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FTC Bans Worker Non-Competes

Alert

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Yesterday, by a vote of 3-2, the Federal Trade Commission (FTC) passed the final version of its much-talked-about non-compete rule. The final rule hews closely to the proposed rule, effectively banning all existing or future non-compete agreements between an employer and non-senior-executive employees or other workers. The FTC modified the final rule for senior executives, only banning prospective non-compete agreements. The final non-compete rule will go into effect 120 days after publication in the *Federal Register*—on September 4, 2024. It is almost certain that there will be substantial legal challenges to the FTC's final rule (at least one has already been filed), but employers should begin evaluating the impact of the final rule on their employment agreements, should it become effective.

BAN ON FUTURE NON-COMPETES FOR ALL WORKERS

The FTC's final non-compete rule prohibits employers from entering into or trying to enter into any non-compete agreement with *any* worker after the rule goes into effect.

The definition of "non-compete clause" includes any condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (a) seeking or accepting work with someone else after concluding employment or (b) operating a business after concluding employment. The FTC was clear that "appropriately tailored [non-disclosure agreements] or [training repayment agreements]" are permissible under the final rule, but warned that overly broad agreements of these types are prohibited if they functionally prevent workers from obtaining other employment in the industry or starting a competing business. The final rule does not apply to restrictions that operate only outside the United States (e.g., to prevent a worker from working or starting a business in Canada).

The final rule covers any type of worker (e.g., interns, volunteers, staffing contractors), regardless of whether such individuals are paid or unpaid or are considered "employees" under other state or federal laws.

EXISTING NON-COMPETES NOT ENFORCEABLE UNLESS WITH SENIOR EXECUTIVE

For most workers, the FTC's final non-compete rule makes enforcement of any existing non-compete illegal. The FTC stated that employers do not need to formally rescind any existing non-competes with workers, but employers will not be permitted to enforce most existing non-competes (or seek to enforce them).

Any non-compete with a "senior executive" that is in effect when the final rule takes effect on September 4, 2024, will be permitted to remain in force. A senior executive is defined as a worker earning more than $151,164 who is in a "policy-making position." The final rule keeps the definition of "senior executive" narrow by specifying that policy-making positions are only those where the individual has the final authority to make policy about significant aspects of the business. The definition does not apply to positions where the individual merely advises or exerts influence over decisions or positions where the individual makes final policy decisions only for a subsidiary or affiliate of a common enterprise.

Employers are required to provide written notice to all current and former non-senior-executive workers that have a non-compete by the effective date of the final rule. The FTC provided model language for the required notice (in English and several other languages), which advises current and former workers that their non-compete restrictions are no longer in effect and that there are no limitations on their ability to work for any company, competitor, or even to start a competing business. The FTC created a safe-harbor for employers that use the model language.

EXEMPTION FOR SALE OF A BUSINESS

The final rule is inapplicable to any non-compete entered as a part of a "bona fide sale of a business entity," a person's ownership interest in a business entity, or all or substantially all of the operating assets of a business entity.

WHAT NOW?

The final rule will likely become effective on September 4, 2024, and will likely face significant legal challenges even before the effective date. One lawsuit asking to strike down the rule has already been filed by a private plaintiff in the U.S. District Court for the Northern District of Texas. Many commentators—and two FTC commissioners—believe that the FTC lacks the authority to issue such a sweeping rule and that the final rule violates the major-questions doctrine (as explained by the U.S. Supreme Court in *West*

Virginia v. EPA). A court may therefore enjoin enforcement of the final rule (at least for a while).

Despite the potential for serious legal challenges, employers need to consider the impacts the final rule will have on their current (and prospective) agreements, and take steps to comply with the rule should it become effective. Preparation for complying with the final rule includes identifying all current and former workers, interns, volunteers, and independent contractors with non-compete agreements or broad confidentiality, non-solicitation, or repayment agreements or similar agreements. From there, employers should work with their attorneys to analyze which workers are required to receive notice under the final rule and prepare a process for ensuring that notice is provided. Employers may also want to consider whether less restrictive alternatives—such as appropriately tailored confidentiality agreements—should be implemented to address the potential loss of a non-compete agreement.

For more information on the FTC ban of non-competes, please contact Amy Conway, Jeetander Dulani, Alisa Ehrlich, Sharon Markowitz, Sharon Ng, Rick Pins, Stephanie Scheck, Vicki Smith, Nicci Warr or one of the attorneys listed below or the Stinson LLP contact with whom you regularly work.

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