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INSIGHT · EMPLOYMENT LAW

Q2 2023 Legal Review: The FTC's Proposed Non-Compete Rule and California's Standard as a National Blueprint

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The FTC's proposed non-compete ban sought to nationalize worker mobility protections pioneered in California under Business and Professions Code Section 16600.

During the second quarter of 2023, the Federal Trade Commission's proposed nationwide non-compete rule generated intense debate across the legal and business communities. The FTC's invocation of Section 5 of the FTC Act to categorize non-compete clauses as unfair methods of competition thrust California's longstanding non-compete prohibition (Business & Professions Code § 16600) into the national spotlight as the definitive policy model.

I. The FTC's Section 5 Rulemaking Authority

The FTC's Notice of Proposed Rulemaking (NPRM) proposed banning all employee non-compete agreements nationwide, with only a narrow exception for substantial business owners (holding at least a 25% ownership interest) executing sales of business entities. The Commission estimated that eliminating restrictive covenants would boost worker earnings by nearly $300 billion annually and expand entrepreneurship.

Business advocacy groups immediately challenged the Commission's authority, arguing that Section 6(g) of the FTC Act does not authorize substantive legislative rulemaking regarding unfair competition, and asserting that a blanket nationwide ban violates the Major Questions Doctrine and the non-delegation doctrine.

II. California's 150-Year Precedent: Business & Professions Code § 16600

While the federal rulemaking faced procedural and constitutional head-winds, California continued to demonstrate that robust economic growth and innovation can thrive under an absolute prohibition against restrictive covenants. Under Business & Professions Code § 16600, California voided every contract restraining lawful profession, trade, or business long before federal interest emerged.

The California Supreme Court's decision in *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937 had already rejected the 'narrow restraint' exception recognized in other jurisdictions, establishing that even narrowly tailored non-competes are void ab initio in California.

III. Compliance Architecture for Multistate Employers

The heightened scrutiny surrounding non-competes in mid-2023 compelled corporate employers to update employment contracts:

- **Trade Secret Protection Over Covenants:** Employers shifted emphasis toward protecting proprietary IP through targeted Non-Disclosure Agreements (NDAs) that do not effectively bar employee mobility, relying on the California Uniform Trade Secrets Act (Civ. Code § 3426 et seq.).
- **Customer Non-Solicitation Limits:** California law treats customer non-solicitation covenants as invalid non-competes unless tied to actionable trade secret misappropriation (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923).
- **Severability Audits:** Multi-state employers were advised to audit all standard employment agreements, removing non-compete clauses for California residents to avoid unfair competition liability under Business & Professions Code § 17200.

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