

January 10, 2023

## **WEBSTER, CHAMBERLAIN & BEAN, LLP – NONPROFIT ALERT**

### **FEDERAL TRADE COMMISSION PROPOSAL ON**

#### **BANNING NON-COMPETE CLAUSES**

On January 5, 2023, the Federal Trade Commission (“FTC”) issued a notice of proposed rulemaking (“NPRM”) to prohibit employers from entering non-compete agreements with workers.

#### **Background**

The FTC has voted 3-1 to publish an NPRM that proposes a sweeping ban on noncompete agreements. The NPRM now enters a public comment period, where comments must be received by no later than March 6, 2023.

Comments may be submitted online at [www.regulations.gov](http://www.regulations.gov) using the subject line “Non-Compete Clause Rulemaking, Matter No. P201200,” or can be mailed directly to the Federal Trade Commission, Office of the Secretary at 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex C), Washington, DC 20580.

#### **Key Provisions**

The NPRM’s essential provision is straightforward, but sweeping: it would deem any noncompete clause with an employee, independent contractor, or unpaid worker to be an unfair method of competition that must be rescinded. Any existing noncompete agreements in force would also have to be rescinded and current and former employees would have to be informed that enforcement of such agreements has ceased. Employers would have 180 days from the date of the publishing of the final rule to rescind such agreements.

The NPRM defines a non-compete clause as an agreement that prevents a worker from seeking or accepting future employment or opening their own business after the end of their employment with their employer. Notably, this would extend to clauses that are functionally non-compete in nature – that is, those that have the effect of prohibiting workers from seeking or accepting employment. This would include provisions such as non-disclosure agreements that are written in a way that prohibits a worker from gaining employment in the same field after leaving their current job.

#### **What does this mean for nonprofits?**

The impact on nonprofits would be substantial. Simply put, the NPRM would deem *any* noncompete clauses with paid employees, independent contractors, and unpaid workers to be an unfair method of competition that must be rescinded. The rule would also apply retroactively: employers would be required to tell current and former employees that they have stopped enforcing any existing noncompete agreements. Because this would operate as a complete ban on non-compete clauses and any related contract or employment provisions, the impact in the nonprofit space would be significant.

Associations should identify and review their existing policies and procedures, as well as any employment agreements, to determine if they may be impacted by a final rule.

**Are there any exceptions to applicability?**

The FTC’s NPRM proposes only one exception: permitting noncompete clauses that are “entered into by a person who is selling a business entity or otherwise disposing of all of the person’s ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity’s operating assets.” This exception suggests a narrow carveout for individuals with a “substantial” ownership stake, and would as a result likely only apply to certain high level employees or executives.

**What are the costs of non-compliance?**

The NPRM does not propose a private right of action for workers, so only the FTC would be empowered to go after rule violations. The FTC is empowered to assess civil penalties for violations of the statutes and rules under its jurisdiction, and complainants can file a complaint or request for FTC action.

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