



# THE FTC'S PROPOSED RULE REGARDING NON-COMPETE AGREEMENTS

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# TODAY'S AGENDA

- What's in a rule?
- Relevant background
- Where to from here?





# The FTC's Proposed Rule

- Federal Trade Commission Rule, not a law passed by Congress
- Only proposed at this juncture
  - Comment period is open through ***March 20, 2023***
  - Legal challenge(s) likely after rule is finalized
- The rule would ban non-compete agreements (effectively supplanting state law)
- Once in effect, employers would need to rescind existing agreements and inform employees (and former employees)
- Uncertainty





# The FTC's Proposed Rule

- Open questions:
  - Senior Executives
  - Different treatment of high earners
  - Franchisees
  - Specific circumstances (merger/acquisition, termination)





# “Flavors” of “Non-Compete” Agreements (not 31, but more than 1)

- Agreements restricting employees from moving to a competitor
- Agreements restricting employees from working in a particular industry
- Agreements prohibiting the solicitation of a business’ customers or prospective customers
- Agreements prohibiting poaching employees





# “Flavors” of “Non-Compete” Agreements (not 31, but more than 1)

- Agreements protecting a business' trade secrets
- Agreements protecting a business' confidential information
- Agreements regarding work-for-hire (i.e., ownership of inventions)
- Non-disparagement agreements





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# Relevant History

- From file cabinets...to the server...to the cloud
- When everyone was required to sign... and then they weren't
- Blue penciling and severability







# Relevant Background (Policy)

What purpose does such an agreement serve?

- Certain proprietary information and other business interests are worth protecting and remain protectable under the proposed rule (i.e., protecting from *unfair* competition)
- Businesses opting not to utilize such agreements risk falling victim to *unfair* competition practices
- Leverage





# Relevant Background (Enforcement)

## Why might a non-compete be unenforceable?

- Overbroad
  - Definitions—industry/goods/services, competitor, customers
  - Issues with respect to geography
    - vis-à-vis broad customer base
    - vis-à-vis remote work employees (in other states)
  - Issues with respect to restrictive period
  - The “janitor” rule
- Inappropriate (based on specific employee/role)
  - Issues with respect to having all employees sign (i.e., relative to an individual employee’s role with the business)
  - Developments re: wage threshold (e.g., Illinois, Maine, Washington)





# Relevant Background (Wisconsin)

## *Star Direct Inc. v. Dal Pra*

- Overbroad business clause – restricting a former employee from engaging in "substantially similar" but not directly competitive business was unreasonable
- Severability

## *Manitowoc Co., Inc. v. Lanning*

- Overbroad non-solicitation of employee clause – "any employee" included all of Manitowoc's employees (world-wide) without any limitation regarding position, geographic location, specialized knowledge or skills, or relationship.

## *Diamond Assets v. Godina*

- Overbroad definition of "confidential information"





# Where to From Here?

- Revisit existing agreements
  - What precisely are we seeking to protect?
  - Are our protections tailored to bona fide proprietary interests—information/documentation, relationships?
  - Are our protections properly tailored—geography, time?
  - As related to the FTC’s proposed rule (e.g., functional test)?
- Introducing revised/new restrictions?





# Questions?

