

Practical Advice Regarding FTC's Non-Compete Ban for Employers

Article By:

Labor and Employment Practice Group

By now, everyone knows that the FTC issued a final rule that would ban all noncompete agreements entered into after the effective date.

Effective Date of FTC Ban

The FTC's noncompete ban is not in effect yet. It does not become effective until 120 days after the date the final rule is published in the Federal Register. The Federal Register is expected to publish the final rule next week, likely making the effective date around the beginning of September 2024.

Existing Legal Challenges to Ban

The U.S. Chamber of Commerce has already filed a challenge to the noncompete ban (*Chamber of Commerce of the United States of America v. Federal Trade Commission*, Case No. 6:24-cv-00148 (E.D. Tex. filed April 24, 2024)). There has been another legal challenge filed as well. We don't know whether these legal challenges will be successful, but we will provide updates when we know more.

Five Things To Do to Prepare

If the legal challenges are not successful and the rule goes into effect (again, approximately early September 2024), here are steps that employers can take to get ready:

- 1. Review existing noncompete agreements to see if the rule bans them.** As a first step, review your existing "noncompete" clauses. Issues to analyze include whether the individual is a "worker" and whether the individual is a "senior executive."
 - Under the rule, a "senior executive" is a person, typically a company officer such as a president, earning more than \$151,164 annually with "policy-making authority." Policy-making authority means "final authority to make policy decisions that control significant aspects of a business entity or common enterprise and does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise." (As so defined, the FTC estimates that senior executives represent less than 0.75% of all workers.) If an individual is a "senior executive," then a noncompete

in place *before* the effective date can still be enforced.

- If the individual is not a “senior executive,” the rule bans any noncompete clause for a worker, independent contractor, or another non-employee worker. Who constitutes a “worker” is defined very broadly, essentially including anyone regardless of legal status who provides services to someone else.
2. **Review other employment agreements or provisions to see if they are banned.** The ban may not void non-solicitation or non-disclosure agreements depending on the provision. It depends on the facts and the provision itself. If the provision prohibits a worker from, penalizes a worker for, or functions to prevent a worker from seeking or accepting work in the U.S. with a different person or from operating a business in the U.S., then it is a “noncompete clause” that is subject to the rule. So, depending on how the agreement is drafted and the factual circumstances, a non-solicit of customers *could* be considered a prohibited noncompete.
 3. **Prepare a notice for non-compliant agreements.** After determining which noncompete clauses do not comply with the FTC rule, prepare a notice to send to workers with those agreements. The notice must inform them that the noncompete clause is no longer valid as of the effective date. The FTC put out [model language](#) for the notification.
 4. **Initiate legal action?** The FTC’s rule does not apply where a cause of action related to a noncompete clause accrued before the effective date. So, if a worker is violating a noncompete that would otherwise be banned under the FTC rule, an employer may want to consider initiating legal action against that worker before the effective date to fall under this exception. Of course, there will be other facts and circumstances to consider as well when deciding whether to pursue legal action, which should be decided in consultation with legal counsel.
 5. **Enter into noncompetes with a worker who would otherwise qualify as a “senior executive.”** The FTC ban permits noncompetes with “senior executives” that pre-exist the effective date to continue after the effective date. After the effective date, an employer may not require a senior executive to sign a new noncompete. Employers should make sure they mind existing state laws to make the noncompete comply as much as possible with state law to assist enforcement efforts.

Update Form Agreements

As part of the review of existing noncompete agreements, take the opportunity to update other form agreements to remove now unenforceable noncompete (and possibly non-solicit or non-disclosure) provisions. It is always a good idea to review and update the agreement generally to make sure that it reflects your current business and definition of confidential information. If the rule prohibits noncompete provisions, employers should make sure provisions about non-solicitation or non-disclosure of confidential information are as strong as possible.

The Rule Does Not Apply to Some Entities or Situations

The final rule does not apply to (1) true nonprofit entities as they fall outside of the jurisdiction of the FTC Act or (2) banks because the FTC does not have regulatory authority over banks (although it does apply to bank affiliates). Also, the final rule generally does not apply to business owners upon the “bona fide” sale of a business. Before assuming the rule does not apply to you, consult your counsel.

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