

## FTC Non-Compete Proposed Rule - What Does That Mean for Employee Benefit Plans?

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As we recently reported [here](#), the Federal Trade Commission (“**FTC**”) proposed a new rule that, if adopted, would ban non-compete provisions and require rescission of existing non-competes. While the rule is not yet effective, employers should inventory their various benefit plans and compensation arrangements to determine where they have restrictive covenants so that they can act quickly in the event the proposed rule is finalized. The impact of this rule on benefit plans and compensation arrangements could be wide-reaching so employers should not just limit their review to employment agreements. For example, the following provisions in equity and compensation plans could become ineffective if the FTC’s proposed rule becomes final:

- Equity and phantom equity agreements often include restrictive covenants and provide that the awards will be forfeited upon a violation of the restrictive covenants, and any previously vested portion of the award would also be clawed back.
- Code Section 457(f) plans of non-profits often include restrictive covenants and delay payment (and taxation) until the restrictive covenants lapse.
- Code Section 280G provides that parachute payments do not include payments that are established by clear and convincing evidence to be reasonable compensation for personal services (including payments made for someone to refrain from performing services). However, in order for payments for a noncompete to be so excluded, the noncompete must be enforceable.
- Bonus plans often include restrictive covenants and provide for forfeiture of bonuses (and clawback of prior bonuses) in the event the participant violates the restrictive covenants.
- Nonqualified deferred compensation plans subject to Code Section 409A often include provisions that forfeit any employer contributions in the event the participant violates restrictive covenants in the plan.

While employers do not need to make any changes to their plans now, it is important for employers to identify which plans may include restrictive covenants to know how this proposed rule may impact those plans. Employers should also alert their board of directors of the possible change in enforceability of restrictive covenants when the board is approving any new compensation programs that include restrictive covenants so that the board understands that, should the rule be adopted, the restrictive covenants may no longer apply.