

LABOR AND EMPLOYMENT / LITIGATION

INFORMATION MEMO

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A Ban For Some, But Not All: Exception to the FTC's Proposed Ban on Non-Compete Clauses

The Federal Trade Commission (FTC) sent a shockwave through the corporate world on Jan. 5, 2023, when it released a proposed regulation banning non-compete clauses in all but extremely limited circumstances. The proposed regulation was subsequently published for comment in the Federal Register on Jan. 9, 2023 and is open for comment until March 20, 2023.¹

While organizations are still coming to grips with the potential impact of the proposed non-compete ban, certain industries and businesses may be insulated from its enactment. This is because the FTC's authority to enact the proposed regulation, and thus enforce it, is limited by its inherent authority under the Federal Trade Commission Act (FTC Act). While the FTC Act empowers the FTC "to prevent persons, partnerships, or corporations" from using unfair methods of competition (which the FTC believes include non-competes), it expressly excludes banks, savings and loan institutions, federal credit unions, common carriers, air carriers and foreign air carriers, and persons and businesses subject to the Packers and Stockyards Act from its purview. Accordingly, these industries are exempt from the FTC's proposed non-compete ban.

Further, the FTC Act only applies to corporations "organized to carry on business for its own profit or that of its members." Therefore, true nonprofit corporations are not subject to the FTC's regulatory authority. That said, what constitutes a true nonprofit corporation for purposes of FTC regulation is somewhat unsettled.

In the 1999 decision *California Dental Association v. Federal Trade Commission*, the U.S. Supreme Court found that a nonprofit state dental association, which provided insurance and preferential financing arrangements to member dentists, was subject to the FTC's jurisdiction because the association provided "substantial economic benefits to their for-profit members." Despite organizing as a nonprofit corporation, the association was not automatically exempt from the FTC's jurisdiction. Instead, the FTC's jurisdiction turned on the manner in which the association operated. As a result of this decision, whether the FTC has jurisdiction over a nonprofit hinges on how the nonprofit uses and distributes profits and whether it attempts to use its nonprofit status for the benefit of others seeking monetary gain.

If a nonprofit acts as a true nonprofit, however, it is not subject to the FTC's jurisdiction, and thus, not subject to the FTC's non-compete ban. Therefore, nonprofit companies such as hospitals, museums, charities, volunteer services organizations and research institutes may still be able to utilize reasonable non-compete agreements—subject, of course, to existing limitations under applicable state law. That said, this area of law is unsettled and may change depending on a variety of factors, including how the proposed regulation is ultimately enacted, how the courts interpret the proposed regulation, and how the courts interpret the FTC's authority under the FTC Act. Moreover, the FTC's position on this issue

¹ <https://www.regulations.gov/document/FTC-2023-0007-0001>

remains unclear. To date, the FTC has only confirmed that the exemption for nonprofits applies to the regulation, without elaborating on how it views the parameters of that exception.

It is also important to note that exempt organizations and nonprofits outside the scope of the FTC's jurisdiction and proposed non-compete ban still need to take the steps necessary to best ensure that their non-competes and other restrictive covenants comply with applicable state law.

For any questions about this issue, please feel free to contact [Bradley Hoppe](#), [Kevin Cope](#), [Paul Buehler](#), any attorney in Bond's [litigation practice](#), [labor and employment practice](#) or the attorney at the firm with whom you are regularly in contact.

