

## FTC's Federal Ban on Non-Competes

The Employer Lawyers Blog

Lowndes

04.24.2024

On April 23, 2024, the Federal Trade Commission (FTC) voted 3-2 to finalize a proposed rule that is essentially a blanket ban on non-competes per Section 5 of the FTC Act, which prohibits unfair competition. The rule generally restricts employers from utilizing non-competes within their workforces.

Under the rule, an employer is prohibited from entering into or attempting to enter into a non-compete clause, enforcing or attempting to enforce a non-compete clause, or representing that the worker is subject to a non-compete clause.

*What is a “non-compete clause” under the new rule?*

Under the final rule, a “non-compete clause” is broader in scope than the typical covenant not to compete in a written agreement.

A “non-compete clause” means 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.

A “non-compete clause” is a term or condition of employment that can be found, among other places, in a contract or workplace policy, whether written or oral.

*Senior executive exception*

Under the final rule, *existing* non-competes for senior executives remain enforceable. Employers, however, are prohibited from entering into, attempting to enter into, or enforcing *new* non-competes with senior executives. The final rule defines senior executives as workers earning

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more than \$151,164 annually in total compensation, exclusive of certain benefits, and who are in policy-making positions.

For purposes of the rule, a policy-making position generally means a business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who was policy-making authority for the business entity similar to an officer with policy-making authority. For purposes of the rule, policy-making authority generally means final authority to make policy decisions and does not include authority limited to advising or exerting influence over such policy decisions.

#### *Notice to employees*

Under the final rule, employers must provide written notice to workers bound to an existing non-compete, other than senior executives, that the non-compete agreement will not be enforced against them in the future. This notice may be delivered on paper or electronically via email or text message and must be provided by the effective date of the final rule.

#### *Sale of business exception*

The rule does not apply to a non-compete clause that is entered into by a person pursuant to 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.

#### *What does the rule mean for non-disclosure and non-solicitation agreements?*

A "non-compete clause" can extend to non-disclosure and non-solicitation agreements or workplace policies if such clauses are deemed to be terms or conditions of employment that 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 that includes the term or condition" or "operating a business in the United States after the conclusion of the employment that includes the term or condition." The interpretation of what is a "non-compete clause" is likely to lead to litigation where there is disagreement about the breadth and scope of such clauses.

In light of the new rule, an employer's ability to enforce employee non-solicitation and non-disclosure agreements may need to be carefully considered. Other options for protecting against the loss of valuable confidential information when employees leave employment may now become more important, such as compartmentalizing confidential information and trade secrets, allowing only restricted access to certain data rooms for work teams and erecting other internal workplace firewalls, to name a few.

#### *What about existing claims?*

The new rule does not apply where a cause of action related to a non-compete clause accrued prior to the effective date.

#### *Who is affected by this rule?*

The rule applies to both employees and independent contractors.

#### *Does state law apply?*

The new rule supersedes state law such as Section 542.335, *Florida Statutes*, only to the extent the state statute permits non-compete clauses that are otherwise prohibited under the rule.

*When does the rule take effect?*

The rule will take effect 120 days after the final version is published in the Federal Register, which is expected to take several days but could occur any day. Legal challenges may delay implementation of all or part of the rule.

We will continue to monitor the situation for new developments, including legal challenges over the FTC's authority to issue such a broad sweeping ban on non-competes in the United States. If you are concerned about how this new rule impacts your business, please reach out to Rachel Gebaide, Melody Lynch, Jyllian Bradshaw or Stephen Thomas to discuss how our employment law team can best address these issues for your business.