

Federal Trade Commission Issues Rule to Ban Employee Non-Competes

On Tuesday, April 23, 2024, the Federal Trade Commission (“FTC”) issued a final rule (“Final Rule”) that virtually bans all employee non-compete agreements nationwide. The ban becomes effective 120 days after the Rule is published in the Federal Register. It applies to anyone who works for a for-profit employer, whether paid or unpaid, and to independent contractors.

As background, in January 2023, the FTC issued a proposed rule subject to a 90-day comment period. It received over 25,000 comments in support of the ban on non-competes. The Commission consequently determined that non-compete agreements constitute an unfair method of competition that violates Section 5 of the FTC Act.

Notably, the Final Rule also applies to non-compete agreements signed prior to the effective date. For workers who are not “senior executives,” existing non-competes are no longer enforceable after the effective date. Existing non-competes for senior executives will continue to apply, however. “Senior executives” are defined as employees in a policy-making position that earn more than \$151,164 annually. The Final Rule requires that employers must give notice to current and former employees with existing non-competes, informing them that they are no longer enforceable. Helpfully, the FTC included model language to comply with the notice requirement.

This advisory is for information purposes only, and does not constitute legal advice. If you would like to discuss the impact of the new FTC Final Rule, please contact Claire MacCollum at (617) 350-6800, or email her at claire.maccollum@gesmer.com.

The Final Rule does not categorically prohibit other restrictive employment agreements, such as non-disclosure agreements (“NDAs”), training repayment agreement provisions (“TRAPs”), and non-solicitation agreements. Employers should still be careful, however, as an NDA or TRAP that is so broad that it prevents an employee from seeking new employment may fall under the definition of a non-compete agreement.

The FTC’s Final Rule is currently being challenged in federal court by the U.S. Chamber of Commerce and Ryan LLC, a national tax services firm. It is possible that legal challenges may delay or preclude implementation of the Final Rule, but it is too early to assess what the immediate future holds.

Even though enforcement of the Final Rule is uncertain, companies with employees subject to non-compete agreements should begin thinking about this significant change in the legal landscape. The Final Rule would supersede all state laws regarding non-compete agreements, so even existing non-competes that comply with Massachusetts’ restrictive law limiting non-competes are at risk.

To enforce violations of the Final Rule, the FTC could commence administrative proceedings under Section 5(b) of the FTC Act or seek an injunction under Section 13(b) of the FTC Act. Questions regarding the enforceability of the Final Rule are expected to be answered in the coming months.



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