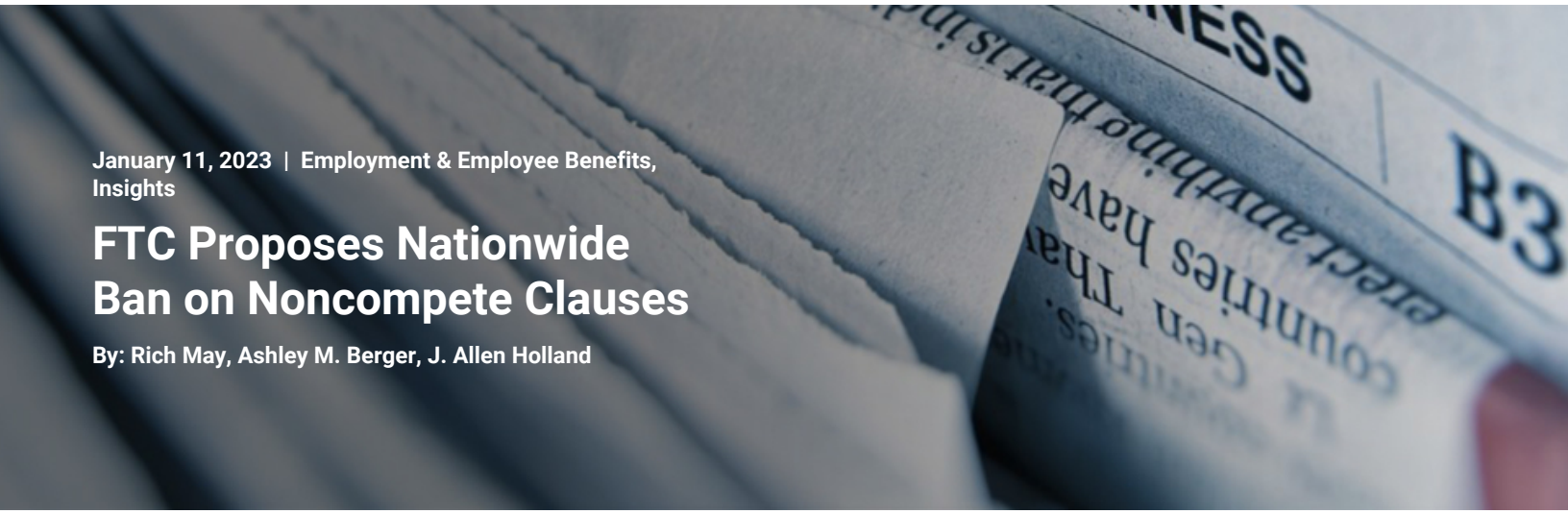


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FTC Proposes Nationwide Ban on Noncompete Clauses

By: Rich May, Ashley M. Berger, J. Allen Holland

On January 5, 2023, the United States Federal Trade Commission ("FTC") proposed a ban on noncompete clauses in employment contracts. The FTC's proposal would bar employers from entering into or enforcing such clauses with employees or independent contractors and require companies to nullify any existing agreements within six months, taking affirmative measures to inform the employee of the nullification.

The proposed rule would generally prohibit employers from using noncompete clauses. Specifically, the FTC's new rule would make it illegal for an employer to:

- enter into or attempt to enter into a noncompete with a worker;
- maintain a noncompete with a worker; or
- represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

The FTC's proposal would also apply to independent contractors and anyone else who works for an employer, paid or unpaid. The FTC's proposal would not apply to agreements preventing competition between the seller and buyer of a business.

The FTC's proposal is based on a preliminary finding that noncompete clauses constitute an unfair method of competition, violating Section 5 of the Federal Trade Commission Act. About one in five American workers are bound by a noncompete clause. According to the FTC, this stifles innovation, suppresses wages and blocks workers from creating new businesses, and ultimately the consumer is harmed as the trickledown effect can include higher prices. Noncompete agreements are used across industries. The FTC anticipates that if the proposal passes, it could increase wages by nearly $300 billion per year and expand opportunities for 30 million Americans.

Notably, the FTC's proposal would not apply to other commonplace types of employment restrictions, such as non-disclosure or non-solicitation agreements. However it could apply to these types of employment restrictions if they are broad enough in scope to practically



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function as a noncompete.

What does this mean for employers and businesses that have noncompete agreements in place for separated employees? Nothing, immediately. The agency will accept public comment on the proposal for 60 days (through March 10, 2023) and consider those submissions before it issues a final version of the rule. The FTC proposal does continue the recent trend of limiting the enforceability of some types of noncompete agreements. It is also anticipated that the proposal will bring certain legal challenges that could delay any final implementation of the rule.

Disclaimer: This summary is provided for educational and information purposes only and is not legal advice. Any specific questions about these topics should be directed to Attorneys J. Allen Holland, Frank Gaeta, David Glod or Ashley M. Berger.

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