



LEGAL NEWS FOR YOUR BUSINESS

March 2023

Tax Alert

ATTENTION, NORTH CAROLINA CORPORATIONS AND LIMITED LIABILITY COMPANIES

Annual reports for corporations and limited liability companies with fiscal years ending on December 31 are due April 15, 2023. Filing of annual reports can be completed via the North Carolina Secretary of State's **online filing** system.

If you have any questions about your reporting obligations, please reach out to any member of Gardner Skelton's corporate and tax team.

Employment Alert

UPDATES ON THE FTC'S PROPOSED NON-COMPETE RULE

On January 5, 2023, the Federal Trade Commission ("FTC") announced a **Notice of Proposed Rulemaking**, outlining a new proposed rule ("the Rule") that would effectively ban non-compete agreements. The FTC considers non-competes to be violations of Section 5 of the Federal Trade Commission Act, which aims to prevent unfair methods of competition. The announcement has caused waves throughout the labor market, affecting nearly every industry.

Although the Rule is not final and will not become enforceable until six months after the issuance of a final rule, employers should take notice of the Rule and how it may affect their employment practices.

Non-compete agreements are commonly used throughout industries to try to prevent workers who develop relationships with customers or who may have access to confidential information or trade secrets from leaving their employer and then using those relationships and/or their work-attained knowledge to compete with their former employer. The FTC has broadly defined a non-compete agreement as “a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer.” In addition, the FTC has proposed a functional test to determine whether an agreement is a de facto non-compete agreement, by evaluating multiple factors, including whether a non-disclosure agreement is so broad that it effectively prevents the employee from working in the same field after the termination of their employment, or whether training reimbursement terms exist in which the costs employees must pay if their employment ends before a certain time period are not explicitly related to the costs incurred by the employer for the hiring and education of the employee.

Under this Rule, employers would not be permitted to enter into or attempt to enter into a non-compete agreement with an employee. Further, the rule would apply retroactively and would void any currently existing non-compete agreements. The proposed Rule has a few exceptions, including non-competes used in the sale of a business and non-compete agreements used between franchisors and franchisees. However, the exceptions are narrow, and can only apply in sale-of-business situations in which the employee subject to the non-compete owns at least 25% of the business.

The Rule is highly controversial and has sparked conversations about non-competes nationwide. Multiple organizations have spoken out in opposition to the Rule, including the United States Chamber of Commerce and the American Hospital Association, which have urged, among other things, that the FTC instead consider a salary threshold or differentiating between high-level and low-level workers. Additionally, comments have stressed that the Rule would prevent companies from protecting their intellectual property, as trade secret laws would only apply after-the-fact, rather than preventatively. Regardless, the Rule is just one example of efforts to curb non-competes in the U.S., as a group of legislators have reintroduced the Workforce Mobility Act, which seeks to ban all newly enacted non-competes, and President Biden specifically spoke out against such agreements in his State of the Union address.

The Rule’s comment period closes March 20, 2023, and the public is encouraged to leave comments on the Rule’s pros, cons, and potential alternatives. If the FTC chooses to issue a Final Rule, many national organizations have made it clear that significant litigation will follow. In the meantime, however, employers should take stock of their current non-compete practices and evaluate the effect the Rule, if made final, would have on their employees and agreements.

If you have questions or concerns about the FTC's Proposed Rule will affect your employment practices, please reach out to any member of Gardner Skelton's employment team.

Healthcare Alert

COVID-19 PHE TO END ON MAY 11, 2023

On January 30, 2023, the Biden Administration announced their intention to end the COVID-19 national emergency and public health emergency declarations (“PHE”) on May 11, 2023. The announcement was made to comply with the Administration’s commitment to give a notice of no less than 60 days and to give healthcare providers ample time to adjust their practices before temporary PHE allowances end. These allowances, enacted at the beginning of the pandemic in 2020, allowed flexibility in coverage for COVID-19 vaccines and tests, telehealth requirements, and insurance coverage, including for Medicaid and Medicare.

While not all flexibilities will end on May 11, 2023, healthcare providers should take note and adapt their practices accordingly. The changes occurring upon the end of the PHE include:

Coverage of COVID tests: Medicare, Medicaid, and private payers will no longer be required to cover COVID tests;

Telehealth considerations:

- Medicare and Medicaid beneficiaries may still receive telehealth services and both audio-only and video services will be covered;
- Some states may end their licensure waiver, and no longer allow physicians licensed in other states to practice medicine;
- The U.S. Department of Health & Human Services (HHS) will end its HIPAA flexibilities for the use of video- and audio-conferencing platforms. Providers must now use a platform that is fully HIPAA compliant;
- DEA-registered providers will no longer be able to prescribe controlled substances without an in-person examination.

For nearly three years, the healthcare system has greatly adapted to the challenges and flexibilities brought about by COVID-19. Although these flexibilities will last another two months, now is the best time for providers to evaluate their current practices and re-align them with the requirements that will arise with the end of the PHE.

If you have questions or concerns regarding the end of the Public Health Emergency, please reach out to any member of Gardner Skelton’s healthcare team.



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