

Client Alert

April 26, 2024

FTC Announces Rule Banning Non-Compete Agreements

On April 23, 2024, the FTC issued a “final rule” that bans non-compete agreements and makes most existing non-compete agreements unenforceable after the rule’s effective date.

The final rule will go into effect 120 days after publication in the federal register. It is expected that final rule will be challenged in the courts so this may delay the effective date of the rule.

1. Upon effectiveness the final rule shall supersede all state laws, regulations, orders, and interpretations that are not consistent with the final rule.
2. Generally a non-compete clause means: A term or condition of employment that prohibits, penalizes, or functions to prevent a worker from: (i) seeking or accepting work with a different person after the conclusion of the employment that includes the term or condition; or (ii) operating a business after the conclusion of the employment that includes the term or condition.
3. Upon effectiveness, post-employment non-compete clauses will be banned for all workers, including employees and independent contractors, except for existing noncompete agreements already in effect with “senior executives.” The rule defines “senior executive” as a worker with a total annual compensation of at least \$151,164 who is in a “policy-making position.” After the effective date, an employer may not enter into a non-compete agreement with any worker, even a senior executive.
4. The rule would apply to post-employment non-compete restrictions, not restrictions during a worker's employment with an employer.
5. Confidentiality, Non-Disclosure, and Non-Solicitation agreements would generally still be allowed under the rule, unless the restrictions are so onerous as to have the same functional effect as a non-compete

clause. Employers should consult with counsel when planning to implement these restrictions.

6. The rule does not apply to non-compete clauses entered into in connection with a bona fide sale of a person's ownership interest in a business entity, or of all or substantially all of a business entity's assets.

7. Once the rule is effective, employers must notify their employees and former employees in writing that their non-competes are no longer enforceable.

8. The rule does not apply where a cause of action related to a non-compete accrued prior to the rule's effective date.

9. Certain employers are not subject to the FTC Act and therefore are exempt from the rule's application. These employers include banks, insurance companies, nonprofits, and some other entities. While the list includes nonprofits, nonprofit entities should consult with counsel as the FTC has indicated that it would analyze the rule's applicability to these organizations on a case-by-case basis.

We will continue to update you on this matter. Please contact our office with any questions.

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