



ftc issues final rule banning most non-compete agreements

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The Federal Trade Commission ("FTC") issued its long anticipated final rule imposing a prohibition on virtually all non-compete agreements for all employees. The final rule follows the FTC's proposed rule published in January 2023.

The FTC's rule banning most non-compete agreements will likely become effective in early September 2024 as the rule is currently scheduled for publication in the Federal Register on May 7, 2024. The final rule broadly covers all workers, regardless of whether the worker is an employee or independent contractor, or whether the worker is paid or unpaid. The final rule will also retroactively affect most existing non-compete agreements, with limited exceptions.

Under the FTC's final rule, a non-compete is defined as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from: (i) Seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (ii) Operating a business in the United States after the conclusion of the employment that includes the term or condition."

However, the final rule also applies beyond traditional understandings of what a non-compete is. The FTC notes in the final rule that the "functions to prevent" prong of the definition could expand to include things like non-disclosure agreements and non-solicitation agreements if the term or condition "is so broad or onerous that it has the same functional effect as a term or condition prohibiting or penalizing a worker from seeking or accepting other work or starting a business after their employment ends."

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One exception to the final rule is for existing non-compete agreements with "senior executives," which remain enforceable if the agreement is entered into before the final rule's effective date. The final rule also does not apply to non-compete clauses that are entered into pursuant to a bona fide sale of a business entity or a person's ownership interest in a business entity.

For existing non-competes that do not fall within one of the limited exceptions, the final rule also includes a notice requirement where employers must notify workers that the non-compete provisions are unenforceable. The rule includes model notice language.

Employers with exclusivity clauses applicable to current workers should not have those terms affected by the FTC's new rule. The final rule's definition of a non-compete applies to a term or condition that would apply to a worker "after the conclusion of employment." The FTC's final rule specifically notes that the FTC is declining to extend the reach of the non-compete ban to concurrent employment.

For employers in the entertainment industry, there is some risk that the FTC's final rule could be interpreted to extend to other types of restrictive covenants such as first-look deals or options. Currently, there is no specific guidance as to whether the FTC's definition of a non-compete will be interpreted to encompass these types of provisions, but there are a number of legal and equitable arguments to support the notion that such provisions should not be prohibited by the final rule. For example, one could argue that restrictions in the form of option rights are not intended to prevent the employee from working; rather, they are intended to preserve the producer's right to further engage the performer. Also, to the extent that options or first-look rights intersect with collective bargaining provisions that sanction such provisions, the final rule arguably could be preempted under Section 301 of the Labor Management Relations Act. However, in the absence of favorable guidance from the FTC on these issues or case law developments, producers may wish to take a more cautious approach and build such rights into a contractual structure that retains an employment relationship with the employee so that the restrictive covenants cannot be deemed to be post-employment.