

Mid-Year 2024: Non-Competes

By

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The Federal Trade Commission’s much-anticipated final rule prohibiting all non-compete agreements for all employees at all levels, with only extremely limited exceptions, arrived in April — 15 months and 26,000+ public comments after being first proposed. With legal challenges already underway, the implications of, as well as exceptions to, this final rule are a classic “hope for the best, prepare for the worst” scenario.

FTC: Non-compete agreements

Final rule effective: 09.04.24 (120 days after publication in the Federal Register)

- Broadly bans all true non-compete clauses — contractual but can also include any workplace policy, whether oral or written.
- Defines “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” either seeking or accepting work after the conclusion of employment, or operating a business after the conclusion of employment.
- It is possible that non-disclosure agreements, training repayment agreement provisions, and non-solicitation agreements that are overbroad and “function to prevent” a worker from seeking or accepting other work or starting a new business after employment ends could be barred by the final rule, depending on the precise language of the agreements and the surrounding facts and circumstances.
- Notice requirement: Although the final rule does not contain a rescission requirement, employers must give notice to workers who entered into a non-compete clause that the non-compete provisions are unenforceable.
- Coverage: All current and former workers, regardless of which entity hired or contracted with them to work and regardless of the worker’s position, title, or status, are covered by the final rule.
- Non-compete clauses entered into with “senior executives” (workers who are in a “policy-making position” and earned at least \$151,164 annually) prior to the effective date remain enforceable.
- Generally, garden variety non-solicitation clauses are not covered by the final rule.

Other considerations

- FTC has limited jurisdiction.
- The final rule expressly incorporates two limited exceptions for the “bona fide sale” of a business entity or its operating assets and “where a cause of action related to a non-compete clause accrued prior to the effective date.”

▶ State limitations on non-competes +

▶ Pending challenges +

Key employer takeaways

Don't panic!

- The FTC's final rule is not yet effective and the legal challenges to it are significant.

Hope for the best and prepare for the worst

- Do your senior executives meet the definition for an exception from the ban?
- Do your agreements “function” to prevent or penalize a worker from taking another job?
- Who will need to receive notice?

As always . . .

- Draft narrowly to protect legitimate business interests, such as trade secrets, confidential information or customer goodwill.
- Draft for severability.
- Avoid non-competes for lower-level workers absent legitimate reasons to do so.

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