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FTC Proposes Sweeping Ban on Virtually All Employee Non-Compete Agreements

On January 5, 2023, the Federal Trade Commission (FTC) proposed a new rule that, if enacted, would virtually abolish employee non-compete agreements in the United States. The proposed rule would prohibit employers from entering into any agreements with employees or individual independent contractors that explicitly prohibit working for a competitor, as well as any other agreement that amounts to a "de facto" non-compete agreement.

The rule generally would not ban other types of restrictive covenants typically signed by employees, such as non-disclosure or non-solicitation agreements. It also would not apply to business-to-business non-competes, or to non-compete agreements entered into in connection with the sale of a business. However, the proposed sale of business exception is very narrow – it would only apply if the restricted party owns 25% or more of the business being sold.

The FTC's rule is also proposed to be retroactive, meaning that it will void all existing employee non-compete agreements, in addition to any future agreements. If it is enacted, employers would be required to rescind all active employee non-competes within six months of the rule going into effect, and to notify all current and former employees within forty-five days of such a rescission. The rule would also supersede all state non-compete laws to the contrary.

The future of the rule is at best uncertain. The proposed rule must first be published in the Federal Register, where interested parties will have the opportunity to propose comments for sixty days. After considering the comments, the FTC may amend the rule before publishing a final version. The final rule would go into effect 180 days after publication. However, significant opposition to and litigation over the proposed rule is expected, which could further delay its implementation.

We will be monitoring the rule carefully and will provide periodic updates as matters develop. However, please contact a member of Choate's Labor & Employment Group if you are interested in learning more.

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