An Overview of the Federal Trade Commission's Final Rule Banning Non-Compete Clauses

What You Need to Know

On April 23, 2024, the Federal Trade Commission (FTC), in a 3-2 vote, approved in final form its rule banning non-compete clauses in most instances. The rule is scheduled to become effective 120 days after its publication in the Federal Register.

The final rule defines a non-compete clause as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) 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 (2) operating a business in the United States after the conclusion of the employment that includes the term or condition.

The final rule is already facing legal challenges, including a lawsuit filed by the U.S. Chamber of Commerce and other business groups, and may never become effective in its present form. Still, both employers and employees who may be impacted should familiarize themselves with the key provisions of the FTC's final rule, which are summarized in this Alert and would affect both future and existing non-compete clauses.

Key Provisions and Impacts

With respect to workers other than senior executives, it will be a prohibited, unfair method of competition:

By the effective date of the rule, an employer who has entered into a non-compete clause must provide the worker with a clear and conspicuous notice indicating that the non-compete clause will not be, and cannot be, enforced against the worker. The FTC's rule contains a form of notice which may be used for this purpose.

Senior Executives

An exception to the rule is provided for non-compete clauses entered into with a senior executive prior to the effective date of the rule. A senior executive is generally a worker in a policy making position who earns at least $151,164 annually.

It is important to note with regard to senior executives that once the rule becomes effective, it will still be a prohibited, unfair method of competition to enter into or attempt to enter into a non-compete clause; to enforce or attempt to enforce a clause entered into after the effective date; or to represent that a senior executive is subject to a non-compete clause where it was entered into after the effective date.

Another Exception

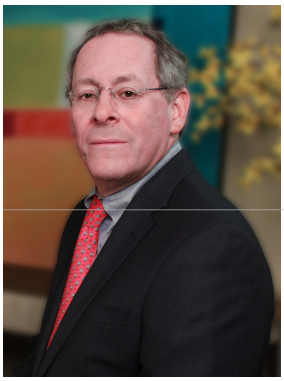
An exception is also provided for non-compete clauses that are entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in the business entity, or of all or substantially all of the operating assets of such an entity.

What Comes Next

The FTC's final rule does not address many important issues, including whether an amendment to an existing employment agreement with a senior executive that is entered into after the effective date of the rule will be viewed as a new agreement, thus voiding a non-compete clause contained in it. It is also not known from the 570-page rule whether the FTC will attempt to enforce the rule against not-for-profit entities.

Setting aside the uncertainty surrounding legal challenges to the FTC's final rule, employers should nevertheless consider proactively consulting with employment counsel to review their use of non-compete clauses with current and former workers in order to assess what action, if any, might be appropriate, including the revision of existing employment agreements and company policies.

We will continue to provide timely updates on the status of the FTC's final rule and related legal challenges. Please contact the author of this Alert with questions or to discuss your specific business circumstances.



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