
Getting Your Business Ready for the FTC's Non-Compete Ban by September 4, 2024

August 9, 2024

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As we have advised, on April 23, 2024, the Federal Trade Commission (FTC) approved a final rule (Final Rule) that renders existing non-competition agreements for employees working in for-profit businesses unenforceable, with the exception of non-competition agreements for senior executives in place before September 4, 2024. The regulation can be found [here](#).

The Final Rule upends a long-standing business practice of using non-competition agreements to protect an employers interests.

Businesses should be poised to respond immediately. Although there has been significant litigation seeking to enjoin the Final Rule, to date, Courts have not issued a nationwide injunction. Thus, **employers need to be prepared to act by September 4, 2024** (Effective Date).

The Final 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 (1) 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 (2) operating a business in the United States after the conclusion of the employment that includes the term or condition.* The Final Rule further provides, *term or condition of employment* includes, but is not limited to, a contractual term or workplace policy, whether written or oral. The Final Rule further defines *employment* as *work for a person*.

When in effect, the Final Rule means the only non-competition agreements that will remain enforceable are those governing senior executives that were signed before the Effective Date. According to the Final Rule, the term senior executives means workers earning more than \$151,164 annually who are in policy-making positions. A policy-making position is one in which the employee acts as president, CEO or someone else with authority to make decisions for the entire company. In addition, as of the Effective Date employers will be prohibited from requiring non-competition agreements from new hires even if they are senior executives.

Additionally, the Final Rule requires employers to notify employees and former-employees who have entered into non-competes that their agreements will not be enforced. The FTC has issued model language for this notice, which is available [here](#).

The FTC has links to this notice in other languages on its website. Employers need to be thoughtful before issuing the FTC-supplied notice because it should not be issued to employees who are senior executives.

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Importantly, the Final Rule does not apply to non-competes entered into by a person pursuant to a bona fide sale of a business entity. In addition, the Final Rule does not apply where a cause of action related to a non-compete accrued prior to the Effective Date, meaning pending enforcement actions remain unaffected.

Although the Final Rule has not been interpreted by any court yet, it is important to note:

- The definition of worker is broad enough that this rule applies to employees, independent contractors, externs, interns, volunteers, apprentices, and even sole proprietors providing services;
- The FTC does not normally have jurisdiction over non-profit businesses, banks, savings and loan institutions, federal credit unions, common carriers, and air carriers, meaning it is likely the Final Rule does not apply to workers in these industries;
- The FTCs definition of *non compete clause* does not necessarily apply to agreements prohibiting employees from soliciting customers or other employees, unless the agreement is so broad as to prevent a worker from seeking or accepting work or operating a business;
- Agreements protecting trade secret and other confidential information, such as non-disclosure agreements, remain enforceable;
- The Final Rule applies to post-employment non-compete agreements and does not impair agreements that restrict competitive activities during the course of employment; and
- The Final Rule supersedes state laws to the extent that they are in conflict, but does not supersede state laws that are more protective (e.g., Californias law banning non-competes even for senior executives).

Although hard-fought challenges to the Final Rule continue to make their way through the Courts, employers should not count on an injunction. For now, employers should immediately work with counsel to develop a strategy to plan for the Final Rule, including (i) strengthening other restrictive covenants (e.g., non-solicitation prohibitions) and proactively developing an approach for addressing the potential risks that the implementation of the Final Rule may impose; (ii) weighing how this Final Rule may influence valuation for mergers or acquisitions when employees may more freely compete; (iii) considering options to strengthen or introduce agreements for senior executives before the effective date; (iv) analyzing how the Final Rule applies to existing non-competes; and (v) planning a method to issue the required notice.

If you would like assistance in this process, please reach out to a Flaster Greenberg attorney.

ATTORNEYS MENTIONED

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