

## FTC Votes to Implement Nationwide Ban on Non-Compete Agreements

April 24, 2024

On April 23, 2024, the Federal Trade Commission (“FTC”) voted 3-2 to implement a nationwide ban on non-compete agreements. The FTC’s final rule (the “Rule”) makes most existing non-competes with employees and independent contractors unenforceable and largely prohibits employers from entering new non-competes. The FTC’s rationale for the ban is its finding that non-competes are an unfair method of competition.

The Rule contains some limited exceptions. It does not apply to existing non-competes with senior executives that were entered before the effective date of the Rule. A senior executive is someone whose total annual compensation is more than \$151,164 and holds a policy-making position (which is typically the president, CEO, or other officer with policy-making authority). Employers should note, however, that they cannot enter new non-competes with senior executives.

The Rule also excludes non-competes entered into by a person pursuant to the sale of a business entity, of the person’s ownership interest in a business entity, or all or substantially all of a business entity’s assets. And the Rule does not apply to non-competes that are part of litigation which arose prior to the Rule’s effective date.

The Rule does not prohibit confidentiality or non-solicitation of customer agreements. However, the FTC may try to argue that very broad non-solicitation agreements (which essentially prohibit solicitation of nearly all the customers in an industry) fall within the FTC’s definition of a non-compete. The FTC defines a non-compete as any agreement that prohibits a worker from seeking or accepting work.

The Rule does not go into effect until 120 days after it is published in the Federal Register. We anticipate significant litigation challenging the Rule. The first lawsuit was filed the same day the Rule was announced.

Before the Rule goes into effect, employers must give written notice to all workers with whom it has entered non-competes made unenforceable under the Rule. The notice must state that the employer will not enforce the non-compete. Such notice must be issued by the Rule’s effective date. Model language for the notice is available at <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule>.

Please stay tuned for further updates as the litigation regarding the Rule progresses.

*This article is for informational purposes only and should not be considered legal advice. Please consult with your legal counsel regarding any specific situation.*

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