

Employment Update: FTC Rule on Non-Compete Provisions

Update – August 21, 2024

FTC'S NON-COMPETE RULE WILL NOT GO INTO EFFECT ON SEPTEMBER 4.

On August 20, 2024, the Federal Court in Texas issued a final ruling on the FTC's Non-Compete Rule stating that the FTC "(i) promulgated the Non-Compete Rule in excess of its statutory authority, and (ii) the Rule is arbitrary and capricious." The Court held the FTC's Non-Compete Rule was unlawful. The Court ordered that the FTC shall not enforce the Rule and the Rule shall not take effect on September 4, 2024. Therefore, employers can continue to enter into non-compete agreements with their employees in accordance with applicable state laws.



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Update – July 3, 2024

On July 3, a Federal Court in Texas issued a preliminary injunction halting the implementation of the FTC's Non-Compete Rule. However, the Order applies only to the named Plaintiffs in the Texas case. The Texas court is expected to issue a final ruling on August 30. The Court found the FTC lacks the statutory authority to issue substantive rulemaking regarding unfair methods of competition.

It is still uncertain as to whether the final ruling will have a broader ban on the FTC from implementing its ruling for all employers nationwide. There is another case pending in the Eastern District of Pennsylvania with a ruling expected at the end of July. Therefore, it still remains uncertain as to whether the FTC rule will go into effect on September 4.

Background

The Federal Trade Commission approved the Final Non-Compete Clause Rule ("Final Rule") on April 23, 2024. The Final Rule's effective date is 120 days after publication in the Federal Register. This rule will ban non-compete provisions for most employees, except for the following: (i) "Senior Executives" who have existing non-compete provisions in place prior to the effective date, and (ii) for non-compete provisions entered into pursuant to a bona fide sale of a business of the person's ownership interest in the business or all or substantially all of the business assets.

Does this impact contractors and severance agreements?

The Final Rule also applies to non-compete provisions in severance agreements, as well as for contractor agreements.

Definition of Senior Executive

Senior Executives are defined as those in “a policy-making position” with a total annual compensation of at least \$151,164 in the preceding year. The compensation can include salary, commissions, and/or bonuses that were earned in the 52-week period. Compensation does not include fringe benefits.

Will existing non-compete agreements remain valid for other workers?

Existing non-compete provisions with workers other than Senior Executives are not enforceable after the Final Rule’s effective date. The Final Rule provides that notice must be given to any current or former worker who has a non-compete provision that is no longer enforceable. The FTC provides a model notice* to notify the worker that the company will not enforce any non-compete clause, that the worker is free to work for a competitor and may start their own competitive business.

Are there challenges to the rule?

The Final Rule has already been challenged in court, and it stands to see if any injunction will be issued on the implementation of the Final Rule.

What does this ban mean for my business?

If the Final Rule survives legal challenges and becomes effective, companies should have all agreements finalized with any new Senior Executives prior to the implementation of the Final Rule. Any non-compete provision (including Senior Executives) entered into after the Final Rule’s effective date will not be enforceable.

For any workers who have signed non-compete provisions, the Final Rule provides a notice requirement. However, companies may also want to consider drafting an amendment to their current employee agreements to remove and rephrase any offending non-compete provisions.

Questions

Our Team will continue to monitor the developments with this decision.

If you have questions you would like to discuss with respect to non-competes or any other employment issue, please contact one of the employment attorneys listed below.

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*The model notice can be found on page 566 of the final regulation.

https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf