

FTC's Noncompete Ban Would Hit Retirement, RIA Consolidation

A proposed ban on noncompete contracts by the FTC would likely have implications for the RIA firms some retirement advisories are acquiring to broaden wealth management capabilities.

By *Alex Ortolani*

A proposal by the Federal Trade Commission to ban noncompete clauses for workers in all 50 states may have a knock-on effect for the [registered adviser investment acquisition trend](#) among retirement advisories should it pass, according to recruiting and legal experts.

On Thursday, the FTC announced [a proposed rule](#) to ban employers from using noncompete clauses in contracts, as it can stymie job flexibility, earning power and innovation, the regulator said.

Restricting noncompetes at the national level—as opposed to leaving it a state decision—has been a focus of the Administration of President Joe Biden since his 2020 election and was the subject a formal [executive order in July 2021](#). That call to federal agencies such as the FTC, however, stated the need to protect “workers, farmers, small businesses, startups and consumers.”

The widescale, national ban proposed this week surprised many employers, as it cut across all industries and roles, says David Woolf, an employment attorney with Faegre Drinker Biddle & Reath LLP in Philadelphia. That includes areas such as financial services and asset management, in which noncompetes have become a regular part of recruiting and hiring.

“If someone is developing your strategies, your insights, you don’t want them jumping to a competitor, at least not immediately,” Woolf says.

Woolf notes that the FTC already seems braced for pushback on higher-compensated roles in the financial sector. In a note seeking [public comment on](#)

[its fact sheet](#), the regulator asked for input on “whether senior executives should be exempted from the rule or subject to a rebuttable presumption rather than a ban.”

“The FTC’s recent proposal on banning employment contracts has a legitimate and noble goal of protecting vulnerable, non-exempt employees,” George Wilbanks, founding partner of executive recruitment firm Wilbanks Partners, said in an emailed response. “However, for partner or officer level or senior executives—exempt employees—who have access to important trade secrets or key client account data, the case for protecting corporate assets, or drawing the line of who owns those assets ... is much more complex and nuanced.”

RIA Acquirers, Beware

In theory, retirement plan advisers would not be as concerned with the ban because they tend to have non-solicitation contracts, says Louis Diamond, president of executive recruiting firm and M&A advisory Diamond Consultants. The FTC specifically carves out non-solicitation from the ruling. But the industry would face employee disruption, Diamond says, if the FTA bans noncompetes among the RIA firms that many retirement and benefits industry aggregators are acquiring.

“This could have an impact, especially at the retirement plan consulting level, where the bigger, aggregator platforms in the retirement space—often those that are private-equity backed platforms—have ironclad noncompete contracts as par for the course,” Diamond says.

Companies such as [CAPTRUST Financial Advisers](#), [SageView Advisory Group](#) and [Arthur J. Gallagher & Co.](#) have all recently noted the acquisition of RIAs as part of their forward strategy to provide more holistic financial offerings.

None of these firms immediately responded to request for comment on the proposed rule.

The FTC said that if an investment adviser has a 25% or more equity stake in a firm, a noncompete could be used. But for any RIAs that do not have that kind of stake, they may be at risk of leaving, either before or after an acquisition, Diamond says.

“All these buyers make deals with consideration of the level of risk,” he says. “If they are a flight risk, the risk bucket goes up.”

California, North Dakota and Oklahoma, as well as the District of Columbia, have some form of noncompete ban. The FTC argues that these states have not had issues with workers taking ideas elsewhere.

“Industries that depend on trade secrets and other key investments have still flourished,” it wrote in its fact sheet. “This shows that employers have other ways of protecting these investments.”

Litigation Pending

Overall, the FTC estimates the ban would increase wages by almost \$300 billion per year and expand career opportunities for 30 million Americans. Public comment on the rule will be allowed for 60 days after it is published in the *Federal Register*, which the FTC says will be soon.

Employment attorneys, as well as employers, will likely be weighing in now with comment, as well as legal challenges, should the rule be passed as proposed.

“This FTC proposal, if finalized, will almost certainly be subject to legal challenge,” Marcia Wagner, founder and managing partner in the Wagner Law Group, said in an emailed response. “Until recently, the FTC had not sought to challenge any non-compete agreements, and it is not at all clear that Congress intended the FTC to have this authority.”

Wagner also notes that RIAs were not the intended target of the regulation, but that statements from the Biden Administration focused on the benefit to retail workers and other working-class employees.

“However, if the regulation as finalized survives legal challenges, presumably wealth management and retirement management advisers whose movement would otherwise be restricted by non-competes would seek to take advantage of this new FTC guidance,” she wrote.

Tagged: FTC, Noncompete, retirement plan advisers, RIAs, Wealth Management

