

THE FTC HAS ANNOUNCED A BAN ON MOST NON-COMPETE AGREEMENTS - KEY POINTS FOR EMPLOYERS TO KNOW

PUBLICATION, *RCCB EMPLOYMENT CLIENT ALERT* - ALEXANDER J. NASSAR, APRIL 26, 2024

On April 23, 2024, the Federal Trade Commission ("FTC") issued a final rule (the "Rule") banning most non-competes for workers. The Rule becomes effective 120 days after publication in the Federal Register. Business groups have already filed lawsuits challenging the Rule. It is uncertain, however, whether the Rule will stand in whole or in part. This means that employers need to strategize in advance for how to deal with the potential implications of the Rule.

WHAT DOES THE RULE BAN?

The Rule prohibits employers from entering or attempting to enter into non-competes with all workers on or after the effective date. This applies to all types of workers, including employees and independent contractors.

State laws that are even more restrictive on non-competes than the Rule continue to apply.

ARE THERE EXCEPTIONS TO/EXCLUSIONS FROM THE RULE?

The Rule provides a few limited exceptions to its broad prohibitions. These include the following:

- The Rule does not directly impact agreements regarding confidential information, trade secrets, customer non-solicits, or employee/service provider non-solicits. However, employers must ensure that the language in these covenants does not prohibit workers from, or penalize them for, seeking or accepting work in a different position or operating a business.
- Non-competes binding "senior executives" prior to the effective date of the Rule may still be enforced. However, non-competes with senior executives following the effective date of the Rule are prohibited. The definition of "senior executive" under the Rule is very restricted; to meet this definition workers must be in a "policy-making position" and make at least \$151,164 annually. The FTC estimates that this definition will apply to less than 1% of workers; reading between the lines, this means that a narrow view will be taken on workers who are found to be in a "policy-making" position.
- Non-competes may still be entered into in connection with the bona fide sale of a business entity, or disposition of a person's interest in a business entity.
- Franchise agreements between franchisors and franchisees may still contain non-competes.
- Breaches of non-competes may still be enforced where a cause of action accrued prior to the effective date of the rule.

IS NOTICE REQUIRED UNDER THE RULE?

Yes. Employers must provide affected workers with clear and conspicuous notice that non-competes affected by the Rule will not be enforced. The FTC has provided a model notice for employers to use. Existing non-competes in place as of the effective date of the Rule do not otherwise need to be rescinded.

KEY TAKEAWAYS FOR EMPLOYERS

The Rule is expected to face significant legal challenges which could delay its implementation and/or modify its final scope. Indeed, legal challenges to the Rule are already underway. However, employers cannot rely on the success of these challenges to delay planning for the Rule's potential impact, and should begin taking some important steps to prepare. Though the specific requirements of the Rule may change, even significantly, the Rule raises some broader concerns for employers to contemplate.

- Employers should understand how non-competes are used within their specific businesses, take stock of the non-compete agreements in force, and the risk the business could face if those clauses become unenforceable.
- Challenges to the Rule may ultimately broaden the classes of workers to whom non-competes could still apply. If this happens, employers will be well-served by determining ahead of time the workers for whom non-competes would be most essential, so that they can more readily adapt as the Rule is implemented.
- Employers should ensure that their covenants with workers relating to confidential information, trade secrets, customer non-solicits, and employee/service provider non-solicits are robust and remain out of scope of the Rule. These protections will be essential for employers going forward regardless of the outcome of challenges to the Rule.

There will certainly be more to come on these developments in the ensuing days, weeks, and months. In the meantime, we stand ready to help our clients navigate these important changes. Contact Alexander Nassar to leverage the experience of Royer Cooper Cohen Braunfeld LLC's Employment Practice Group.

PROFESSIONALS

Alexander J. Nassar

CAPABILITIES

Employment