

FTC Issues Final Rule Banning Non-Competes

By: John Vering

On April 23, 2024, the Federal Trade Commission (FTC) voted 3-2 to issue a Final Rule ("Rule") – Non-Compete Clause Final Rule – that would generally ban employers from entering into non-competes with workers and require employers to notify workers that their existing non-compete agreements are unenforceable. The majority of FTC commissioners concluded that non-compete agreements constitute an unfair method of competition, and, therefore violate Section 5 of the Federal Trade Commission Act. The Rule will take effect (unless enjoined by a court) 120 days after it is published in the Federal Register (likely during the week of April 29, 2024).

What Does the Final Rule Generally Provide?

The Rule would generally prohibit employers from using non-competes and would make it illegal for employers to:

- Enter into or attempt to enter into a new non-compete with a worker (including senior executives) after the effective date;
- Enforce existing non-competes with workers other than senior executives; or
- Represent to a worker that the worker is subject to a non-compete; or
- Penalize a worker by requiring a worker to pay a penalty if they get another job, start a business; or
- Utilize terms and conditions of employment or agreements that aren't labeled as non-competes but are so restrictive that they effectively prevent a worker from getting a new job or starting a business (which could include some overbroad non-disclosure and non-solicit agreements even though reasonably drafted non-disclosure and non-solicit agreements are still legal under the Rule).

The Rule would require employers to notify current and former employees who have active non-competes, but are not senior executives, that their non-compete agreement is not enforceable. The final rule provides some model language for providing such notice.

Who is Covered by the Final Rule?

The Rule would apply to all workers, whether full-time or part-time, including employees, independent contractors, interns, externs, volunteers, apprentices, and others. The Rule covers all types of businesses (partnerships, corporations, associations, limited liability companies, and any other legal entity, or a division or subsidiary thereof) in nearly all industries. Some employers are outside the FTC's jurisdiction and therefore not subject to the Rule. This includes banks, savings and loan institutions, federal credit unions, common carriers, air carriers, and certain non-profits and governmental entities.

Finally, the Rule does not exempt any person from complying with state laws that restrict non-compete agreements.

Are There Exceptions?

As noted above, existing non-competes with senior executives are still enforceable. The Rule defines a "senior executive" as a worker who earns more than \$151,164 in compensation a year and is in a

“policy-making position,” which is defined as having final authority to make policy decisions that control significant aspects of a business entity or common enterprise and does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise. Policy-making position includes the president, CEO, or someone else with authority to make policy decisions for the entire company. Compensation can include salary, commissions, performance bonuses, and any other compensation agreed to that the worker knows and can expect, but does not include items like benefits or board and lodging. If the worker worked only for part of the year, you can annualize their earned compensation to see if they meet the threshold.

The Rule only applies to non-competes between businesses and workers. For example, the Rule does not apply to non-competes in franchisor/franchisee contracts, but it does apply to non-competes between employers and workers at franchises.

The Rule doesn’t apply to non-competes between a buyer and seller of a business (or potentially the seller’s share of a business). The seller can agree to a non-compete individually, but not for any of the business’s workers. The Rule prohibits non-competes for workers, including in a sale of business context.

The Rule does not apply to lawsuits relating to non-competes that were filed prior to the effective date.

Will the Courts Allow the Final Rule to Take Effect?

The FTC has already been sued by a number of employers and employer associations, including the U.S. Chamber of Commerce. While we do not have a crystal ball, there is a realistic chance that federal courts will find that the Rule exceeds the FTC’s authority.

What Should Employers Do?

As the effective date approaches, employers should take stock of what current and former employees are covered by non-compete agreements, and be prepared to notify them that their non-compete agreements are not enforceable if the Rule has not been enjoined (declared unlawful by a court with jurisdiction over your workers). Note that some existing state laws ban or restrict non-compete agreements or make them unlawful as to certain categories of workers. To the extent an employer’s existing non-compete agreement is contained in a broader agreement that also contains provisions for confidentiality of trade secrets or non-solicitation of customers or employees which are still enforceable, an attorney can help to narrow those agreements to comply with the new Rule.

Please contact us with any questions about this Rule or if you need assistance preparing to comply with the Rule. The Rule including commentary runs 570 pages and has various nuances. We will be monitoring further developments and legal challenges to the Rule.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the author, [John Vering \(jvering@sb-kc.com\)](mailto:jvering@sb-kc.com), or other members of the Seigfreid Bingham’s Employment Law Group, including [Shannon Cohorst Johnson \(sjohnson@sb-kc.com\)](mailto:sjohnson@sb-kc.com), [Mark Opara \(mopara@sb-kc.com\)](mailto:mopara@sb-kc.com), [John Neyens \(jneyens@sb-kc.com\)](mailto:jneyens@sb-kc.com), [Brenda Hamilton \(bhamilton@sb-kc.com\)](mailto:bhamilton@sb-kc.com), [Julie Parisi \(jparisi@sb-kc.com\)](mailto:jparisi@sb-kc.com), [Christopher Tillery \(ctillery@sb-kc.com\)](mailto:ctillery@sb-kc.com), [Cody Weyhofen \(cweyhofen@sb-kc.com\)](mailto:cweyhofen@sb-kc.com), [Katie Conklin \(KConklin@sb-kc.com\)](mailto:KConklin@sb-kc.com), or your regular contact at Seigfreid Bingham at 816.421.4460.