

Insights

The FTC Non-Compete Ban Clings to Life: Prepare Now Ahead of the Deadline

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The Federal Trade Commission's (FTC) final rule prohibiting most post-employment non-compete agreements (Final Rule) is set to take effect on **September 4, 2024**.

The ban applies to non-competes for U.S. workers in most industries,^[1] including both employees and independent contractors, with limited carve-outs. As Lowndes previously [discussed](#) when the Final Rule was issued, the notable exceptions include:

- Existing agreements for "senior executives," defined as workers earning more than \$151,164 annually and holding policy-making positions;
- Non-competes entered into in connection with the bona fide sale of a business; and
- Non-competes enforced where the cause of action accrued prior to the Final Rule's effective date, which is currently set for September 4, 2024.

Currently, several legal challenges to the Final Rule are pending in federal courts. In each case, the plaintiffs seek to invalidate the Final Rule and have requested injunctive relief to delay its enforcement pending a determination on the merits:

- *Properties of the Villages, Inc. v. Federal Trade Commission*. On August 15, 2024, a Florida federal court found that the Final Rule "exceeds the FTC's authority under [the FTC ACT] and granted a [preliminary injunction](#) to enjoin the FTC from enforcing the Final Rule, but only with respect to the named plaintiffs. Accordingly, this employer-favorable decision does not extend to all other employers who remain obligated to comply with the Final Rule by September 4, 2024.
- *Ryan LLC v. Federal Trade Commission, et al.* In July, a Texas federal court found that the plaintiffs had met their initial burden of showing a likelihood of prevailing on the merits of their claims, including the claim that the FTC lacked authority to issue the Final Rule. As a result, the court enjoined the FTC from enforcing the Final Rule, *but only with respect to*

the named plaintiffs. This employer-favorable decision does not extend to all employers. The court indicated that, following further briefing, it intends to issue a final ruling on the merits on or before August 30, 2024—notably, the Friday before Labor Day weekend and just days before the Final Rule is scheduled to go into effect on Wednesday, September 4, 2024.

- *ATS Tree Services, LLC v. Federal Trade Commission, et al.* A Pennsylvania federal court denied the motion for a temporary injunction after concluding that ATS failed to demonstrate that the FTC's Final Rule would cause irreparable harm or a likelihood of success on the merits of their claim that the FTC exceeded its authority in issuing the Final Rule.

Given the current legal landscape, employers should plan for the Final Rule to take effect on September 4, 2024, and prepare for compliance by taking the following steps:

1. Identify existing non-compete clauses.

Initially, employers should identify non-compete provisions that extend beyond September 4, 2024, for both current and former workers. It's important to recognize that non-compete clauses may be found in various documents, not just employment agreements. For example, non-compete clauses may also be embedded in severance agreements, ownership documents, and corporate transactional documents.

2. Determine exceptions.

Employers must determine whether the identified non-compete clauses fall within one of the Final Rule's exceptions.

3. Issue notices.

Employers must issue notices to current and former workers who are currently subject to a non-compete clause – that does not fall into one of the exceptions -- to inform these individuals that the company will not enforce the non-compete clauses. If the provisions are not excepted, employers should be ready to issue the required notices to affected individuals before the September 4, 2024, deadline, as mandated by the Final Rule. However, given the possibility that the rule could be invalidated, it might be wise to prepare the notices now – in August – but delay issuing the notices to current and former workers until closer to the deadline. The notices must be addressed and issued to individual workers; a form letter to “All Current and Former Workers” will not be compliant. Accordingly, companies must take the necessary time to identify the to-be-banned non-compete clauses and prepare individual letters to affected current and former workers.

4. Revise documents.

Employers must ensure that any agreements entered into as of September 4, 2024, do not include a prohibited non-compete clause.

Lowndes will continue to monitor this issue and provide updates as necessary. If you have questions regarding the FTC's non-compete ban, the exceptions to the rule, and the required notices, Lowndes attorneys stand ready to assist.

[1] According to the FTC website, the agency enforces a variety of antitrust and consumer protection laws affecting virtually every area of commerce, with some exceptions concerning banks, insurance companies, non-profits, transportation and communications common carriers, air carriers, and some other entities.