

FTC Proposal to Ban Non-compete Clauses

What is the Federal Trade Commission (“FTC”) proposing?

The FTC released its ban on non-compete clauses on April 23, 2024 and intends for the proposal to take effect at the end of August. This ban would apply prospectively to all new agreements, and retroactively to all existing agreements except senior executives, defined as employees making over \$150,000 with decision making authorities. The ban extends to other covenants like non-disclosures and non-solicitations if they are deemed to be restrict freedom of movement.

Non-competes have typically been enforced at the state level and this proposal represents an attempt by the agency to take on unprecedented regulatory authority over business operations that have never been within the purview of the FTC. Typically, the agency has been responsible for antitrust enforcement and for protecting consumers, so the FTC has almost no experience enforcing or investigating non-compete clauses. The FTC argues that non-competes harm workers by suppressing wages and restricting freedom to move jobs and that a ban is needed to ensure workers are not taken advantage of by their employers.

NAW opposes the FTC’s ban on non-competes and believes narrowly targeted non-competes play an important role in workforce policy.

How do wholesaler-distributors utilize non-competes?

Wholesaler-distributors utilize non-compete clauses in responsible, narrow, and targeted ways:

- Typically, they’re used for highly compensated employees to protect proprietary information including sales data, relationships with vendors and customers, company strategy, and other non-public information essential to their business.
- They are generally temporary, applying for just one or two years, and are often specific to a location such as a limited mile radius, a specific state, city, or region.
- They often limit workers from engaging in specific actions, such as selling products they were trained in through the employer’s training or soliciting their former employer’s customers.

How would the FTC proposal harm wholesaler-distributors?

The proposal would render the vast majority of non-competes non enforceable, which would mean wholesaler-distributors have no way to prevent existing employees from taking proprietary or sensitive business information such as pricing information and sales relationships to a competitor. Wholesaler-distributors have no other way of protecting this information.

The ban will cause wholesaler-distributors to make significant changes to their business practices. For instance, they may curb the significant investments they make in recruiting and training new employees. Many wholesaler-distributors spend hundreds of thousands or even millions of dollars each year on training, typically spending the first six to 12 months training a new sales employee. In addition, businesses may more closely guard proprietary business information in order to prevent this data from being acquired by a competitor.