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### Federal Trade Commission proposes a noncompete ban: Five things to know

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By John David Gardiner

By now, most compliance professionals are aware of the Federal Trade Commission (FTC) press release from January 5,<sup>[1]</sup> which announced its proposed rule to ban noncompete clauses.<sup>[2]</sup> The FTC proposed adding a new subchapter J, consisting of Part 910, to Chapter 16 of the Code of Federal Regulations. The FTC invited public comment through March 20, 2023.

The FTC's proposed rule, if implemented, would prohibit employers from entering into or attempting to enter into "a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause." Employers would also be required to rescind any existing noncompete agreements by providing individual notice to anyone currently subject to a noncompete, including former employees.

The proposed rule defines a noncompete 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" but it also contains a functional test. According to the functional test, the FTC would deem any contractual term that has the effect of prohibiting a worker from seeking or accepting employment to be a noncompete clause. The FTC provides the following examples of terms that may be de facto noncompete clauses:

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