

The FTC Did What?! It Banned Noncompetes

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Over a year ago, in January 2023, [we reported](#) on Winstead's Employer Law Resource Blog that the [Federal Trade Commission](#) issued a proposed rule banning noncompetes. The FTC later extended the original 90-day notice-and-comment period and thereafter apparently took its time considering the multitude of comments it received. Finally, on April 23, 2024, the FTC issued a [press release](#) announcing the issuance of its [final rule](#) officially banning noncompetes nationwide.

FTC's Stated Purpose.

The FTC's press release frames the noncompete ban as a tool to reinvigorate the United States economy, stating that banning noncompetes will create more than 8,500 new startups and businesses annually. The FTC asserts that, out of the 26,000 comments received during the notice-and-comment period, 25,000 comments were in support of the FTC's proposed ban on noncompetes. The final rule has yet to be published in the Federal Register, but it will become effective within 120 days of such publication.

Definition of Noncompete.

The [final rule](#) bans existing noncompetes nationwide for most workers, including the use of such covenants in severance agreements. The FTC broadly defines a "non-compete clause" as a "term or condition of employment that either prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:

(A) 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

(B) operating a business in the United States after the conclusion of the employment that includes the term or condition."

This definition does not expressly include nondisclosure, training-repayment, no-hire, and nonsolicitation agreements. The FTC further stated that the definition of noncompete "would generally not apply to other types of restrictive employment agreements that do not altogether prevent a worker from seeking or accepting other work or starting a business after their employment

ends and do not generally prevent other employers from competing for that worker's labor." That said, under the "functions to prevent" clause of the noncompete definition, the final rule can encompass nondisclosure and nonsolicitation agreements if the scope of such agreement has the same functional effect as a noncompete clause.

For that matter, the FTC also noted certain judicial opinions that found certain restrictive covenants could be "de facto non-compete." (citing "[*Wegmann v. London*, 648 F.2d 1072, 1073 \(5th Cir. 1981\)](#)" (holding that liquidated damages provisions in a partnership agreement were de facto non-compete clauses "given the prohibitive magnitudes of liquidated damages they specify"); [*Brown v. TGS Mgmt. Co., LLC*, 57 Cal. App. 5th 303, 306, 319 \(Cal. Ct. App. 2020\)](#) (holding that an NDA that defined "confidential information" "so broadly as to prevent [the plaintiff] in perpetuity from doing any work in the securities field" operated as a de facto non-compete clause and therefore could not be enforced under California law, which generally prohibits enforcement of non-compete clauses)").

Notice Requirement.

Practically speaking, the final rule contains a notice requirement, wherein employers must give notice to employees that their existing noncompete cannot be legally enforced against the worker. Employers must comply with the notification requirement within 120 days of the rule's publication in the Federal Register. The final rule includes model language to assist employers in sending compliant notices to applicable workers. Notices can be delivered to workers via hand delivery, regular mail, email, and even text messages.

Exceptions.

The FTC does include several notable exceptions to its ban, including:

- (1) certain highly compensated senior executives with existing noncompetes,
- (2) the sale of a business (wherein the seller owns at least 25% of the business entity), and
- (3) causes of action that accrued *prior to* the final rule.

The senior-executives exception appears likely to pose the most questions by employers in the near term. Under the final rule, a "senior executive" is someone who has at least \$151,164.00 in "total annual compensation" and who is in a "policy-making position." A "policy-making position" is an employer's "president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority." This last broad (and, perhaps, circular) category seems likely to lead to questions by employers about the scope of the ban's senior-executives exception.

What Now?

Challenges to the FTC's new rule are expected to arise quickly. For example, the U.S. Chamber of Commerce has [already indicated](#) that it intends to file a lawsuit to block the FTC's final noncompete rule. At Winstead, we expect that such challenges and requests to enjoin the noncompete rule will be filled and sought swiftly.

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