

April 24, 2024

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## FTC Declares Employees Free from Most Noncompetes, But How Far Does the Ban Go and Will It Last?

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During an Open Commission Meeting on April 23, 2024, the Federal Trade Commission (“FTC”) voted 3-2 in favor of issuing the Noncompete Clause Rule (the “Final Rule”), which, with limited exceptions, makes it unlawful to enter into noncompete agreements with workers<sup>1</sup> on or after the Final Rule’s effective date, which is 120 days after its publication in the Federal Register (“effective date”). The FTC determined that noncompetes are an unfair method of competition and, therefore, violate Section 5 of the Federal Trade Commission Act. Here are the highlights of the Final Rule:

- Existing noncompetes that were entered into before the effective date remain in force for senior executives, which the Final Rule defines as a worker in a “policy-making position” with a total annual compensation of at least \$151,164 in the preceding year or total compensation of \$151,164 when annualized so long as the worker was only employed during part of the prior year. The Final Rule defines a policy-making position to include a business entity’s president, CEO or the equivalent, another officer of a business entity (vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, or any other natural person routinely performing corresponding functions) who has policy-making authority, or any other natural person who is not an officer who has policy-making authority for the business similar to an officer with policy-making authority.
- After the effective date, existing noncompetes for workers who are not senior executives are unenforceable. Employers are prohibited from entering into or enforcing new noncompetes with all workers.
- Employers must provide workers who are not senior executives “clear and conspicuous notice by the effective date that the worker’s noncompete clause will not be, and cannot legally be, enforced against the worker.” Section 910.2(b)(2) & (4) of the Final Rule provides the form of notice and model language that satisfies the notice requirement to the worker. The FTC eliminated a provision in the proposed rule issued in January 2023, which would have formally required employers to rescind existing noncompete agreements.

Section 910.3 of the Final Rule provides the following exceptions:

- The Final Rule does not apply to noncompete clauses entered into by a person under 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.

<sup>1</sup>The final rule affects employers within the FTC’s jurisdiction and applies to employment agreements with a wide range of paid or unpaid workers, including employees, independent contractors, and interns. Although the FTC does not have jurisdiction over most nonprofit organizations, such as some hospitals and healthcare systems, it does have jurisdiction over nonprofits that actually operate for profit or the profit of their for-profit members, for example, where nonprofit hospitals have relationships with for-profit physician practices.

- The Final Rule does not apply where a cause of action related to a noncompete clause accrued before the effective date.
- Where a good-faith basis exists to believe that the Final Rule is inapplicable, it is “not an unfair method of competition to enforce or attempt to enforce a noncompete clause or make representations about a noncompete clause.”

Additionally, under § 910.4(a), the Final Rule will not limit or affect the enforcement of State laws applicable to noncompete clauses, including, but not limited to, state antitrust and consumer protection laws, so long as such State laws do not conflict with the Final Rule. Nevertheless, the Final Rule will preempt State laws that conflict with its language.

The Final Rule presents broad implications for employees and employers, but court challenges are inevitable. For instance, the U.S. Chamber of Commerce submitted its strong opposition to the FTC’s proposed rule and, in an April 17, 2023 letter to the FTC, called the “categorical ban” representative of “arbitrary and capricious decision-making.” On April 24, 2024, the U.S. Chamber of Commerce and other business groups filed a lawsuit against the FTC in the U.S. District Court for the Eastern District of Texas in which the plaintiffs seek an order permanently enjoining the FTC from enforcing the Final Rule.

Dickinson Wright will continue to monitor all developments, including pending litigation, that may affect the implementation of the FTC’s Final Rule. In the meantime, companies should assess how they can protect their trade secrets and confidential information without the ability to enforce noncompete agreements. Dickinson Wright attorneys can assist in determining how the Final Rule and other developments will affect existing and future employment agreements.

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