

# As Congress and the FTC target non-compete clauses, could NDAs become collateral damage?

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On February 1, the Workforce Mobility Act<sup>1</sup> was reintroduced in the U.S. Senate with bipartisan support “to limit the use of non-compete agreements that negatively impact American workers.”<sup>2</sup> A co-pending bipartisan bill was also introduced in the U.S House of Representatives.<sup>3</sup>

The Bill comes less than a month after the Federal Trade Commission (FTC) introduced its proposed rule<sup>4</sup> banning all non-compete agreements for U.S. Workers. The Bill, in contrast, does permit for limited exceptions, such as for business owners and senior executives with significant severance packages.<sup>5</sup>

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The Bill is very significant in that, unlike the FTC rule, it expressly authorizes private causes of action for damages. Moreover, the Bill also invalidates arbitration agreements that otherwise would prevent employees from going to court.<sup>6</sup> The Bill goes further by explicitly invalidating any limit on class or joint actions by workers who sue for damages.<sup>7</sup>

The Bill empowers the Department of Labor to file suit to enforce its terms<sup>8</sup> and for the FTC to enforce the law through administrative actions.<sup>9</sup> Finally, the Bill authorizes states to bring actions to enforce it and vindicate workers’ rights.<sup>10</sup>

The FTC rule is different in another key way from the Bill because it empowers the Commission to investigate and take action against other types of contracts that can limit employee mobility.<sup>11</sup>

- Non-disclosure agreements (NDAs) — also known as “confidentiality agreements” — which prohibit the worker from disclosing or using certain information;
- Client or customer non-solicitation agreements, which prohibit the worker from soliciting former clients or customers of the employer...;
- No-business agreements, which prohibit the worker from doing business with former clients or customers of the employer, whether or not solicited by the worker;
- No-recruit agreements, which prohibit the worker from recruiting or hiring the employer’s workers;

- Liquidated damages provisions, which require the worker to pay the employer a sum of money if the worker engages in certain conduct; and
- Training-repayment agreements, which are liquidated damages provisions in which the worker agrees to pay the employer for the employer’s training expenses if the worker leaves the job before a certain date.

This secondary focus in the FTC rule falls most heavily on NDAs because, absent a non-compete clause, these contracts are the employers’ primary protection against disclosure of their trade secrets by departing workers. Depending on the Bill’s fate and the text of the FTC’s final rule, it is possible that an employer reliant on non-compete clauses accompanied by broad NDAs could be left with no protection at all.

The FTC’s proposed rule is also of more immediate concern because it could go into effect on the vote of the three Democrat commissioners as early as this summer. The Bill is a reintroduction of prior legislation that was left pending at the end of the last session.

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The bipartisan support for the 2023 Bill in both the Senate and the House, along with the co-pending FTC rule, may lead to a different outcome for the Bill this term, but Congressional priorities and politics are unpredictable.

The FTC started 2023 by giving non-compete clauses high priority. On the same day the FTC announced the proposed rule, it issued a press release announcing its first-ever enforcement actions against employers based on non-compete clauses:

The Federal Trade Commission has taken legal action against three companies and two individuals, forcing them to drop non-compete restrictions that they imposed on thousands of

workers. Drawing from the FTC’s substantial expertise in this space, these actions mark the first time that the agency has sued to halt unlawful non-compete restrictions.<sup>12</sup>

The FTC’s proposed rule and these cases are the first coordinated actions taken by the Commission against a common business practice since its recent policy announcement broadening its enforcement focus beyond Sherman Act “rule of reason” violations to all methods of unfair competition.<sup>13</sup>

It is a mistake to underestimate the seriousness of this proposed rule or to believe that the slowness of past rule-making procedures will prevent the non-compete rule from going into effect sooner rather than later.

But is the elimination of non-compete clauses as big of an issue as the thousands of comments to the FTC seem to make it out to be? The California example may be instructive. California long ago outlawed enforcement of non-compete clauses, except in the sale of a business,<sup>14</sup> and yet the state is a center of technological advancement with active labor markets.

Further, “California is set to become the world’s 4th largest economy<sup>15</sup> — larger than Germany and the United Kingdom if the state were an independent nation.”<sup>16</sup> California had a **\$3.63 trillion gross state product as of 2022**.<sup>17</sup>

The Bill’s findings and the FTC’s report on the proposed rule show that non-compete agreements are used with tens of millions of U.S. workers who are not in sensitive positions. In light of the California experience, perhaps it is time to restrict non-competes to protect workers nationwide?

It is, however, the NDA that remains the primary back stop for many companies to protect trade secrets. NDAs are not part of the Bill. And while NDAs in principle are not the primary targets of the FTC’s proposed rule, NDAs that go too far in practice may be swept up by the movement to eliminate restrictions on worker mobility.

What should employers do now? Definitely look at your NDAs and consider who you are asking to sign them and why, and how you can justify the breadth and duration of each one.

## About the author



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Most important, revisit your measures for protecting your intellectual property: What other tools can you use to help keep your trade secrets from walking out the door?

## Notes

<sup>1</sup> <https://bit.ly/3jHfH22>

<sup>2</sup> “Murphy, Young Reintroduce Bill to Protect American Workers, Limit Non-Compete Agreements,” Press Release, U.S. Senator Chris Murphy (D. Conn.), Feb. 1, 2023, at <http://bit.ly/3jFVIRi>.

<sup>3</sup> *Id.*

<sup>4</sup> “Pursuant to Sections 5 and 6(g) of the Federal Trade Commission Act, the Federal Trade Commission (“Commission”) is proposing the Non-Compete Clause Rule. The proposed rule would, among other things, provide that it is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that the worker is subject to a non-compete clause.” FTC-2023-0007-0001, Regulations.gov. at <https://bit.ly/3DQaziY>.

<sup>5</sup> Worker Mobility Act, Senate Bill, Section 3(b). 6 *Id.* at 6(e).

<sup>6</sup> *Id.* at 6(e).

<sup>7</sup> *Id.* at 6(e)(2).

<sup>8</sup> *Id.* at 6(b).

<sup>9</sup> *Id.* at 6(a).

<sup>10</sup> *Id.* at 6(f).

<sup>11</sup> FTC-2023-0007-0001, Regulations.gov. at pp. 10-11.

<sup>12</sup> “FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers Agency action eliminates non-competes covering thousands of workers, promoting greater economic opportunity and competition,” Press Release, Jan. 4, 2023, at <http://bit.ly/3HCl6ya>.

<sup>13</sup> FTC Press Release, FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition, 11/10/2022, at <https://bit.ly/3RI4RFp>.

<sup>14</sup> Cal. Bus. & Prof. Code § 16600: “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.” (There are some narrow exceptions to the rule, mainly in sale of a business).

<sup>15</sup> <http://bit.ly/3YejKC2>.

<sup>16</sup> M. Torres, “California Set To Become World’s 4th Largest Economy. Who is Left Out?,” California Budget and Policy Center, Nov. 16, 2022, at <http://bit.ly/3RJ4gmQ>.

<sup>17</sup> <http://bit.ly/3lh1BVt>.