

FTC Final Rule Banning Noncompetes Challenged in Court on Same Day

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The Noncompete Rule

On April 23, 2024, the Federal Trade Commission (FTC), issued a Final Rule banning all noncompete agreements for any worker in the United States, regardless of industry, title, job function, or compensation, after the effective date of 120 days from publication in the Federal Register.[1] The Final Rule generally defines a noncompete to mean a contractual term, written or oral, or workplace policy that prevents a worker from working for a competing employer, or starting a competing business, within a certain geographical area and period of time after the worker's employment ends.[2] This sweeping new Final Rule is anticipated to become effective between August 20-24, 2024.

The Final Rule applies to anyone who works, paid or unpaid, for a for-profit employer and to independent contractors. Commencing on the effective date, it prohibits employers from entering into new noncompetes with any employee, including senior executives, or representing to any employee that they are subject to a noncompete.

The Final Rule does allow for enforcement of existing noncompetes entered into with "senior executives." Senior executive means a person in a "policy making position" who was paid more than \$151,164 in the prior year.[3] Existing noncompetes for senior executives are not affected by the Final Rule and any new noncompetes with senior executives entered into prior to the effective date are effective, but only until its expiration. However, no new noncompetes with senior executives may be entered into after the effective date.

All non-senior executives and employees who are now subject to a noncompete must be given a written notice by the effective date, stating that their noncompetes are no longer in effect and will not be enforced. The Rule contains model language for the notice.

The Final Rule contains an exemption for noncompetes “entered into by a person pursuant to a bona fide sale of a business entity, of the person’s ownership interest in a business entity, of all or substantially all of a business’s entity’s operating assets.” It also exempts causes of action that accrued prior to the effective date, and does not apply to not-for-profit entities.

Immediate Legal Challenges to the Rule

Just hours after the FTC issued the Final Rule, Plaintiff Ryan, LLC, (a global tax services firm), filed the first lawsuit against the FTC in the United States District Court for the Northern District of Texas.[4] Ryan alleges that it will be seriously and irreparably harmed by the implementation of the Noncompete Rule, and asks for a judicial declaration that the Noncompete Rule violates the Administrative Procedure Act and Article II of the U.S. Constitution. The following day, the Chamber of Commerce filed a lawsuit seeking declaratory and injunctive relief in the United States District Court for the Eastern District of Texas asserting similar allegations contesting the validity of the Final Rule.[5] The Chamber’s lawsuit includes a request for a permanent injunction on enforcement of the Final Rule and a delay of the effective date and implementation pending the conclusion of the case.

If a court issues a stay, temporary restraining order, or preliminary injunction, the implementation of the rule would be delayed while the challenge to its validity is litigated. But, unless and until a nationwide stay or other relief is granted, employers should plan to comply by the effective date, and thereafter should remain vigilant for further legal developments. Given other cases pending before the US Supreme Court[6] that challenge the legal implication of a federal agency’s rule-making authority, the outcome of those cases also may decide the effect of the FTC’s Noncompete Rule.

Employer Strategies and Planning

While legal challenges against the Final Rule play out, employers should review their existing noncompete agreements with counsel to ensure compliance and to keep abreast of new developments. Moreover, employers should assess whether their business interests can be protected by agreements covering non-disclosure and confidentiality of employer information, non-interference, and non-solicitation of customers and employees.

Employers should also ensure that all company trade secrets are properly safeguarded, shared with only those who have a business need to know, and are properly secured to ensure their secrecy. If an employer’s handbook contains a noncompete policy, the handbook should be reviewed to determine if changes must be made and whether notice should be given as provided in the Final Rule.

For more information and guidance on the developing status of the Noncompete Rule, employers should contact the authors or your Nelson Mullins attorney.

[1] The full text of the Final Rule can be found at the following link: [Noncompete Clause Final Rule \(ftc.gov\)](https://www.ftc.gov).

[2] Employers in a wide range of industries (healthcare, technology, professional services, to name a

few) utilize noncompetition agreements to protect legitimate business interests and to promote innovation, collaboration, worker training, and company sustainability and growth, among other things. The agency estimates that 30 million people – an estimated 18% of U.S. workers – are bound by noncompetes. In the vast majority of states, reasonable noncompetition agreements are enforceable. That is – until the FTC issued the Noncompete Rule.

[3] Policy making position means a president, chief executive officer, or the equivalent, or other person who has policy making authority, i.e., decisions that control a significant aspect of a business entity.

[4] Ryan, LLC v. FTC, Case No. 3:24-cv-00986 (N.D. Tex) (filed April 23, 2024).

[5] Chamber of Commerce of the United States of America et al v. FTC and Lisa Khan, Case No. 6:24-cv-00148 (E.D. Tex) (filed April 24, 2024).

[6] See Loper Bright Enterprises, et al. v. Raimondo, Sec. of Comm., et al., Dkt. No. 22-451; Relentless, Inc. v. Dep't of Com., Dkt. No. 22-1219; Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., Dkt. No. 22-1008.

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National Law Review, Volume XIV, Number 207

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