

EMPLOYMENT LAW UPDATE

April 26, 2024

FTC ISSUES FINAL RULE BANNING MAJORITY OF NON-COMPETES ACROSS THE US

On April 23, 2024 the Federal Trade Commission issued its long awaited final rule that purports to ban the majority of non-competes across the United States. The rule is likely to be published in the next week or so, and will take effect 120 days after being published, so likely late summer 2024. While it is already being subjected to legal challenge, employers still need to educate themselves on what the law does and prepare themselves in the event the legal challenges fail as the rule would do away with a business practice that has been in use for over a century and would represent a sea-change in terms of employee mobility and bargaining power.

Various restrictive covenants, including non-competes, have been in use in the employment relationship for decades to protect the legitimate business interests of the employer in limiting what an employee may do for a limited time frame following the end of the employment relationship. Non-competes are generally those that restrict the employee from going to work for a competitor or starting their own competing business. Other restrictive covenants are non-solicitation provisions which restrict the employee's ability to solicit the employer's clients or other employees and confidentiality provisions which restrict the sharing of certain business information. The FTC's final rule purports to ban non-competes.

If the rule takes effect, it will ban employers from entering into new non-competes with workers after the effective date regardless of the person's job title, duties or compensation. The only carveouts are for: (1) those working in banks, insurance companies, transportation and common carriers and some other limited entities who are not subject to the jurisdiction of the FTC, (2) non-profits that are permitted to continue to use non-competes with their employees and (3) non-competes entered as part of the sale of the business. As to already existing non-competes that are in place on the effective date, the vast majority of those will automatically be rescinded. The only exception is for existing non-competes with "Senior Executives" which are defined as those that were paid more than \$151,164 in the prior year and who are in a policy making position within the company. Once existing non-competes with Senior Executives expire, they will not be permitted to enter into new ones. It is also important to note that the non-compete ban applies whether the worker is an employee, independent contractor, consultant or anything else.

Employers will be required to provide written notice to all non-senior executives that advises workers, including former employees, who have existing non-competes that the non-competes are rescinded and will no longer be in effect. The FTC published a model notice that employers can utilize if they desire to ensure their written notice satisfies the FTC's notice requirements. The notice must be provided by the effective date, must be individualized in that it identifies the employee by name, and must be delivered by hand, mail, email or even text message. Regardless of the medium used, employers should make sure they can track and prove receipt.

The rule defines non-competes 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.” This will obviously ban the non-competes discussed above. However, employers will also need to carefully craft their non-solicitation provisions and confidentiality provisions to ensure these are not too overbroad or overreaching wherein they may inadvertently fall under the non-compete ban.

Some steps that may be recommended for your business, depending on the circumstances, are:

- Immediate action is not recommended as the legal challenges could potentially delay the effective date significantly. However, starting thinking ahead, in the event it becomes necessary.
- Thoughtfully and critically review which employees have access to business information, trade secrets, customer lists, and the like. If you will be unable to stop workers from competing immediately after leaving your company, then much fewer individuals should have access to such information.
- Consider extending out your non-competes with your current Senior Executives. While anything beyond 24-36 months may be unenforceable in any event, if there was ever a time to slightly overreach to try and lock in a non-compete with a Senior Executive, now would be the time.
- Without the ability to use non-competes, much more careful thought should be given to the non-solicitation and confidentiality provisions as these will be your only methods of protection moving forward. They should not be drafted in such a way so as to prohibit, penalize or prevent a worker from seeking or accepting work elsewhere or operating their own business, or they may be treated the same as a non-compete. Careful thought and planning will be required to effectively protect your business with the tools you have remaining following the elimination of non-competes.

We will continue to monitor the legal challenges and status of the rule.

If you have any questions related to this information or any other employment laws that may affect your business, please contact Aaron J. Graf Mawicke & Goisman, S.C.

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