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Labor & Employment and Antitrust Alert

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FTC approves nationwide ban on non-competes

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The Rule, which becomes effective 120 days after publication, bans non-competes with workers and negates many existing agreements.



What's the impact?

- The Rule covers all “workers,” including employees, independent contractors, volunteers, interns, and externs.
- Upon the effective date of the Rule, existing non-compete agreements with employees other than senior executives are not enforceable.
- The Rule does not apply to certain non-competes entered into in connection with the sale of a business.

On April 23, 2024, the Federal Trade Commission (FTC) issued [a new Rule](#) that—with limited exceptions—bans non-compete clauses for workers nationwide across all industries. The Rule also requires employers to notify workers, including former employees, that the non-compete clauses are no longer in effect.

Key points of the FTC's non-compete Rule

The Rule provides that it is an “unfair method of competition” for an employer to “enter into or attempt to enter into a non-compete clause,” “enforce or attempt to enforce a non-compete clause,” or “represent that the worker is subject to a non-compete clause.” The term “non-compete clause” is defined broadly as any contractual term “that prohibits a worker, penalizes a worker for, or functions to prevent a worker from” seeking or accepting work with a different person or operating a business, after the conclusion of the worker’s employment with the employer. The Rule does not prohibit other post-employment restrictive covenants, like non-disclosure or non-solicitation clauses. However, the FTC noted that the “functions to prevent” language could be used to invalidate such otherwise permissible clauses if “an employer adopts a term or condition that is so broad or onerous that it has the same functional effect as a traditional non-compete clause.

WHO IS COVERED BY THE NON-COMPETE RULE?

The Rule covers all “workers,” which includes not just employees but also independent contractors, volunteers, interns, and externs. However, the definition excludes franchisees in the context of a franchisee-franchisor relationship. The Rule itself does not exempt any specific employers, although some employers (such as certain nonprofit entities) are outside of the FTC’s jurisdiction.

The Rule allows employers to enforce existing non-compete clauses only with “senior executives,” as defined in the Rule. Critically, however, the Rule imposes an affirmative requirement on employers to notify current and former employees by the effective date, that the employee’s non-compete clause will not and cannot be enforced.

EXCEPTIONS TO THE NON-COMPETE RULE

Other than existing non-competes with senior executives and causes of action related to a non-compete clause accrued prior to the Rule’s effective date, the Rule’s only exception is for non-competes made in connection with the sale of a business. Specifically, the Rule does not apply to a non-compete clause “that is entered into by a person pursuant to a bona fide sale of a business entity, of the person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets.”

HOW CAN EMPLOYERS COMPLY WITH THE NON-COMPETE RULE?

As we warned in [January](#) when the non-compete ban was proposed, this Rule will have sweeping impacts across all industries if it takes effect. The [U.S. Chamber of Commerce](#) calls the Rule an “unlawful” and “blatant power grab” and has sued in the Eastern District of Texas to block it. Nevertheless, employers should be prepared to comply with the Rule, including identifying current and former employees subject to an existing non-compete clause, preparing the

required notice to current and former employees, and examining existing agreements and policies so that they may be adjusted as necessary.

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