

FTC Charges Forward with Sweeping Non-Compete Ban

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April 24, 2024



On April 23, 2024, the Federal Trade Commission ('FTC') narrowly voted (3-2) to issue a final rule banning almost all non-compete agreements nationwide.

The rule is set to take effect 120 days after it is published in the Federal Register.

The final rule was approved but not without significant criticism. Many are scrutinizing the scope of the rule and the FTC's authority (or lack thereof) to issue the sweeping rule. Less than a day after the FTC voted to approve the rule, the U.S. Chamber of Commerce, the nation's largest business lobbying group, filed a lawsuit against the FTC seeking to block implementation of the rule. Thus, the final rule will face many legal challenges, and its implementation may likely be delayed or thwarted altogether.

What are non-competes?

Millions of American workers are covered by non-compete agreements. Generally, non-competes are used by employers to restrict or prevent former employees from working for a competitor for a specific period of time.

Non-competes are used across a wide range of industries and in various contexts. Many businesses have long considered non-competes necessary to prevent unfair competition from employees and as a tool to protect legitimate business interests.

What is the Rule?

The rule provides that non-competes constitute an unfair method of competition, and therefore violate Section 5 of the Federal Trade Commission Act (the "Act"). The final rule defines a "non-compete clause" as a "term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition". For purposes of the final rule, a "term or condition of employment" includes, but is not limited to, "a contractual term or workplace policy, whether written or oral."

The rule addresses new non-competes (*i.e.*, those entered into after the effective date of the rule) and existing non-competes (*i.e.*, those entered into before the effective date of the rule). These are the highlights you

need to know:

- The rule prohibits employers from entering into and enforcing new non-competes with ***all workers***. The term "worker" includes, but is not limited to, an employee, independent contractor, extern, intern, volunteer, apprentice, sole proprietor who provides a service to a client, or a person who works for a franchisee or franchisor.
- The rule renders existing non-competes unenforceable after its effective date, except for those for "senior executives." The FTC defines a "senior executive" as a worker earning more than \$151,164 annually who is also in a "policy-making position."
- Although a formal rescission of existing agreements is not required, the rule requires employers to notify current and former workers (except senior executives) that their existing non-competes are no longer enforceable.

The final rule does not apply to non-competes entered into as part of the sale of a business. In addition, the rule does not apply to a cause of action (such as a breach of contract claim) related to a non-compete that accrued prior to the effective date. Meaning, a former employee's violation of a non-compete that occurred prior to the final rule's effective date still may be litigated; however, the final rule undoubtedly will impact how that litigation proceeds. Notably, the final rule does not address non-solicitation, non-recruitment, or non-disclosure agreements. However, if you have been following the National Labor Relations Board, you know that many of these restrictive covenant agreements are subject to greater scrutiny and disfavor by other federal agencies.

What should employers do now?

There are various steps employers should consider:

- Employers should take stock of their existing agreements, handbooks, and other employment documents to determine whether any clauses fall within the scope of the final rule.
- Once the rule becomes effective, employers must send notice to existing and former employees (who are not senior executives) clarifying that their non-competes are no longer valid.
- Employers can ensure that their executive-level and highly compensated employees already signed enforceable non-competes. If they have not, evaluate other contractual provisions (like confidentiality, non-solicitation, etc.) that protect your business since new non-competes will not be permitted (at least until the legal battles over this final rule are resolved).
- Employers should consult legal counsel to determine what measures to take to protect confidential information, trade secrets, and intellectual property.
- Stay tuned . . . this sweeping ban will be ripe for extensive legal challenges over the next few years.

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