

LEGAL UPDATES

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## Services

Labor & Employment  
Non-Competes &  
Restrictive Covenants

## Professionals

M. SCOTT LEBLANC  
MILWAUKEE:  
414.978.5512  
CHICAGO:  
312.655.1500  
SCOTT.LEBLANC@  
HUSCHBLACKWELL.COM

COURTNEY STEELMAN  
KANSAS CITY:  
816.983.8000  
COURTNEY.STEELMAN@  
HUSCHBLACKWELL.COM

CHENGZHUO HE  
KANSAS CITY:  
816.983.8364  
CHENGZHUO.HE@  
HUSCHBLACKWELL.COM

# Following FTC's Lead, Senators Renew Efforts to Ban Non-Compete Agreements

In the wake of the Federal Trade Commission's (FTC) proposed rule that would effectively ban non-compete agreements nationwide, on February 1, 2023, a bipartisan group of U.S. Senators have renewed their efforts to ban the use of non-compete agreements nationwide through legislative action.

The bill, titled "Workforce Mobility Act of 2023" (the "Act"), was previously introduced in 2019 and 2021. The most recent effort is being led by Senators Christopher Murphy (D-CT) and Todd Young (R-IN) and is co-sponsored by Senators Tim Kaine (D-VA) and Kevin Cramer (R-ND). Representatives Scott Peters (D-CA) and Mike Gallagher (R-WI) have introduced the same bill in the House of Representatives.

According to Senator Murphy's statement, the Workforce Mobility Act would:

Narrow the use of non-compete agreements to include only necessary instances of a dissolution of a partnership or the sale of a business;

Charge the Federal Trade Commission and the Department of Labor with enforcement, as well as making explicit a private right of action in federal court;

Require employers to make their employees aware of the limitation on non-competes. The Department of Labor would also be given the authority to make the public aware of the limitation; and

Require the Federal Trade Commission and the Department of Labor to submit a report to Congress on any enforcement actions taken.

## **The Reintroduced Bill that Would Ban Non-Compete Agreements Nationwide**

The Act provides that, with certain limited exceptions, “no person shall enter into, enforce, or attempt to enforce a noncompete agreement with any individual who is employed by, or performs work under contract with, such person with respect to the activities of such person in or affecting commerce. Such agreements will have no force or effect.”

Under the Act, a “noncompete agreement” is defined as “an agreement entered into after the date of the enactment of the Act between a person and an individual performing work for the person, that restricts such individual, after the working relationship between the person and the individual terminates, from performing (a) any work for another person for a specified period of time; (b) any work in a specified geographical area; or (c) any work for another person that is similar to such individual’s work for the person that is a party to such agreement.”

Thus, unlike the FTC’s proposed rule, the Act would not apply to noncompete agreements entered into *prior* to its enactment.

The Act also provides three limited exceptions where noncompete agreements could still be entered into and enforced:

1. The sale of goodwill or ownership interests in a business.
2. In connection with a sale of goodwill or ownership interest, where a buyer or seller enters into a severance agreement with senior executives that includes a noncompete provision of up to one year, limited to the geographic region in which the company previously operated. The senior executives with noncompete agreements must be guaranteed severance payments of at least one year’s compensation in the event their employment is terminated.
3. Partnership agreements, where the restriction prevents departing partners from carrying on similar businesses in the same geographic area where the partnership operates or operated (in the event of a partnership dissolution).

The Act would also allow for non-disclosure agreements to protect trade secrets but would require employers to post notice of the provisions of the Act to employees.

Notably, the Act would authorize not just the FTC, but the Department of Labor, state Attorneys General, and individual employees to bring actions against employers who violate the Act to seek damages, injunctions, and other relief. Claims under the Act would also be exempted from arbitration and joint-action waivers, including waivers of joint, class, and collective actions.

## **FTC to Host Public Forum Examining Proposed Rule to Ban Noncompete Agreements; Public Comment Period to End on March 20, 2023**

The FTC announced that it will host a virtual public forum to examine the non-compete proposed rule on February 16, 2023 from 12:00 to 3:00 PM ET. The FTC has scheduled certain speakers and will broadcast the event on the agency's website. After, members of the public will have an opportunity to comment via livestream. The FTC invites stakeholders to sign up to speak through a webform.

Please also note the FTC proposed rule is still in the public comment period until March 20, 2023. The FTC has received, so far, over 5,345 comments on Regulations.gov regarding this FTC proposed rule. More than 100 business groups also requested the FTC extend the comment period for an additional 60 days which could potentially extend the comment period to May 19, 2023 if granted.

### **What This Means to You**

It has been widely anticipated that the FTC proposed rule will be scaled back in response to a wave of comments from interested parties, and almost certainly challenged by affected businesses and trade associations in federal courts who will have strong arguments that the FTC lacks authority to regulate in this area. For more information about the FTC proposed ban, see our previous alert, "FTC Proposes Nationwide Ban on Non-Compete Agreements."

The same avenues to challenge do not exist when it comes to legislative action. If there is sufficient bipartisan momentum to pass the Act through both the U.S. Senate and House of Representatives, the chances of a nationwide non-compete ban going into effect are far greater.

For his part, President Biden has signaled that he would sign the Act into law if it passes both the House and the Senate. In his 2023 State of the Union address on February 7, 2023, President Biden talked about the perils of noncompete agreements and called for an end to noncompete agreements.

### **Contact Us**

For more information on this topic please contact, Scott LeBlanc, Courtney Steelman, Chengzhuo He, or your Husch Blackwell attorney.