

Is the FTC's Ban on Non-Competes a Non-Issue?...Not Yet

Labor & Employment Law Update

By Craig Kubiak and Laurie Meyer on August 15, 2024

There is much uncertainty about the future of FTC's new rule (the "FTC Rule") making most non-compete agreements unlawful and barring employers from enforcing past non-compete clauses against nearly all employees and independent contractors.

As we previously reported, after the FTC Rule was announced in April, several lawsuits were filed seeking to stop or delay the rule's effective date as well as challenging the FTC's authority to promulgate such a rule in the first instance. Most of those suits were filed and the injunctions heard before the Supreme Court's ruling which overturned the Chevron deference doctrine. Those lawsuits have been slowly making their way through the court system in several jurisdictions.

On July 3, 2024, a federal court in Texas temporarily blocked the FTC from enforcing its rule *against the plaintiffs in that case only*. While the judge only entered a preliminary injunction, it was indicated that a final decision on the merits would be made by August 30, 2024. Notably, while the judge agreed with the plaintiffs that the FTC did not have authority regarding substantive rulemaking, she limited the injunction to only the plaintiffs in the case, and thus, it is unclear what will happen when the judge rules on the merits of their claims later this month. Further, on July 23, 2024, a federal court in Pennsylvania denied a preliminary injunction request by an employer who argued that without noncompete clauses, it would lose the return on its investment in specialized employee training. The Pennsylvania judge determined that the alleged harm to the employer was too speculative, that the employer was unlikely to succeed on the merits, and that the FTC does have the authority under the FTC Act to promulgate substantive rules to prevent unfair methods of competition.

While we wait for final decisions in these and other cases, employers **should be making preparations now** in the event that the FTC Rule survives these challenges. The effective date of the rule is fast-approaching: **September 4, 2024**. If there is no nationwide injunction entered prior to this effective date, employers will have to send notices to past and current employees with existing non-compete agreements covered by the rule in order to be in compliance. (Of course, regardless of how these cases ultimately play out, the losing parties will

almost certainly appeal, and those appeals may make their way ultimately to the U.S. Supreme Court. However, those appeals will undoubtedly take many months, and employers should thus be prepared to comply.)

HOW SHOULD EMPLOYERS PREPARE?

First things first: A quick refresher on what the FTC Rule does and who it applies to:

Assuming the FTC Rule goes into effect on September 4, the rule:

- Prohibits companies from entering into any new non-compete agreements that are not part of a bona fide sale of a business.
- Allows existing non-compete agreements with “senior executives” (those in a policy-making position earning at least \$151,164 annually) to survive – but makes unlawful any new non-compete agreements (even with senior executives) outside of the sale of business context.
- Does not apply to bona fide nonprofit employers.
- As to existing non-compete agreements with non-senior executives, requires employers to provide clear and conspicuous notice to those workers by September 4, 2024 that the worker’s non-compete clause will not be, and cannot legally be, enforced against the worker. The FTC Rule does contain a model notice for employers in seven languages – however, this language is suggested and not required.
- Does not explicitly ban non-disclosure (confidentiality) agreements, customer/client non-solicitation agreements, or employee non-solicitation agreements. Thus, if an existing agreement with a past or current employee or independent contractor contains both a non-compete clause and a non-solicitation clause and a non-disclosure agreement, only the non-compete clause will become unenforceable. The remaining terms, provided they do not otherwise violate state or federal law, will remain enforceable—and workers should be reminded of this fact.
- NOTE: The FTC does prohibit broad non-solicitation or non-disclosure agreements that effectively constitute a “non-compete clause” as defined by the FTC Rule because they effectively preclude the worker from working in the United States. The rule defines a “non-compete clause” as:

A term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from: seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment; or operating a business in the United States after the conclusion of the employment.

- FURTHER NOTE: If a state law (such as those in California, Colorado, Oklahoma, North Dakota, Minnesota, or Hawaii) provides greater protection

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to workers than does the FTC Rule, those state laws will apply. Conversely, if the state or local law provides weaker protections to workers in connection with non-compete enforceability, the FTC Rule will control.

Steps for Employers Now:

1. Determine all individuals (including independent contractors) who have existing non-compete agreements.
2. Determine if any of those agreements are with “senior executives” as that term is defined in the FTC Rule. As noted above, this is a *very* narrow category of employee.
3. Review those agreements to determine enforceability – with or without the FTC Rule. For example, is the non-solicitation clause properly drafted and enforceable? Is the non-disclosure provision and its definition of “confidential information” overbroad? Or insufficient to protect your information? Now is your opportunity to shore up problematic agreements and to ensure protection of your customer base, current employees, and confidential information.
4. Determine if existing non-compete agreements comply with state law and even other federal law – such as the National Labor Relations Act.

There is still a great deal of uncertainty as to the future of the FTC Rule. But the time for compliance is fast approaching, and there is no guarantee that any of the pending cases will yield a definitive decision before the rule’s effective date. Employers must prepare now and work with knowledgeable counsel to construct compliant notices to workers.

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