FTC Proposes New Rule Prohibiting Employers from Implementing Post-Employment Non-Compete Agreements

Posted in Alert on February 17, 2023

LEGISLATIVE UPDATE AS PUBLISHED IN THE FEBRUARY 2023 EDITION OF THE SOUTHEAST TENNESSEE SHRM NEWSLETTER.

In January, by a 3-1 vote, the U.S. Federal Trade Commission (the "FTC") proposed a new rule that would essentially prohibit employers nationwide from implementing post-employment non-competition agreements, on the basis that a non-compete agreement constitutes unfair competition by "block[ing] workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand."

Moreover, the rule would nullify any existing non-competition agreements currently in place and would require employers to inform both current and former workers (including independent contractors) that such clauses no longer are in effect. Critically, the rule would not – at least expressly – prohibit employers' use of other restrictive covenants such as non-solicitation or nondisclosure provisions, but certain guidelines would be put in place to curb their use, as well. The rule would not apply to a non-competition provision implemented within the context of the sale of a business.

The proposed rule is now open for public comment for 60 days and, then, the FTC would elect to implement (or not) a final rule. If the FTC takes that step, any final rule will become effective 180 days following publication. While nowhere near the final stages yet, any final rule enacted by the FTC undoubtedly would face significant legal scrutiny in the courts.

Stay tuned. The "competition" is just starting to heat up!

We Can Help

To learn more, contact Scott Simmons or another member of our Labor & Employment Practice Group.