

Legal Connections



February is an important time to celebrate our commitment to the principles of freedom, democracy, and equal rights for all people.



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LEGAL EXPERTISE FOR THE BUSINESS COMMUNITY

FEBRUARY 17 - MARCH 2, 2023

HOT-BUTTON ISSUES AFFECTING WORKPLACES IN 2023 PART 1

A new year is the perfect time for employers of all sizes to review their policies and practices ensuring they're up to speed and in compliance with national, state, and local laws. It's also the time to reflect on the previous year and the hot-button issues that emerged during 2022 and will likely affect the workplace in 2023.



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in doing so. To compound matters for employers, the NLRB issued several decisions in 2022 protecting employees' right to associate and making it increasingly difficult for employers to maintain a union-free workplace.

Employers of all sizes should start the year with a thorough review of their policies prohibiting outsiders from

soliciting in their workplace. This is the most effective tool employers can use to keep their workforce union-free. Ultimately, however, the best way to keep a union from organizing in your workplace is to offer competitive compensation, a good work environment, and listen to employees and meaningfully respond to the changes they want to see. If the workforce is happy with the work environment, then there is little benefit to inviting a union to sit at the table.

Can Unions Come to Your Workplace?

Unions and the National Labor Relations Board (NLRB) were extremely active in 2022, and that trend is not expected to slow. The belief that unions are limited to the public sector and skilled labor positions are myths perpetuated throughout all industries. As large and small companies alike discovered in 2022, unions are actively recruiting to expand their presence into new workplaces and have been successful

Employees & Independent Contractors: What's the difference?

Whether a worker should be compensated as an employee or an independent contractor continues to flummox employers. It's easy to see why: In the past five years, the Department of Labor (DOL) issued new interpretive guidance, expanding the ability to compensate individuals as independent contractors, and then subsequently repealed that guidance. Currently, the DOL is set to issue another set of new regulations on this issue, to take effect in 2023.

In addition, the DOL is only one of several state and federal agencies that utilize its own tests to determine whether a worker should be an employee or an independent contractor. It continues to be the safest course of action for an employer to classify its regular workers as employees. That may not be appropriate in all situations, though.

A consistent test to evaluate a worker's appropriate status is the degree to which the potential employer exercises control over the worker. Does the employer control when, where, and how workers perform their work? If the answer is generally yes, the worker is likely an employee. What about a highly skilled worker who works on a per-project basis, generally sets their schedule, and determines how the work is performed? In that case, the worker could possibly be an independent contractor. It is a distinction with significant implications, including unpaid taxes, workers' compensation coverage and entitlement to other employment benefits, and general employment law coverage of the worker. With the DOL preparing to issue its final rule in 2023, this will surely continue to be an issue at the forefront of employment litigation. ■

Watch for Part two in the 3/3 Legal Connections Page.

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WHAT YOUR BUSINESS NEEDS TO KNOW ABOUT THE PROPOSED BAN ON NON-COMPETE AGREEMENTS

Kicking the New Year off with an unpopular bang, the Federal Trade Commission ("FTC") announced a Proposed Rule in January 2023 that would broadly ban non-compete agreements between employers and their workers. (The proposed rule is available on the FTC website at www.ftc.gov).



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contains an exception that allows for non-competes to prevent employees from departing to a competitor after sale of their employer's business.

Is the FTC's Ban Already in Effect?

No. Like all rules issued through regulatory agencies, the FTC's proposed rule will go through a notice-and-

comment period, which is a 60-day period by default. The comment period regarding the Proposed Rule is open through March 20, 2023, which allows stakeholders and members of the public to submit comments on the Proposed Rule. At some unknown point after the comment period closes, the FTC will likely issue a final version of the rule, which may differ from the current language of the Proposed Rule.

Further, any final rule issued to ban non-competes will face legal challenges and will likely be stayed by a court order while those challenges are reviewed.

What is the Proposed Rule?

The Proposed Rule is a broad ban against using "non-compete clauses" in the employment context. The rule defines a "non-compete clause" as "a 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."

Unlike the shifting tide on non-compete laws across the country, the Proposed Rule makes no exception for high-level employees or employees with direct access to trade secrets. Rather, the proposed non-compete ban only

Would the Proposed Rule impact existing non-compete agreements?

Yes. Existing non-competes are impacted under the proposed rule. Section 910.2(b) of the Proposed Rule provides that "an employer that entered into a non-compete clause with a worker prior to the compliance date must rescind the non-compete clause no later than" the "compliance date," which the rule defines as 180 days after publication of a final rule.

Does the New Rule Apply to Other Restrictive Covenants, such as Nondisclosures, Customer Non-solicits, and Non-recruitment Covenants?

Generally, no. But, the exact scope of the rule is not clear because, in addition to banning non-competes, the rule prohibits "de facto" non-competes, or contractual provisions that have the effect of preventing an employee from working elsewhere after their employment ends. For example, the Proposed Rule identifies Non-disclosure agreements that are so broad that they prevent an employee from working in the same field elsewhere, as being an example of a de facto non-compete. Another example set

forth was training-repayment provisions that require workers to repay training costs upon departure.

These examples suggest that other restrictive covenants like customer non-solicitation, employee non-recruit, and non-disclosure agreements will not be impacted even if the Proposed Rule goes into effect without being pared down.

Can I still enforce my existing Non-Competes in the meantime?

Yes. The FTC's proposed ban has not taken effect. Employers can enforce non-competes consistent with existing state law. But, employers should stay mindful that are developments are in progress and keep an open dialogue with counsel experienced with non-compete and trade secret matters.

Further, employers should review what steps they are taking to protect their trade secrets and other confidential information. Federal and state trade secret law will be unaffected by the potential ban and will take on a more significant role moving forward in preventing unfair competition. ■