



The Future of Noncompetes

New FTC rule may prohibit these agreements

by: Robert C. Goldberg, BTA General Counsel

There is nothing more valuable to the independent dealer than the identity of his (or her) customers, the terms of their relationships and key contacts. A majority of dealers protect this valuable information with noncompetition and nondisclosure agreements. On Jan. 5, the Federal Trade Commission (FTC) issued a notice of rulemaking that would prohibit almost all non-compete agreements between employers and employees. The FTC stated: “The freedom to change jobs is core to economic liberty and to a competitive, thriving economy. Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand.”

The FTC’s proposed rule is broad in a number of respects and would apply to almost any form of noncompete, with the exception of an expressed carve-out for noncompetes associated with the sale of a business where an individual has a greater than 25% ownership interest in the business. Moreover, the proposed rule would apply to the establishment of noncompetes, the enforcement of noncompetes and any implication that an employee is subject to a noncompete even when there is no actual agreement in place.

The proposed rule would not only prohibit future noncompete agreements, but would also invalidate those already in effect. The proposed rule also would explicitly apply to agreements the agency refers to as implicit noncompete agreements like “a nondisclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker’s employment with the employer.”

It appears the intent of the rule is to retain workers through increased compensation and benefits rather than prohibiting the ability to work elsewhere. The proposed rule would not level the playing field, but shift the advantage to employees.

Recent years have seen increased concerns from regulators and legislators that noncompete and other labor restrictions may unduly restrict employees’ mobility, and lead to both the reduced ability of employees to negotiate wages and depressed wages across many industries. Several states and municipalities have forbidden noncompetes or curtailed their application. The proposed FTC rule would apply nationwide. The rule would



supersede state and municipal rules unless those were more restrictive than the proposed FTC rule. The proposed rule would outlaw noncompetes without consideration of the necessity or reasonableness of the limitation. This would upset years of judicial rulings and recognized industry practices.

As with all proposed rules, there is a 60-day period for public comments. It is likely that an ultimate rule will vary from this restrictive proposal made by the FTC. The Business Technology Association (BTA) will provide comments based on the need to protect confidential end-user information from competitors by simply hiring a key employee.

This is a far-reaching proposal and very controversial. Litigation over the proposed rule is a virtual certainty. Among other issues, the federal courts and, perhaps, ultimately, the Supreme Court of the United States, will need to determine whether and to what extent the rule is within the scope of the FTC’s statutory mandate to regulate unfair competition. If the rule is ultimately issued by the FTC, there will be ample time to comply prior to enforcement. Dealers should refrain from making any policy changes at this time and await the final rule. BTA will keep you informed. ■

Robert C. Goldberg is general counsel for the Business Technology Association. He can be reached at robert.goldberg@sfbg.com.

