



31st ANNUAL

## LABOR AND EMPLOYMENT LAW CONFERENCE

# The FTC Proposed Rule Banning Non-Compete Agreements

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1

## Summary of FTC Ban

Existing non-competes are prohibited with limited exceptions

Non-compete is any agreement that *penalizes* a worker or *functions to prevent* a worker from accepting work with a different person

2

## Agreements that Penalize Employees And Are Expressly Subject To FTC Ban

Liquidate damage clause (Final Rule @76)

Forfeiture of severance (Final Rule @77)

*Exxon v. Drennen 2014 (forfeiture provision in profit share is not a covenant not to compete)*

3

## Agreements That May Function As Non-compete Agreements

Nondisclosure agreements

Training repayment programs

Non-solicitation (FR @77)

*Unless they are so broad and onerous that they penalize a worker from accepting new employment*

4

## Examples of Agreements the FTC Describes As Functionally Equivalent to Noncompete

A non-disclosure that prevents the employee from disclosing “any information” they learned in prior employment (even publicly available information)

A retraining payment program that imposes a significant cost such that the employee cannot take a new job

Final Rule @ 77-78

5

## Senior Executive Exception

- 1 An employee who earns more than \$151,164 annually, and

- 2 Who is in a policy-making position

“final authority to make policy decisions that control significant aspects of a business”

6

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