

April 26, 2024 | Business, Corporate & Securities, Employment & Employee Benefits, Insights

What You Need to Know About the FTC's Ban on Most Non-Competes

By: Kayla Perry

The Federal Trade Commission ("FTC") issued a final rule this week that bans almost all non-competition agreements between employers and workers. But the rule is not scheduled to take effect until late August or early September, and there is already litigation challenging it.

The final rule, if it survives legal challenges, will impact workers at all levels, from minimum wage to the C-suite. The rule prohibits employers from entering into any term or condition of employment that prohibits or penalizes a worker (including employees and independent contractors) for, or functions to prevent a worker from:

1. seeking or accepting work in the U.S. with another person after ceasing employment with the employer; or
2. operating a business in the U.S. after ceasing employment with the employer.

In addition to prohibiting new non-competes, the final rule applies to existing non-competes.

The final rule does not have an impact on non-disclosure agreements or non-solicitation agreements, except to the extent they have the same operational effect as non-competes.

Exceptions to the Non-Compete Ban

The final rule carves out the following exceptions from the ban:

- existing (not new) non-competes with a "senior executive," meaning a worker who:
  - (i) was (a) in a policy making position, such as a president, chief executive officer, or equivalent, or (b) an officer of a business or



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natural person who had final authority to make policy decisions that control significant aspects of a business entity or common enterprise (excluding authority limited to advising or exerting influence over policy decisions or having authority to make policy decisions for only a subsidiary or affiliate of a common enterprise); and
  - (ii) earned a total compensation of at least $151,164 either (a) in the preceding year; (b) when annualized if the worker was employed for only part of the preceding year; or (c) when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year;
- non-competes entered into by a person pursuant to a bona fide sale of a business entity;
- any cause of action accrued before the effective date of the final rule, protecting any ongoing litigation from the implications of the final rule;
- enforcement, or attempts to enforce, a non-compete or to make representations about a non-compete where the employer has a good-faith basis to believe the final rule does not apply; and
- industries in which the FTC does not have jurisdiction under the FTC Act, such as banks, savings and loan institutions, federal credit unions, air carriers, persons and businesses subject to the Packers and Stockyards Act, and certain non-profit organizations.

Notice Requirement

Under the rule, companies must provide notice to any worker who is not a senior executive by the effective date that the worker's non-compete is no longer in effect and will not be, and cannot legally be, enforced against the worker. The notice must:

1. identify the person who entered into the non-compete with the worker; and
2. be delivered (a) by hand to the worker; (b) by mail to the worker's last known personal street address; (c) by email to an email address belonging to the worker; including the worker's current work email address or last known personal email address; or (d) by text message to a mobile phone number belonging to the worker.

Effective Date

The final rule is set to take effect 120 days after its publication in the Federal Register. (As of the date of this writing the final rule has not yet been published.) However, as noted above, the rule is already facing several legal challenges, including by the U.S. Chamber of

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Commerce. Rich May will monitor developments to these legal challenges.

No immediate action is required to be taken by employers; however, employers should consider the impact that the final rule, if it survives legal challenges, will have on both their present and future employment agreements, and should review their current policies and practices, and determine which workers, if any, qualify as senior executives.

Additionally, companies that seek to acquire or sell businesses should consider the impact the final rule, if it becomes effective, will have in the context of mergers and acquisitions.

Contact the author or another member of your Rich May team to examine your current employment agreements or to otherwise assist you to navigate the final rule and its implications.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Kayla Perry.

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