparently recognized this by discussing two alternative approaches that might be taken when the final rules are announced. It also seems likely that there will be court challenges to whatever final rules are issued by the FTC, on the theory that the FTC has exceeded its authority. Companies that are currently using non-solicitation or non-disclosure agreements for at least some of their employees should also revisit those agreements to be sure they are not so broad as to constitute an NCA.

If you have further question on NCAs or other business matters, please contact PLDO Partner William F. Miller at 508-420-7159 or email wmiller@pldolaw.com.



William F. Miller
Partner

PANNONE LOPES
DEVEREAUX & O'GARA LLC
c o u n s e l o r s a t l a w

This memorandum is intended to provide general information of potential interest to clients and others. It does not constitute legal advice. The receipt of this memorandum by any party who is not a current client of Pannone Lopes Devereaux & O'Gara LLC does not create an attorney-client relationship between the recipient and the firm. Under certain circumstances, this memorandum may constitute advertising under the Rules of the Massachusetts Supreme Judicial Court and the bar associations of other states. To insure compliance with IRS Regulations, we hereby inform you that any U.S. tax advice contained in this communication is not intended or written to be used and cannot be used for the purpose of avoiding penalties under the Internal Revenue Code or promoting, marketing or recommending to another party any transaction or matter addressed in this communication.