



Federal Trade Commission Issues Nationwide Ban on Non-Compete Agreements

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Non-compete agreements are a hot button issue and have come under increased scrutiny in recent years. As expected, the Federal Trade Commission (“FTC”) announced a new federal rule (“Rule”) that bans nearly all non-compete agreements nationwide, subject to very narrow exceptions. The Rule will take effect 120 days after publication in the Federal Register (publication is expected to happen very shortly). However, a lawsuit has already been filed by the U.S. Chamber of Commerce which may delay or prevent the Rule from ever going into effect. Nonetheless, employers should familiarize themselves with the Rule now so that they do not get caught off-guard if the Rule does take effect.

Key Highlights

Here are some key highlights of the Rule. First, the Rule contains a broad definition of “non-compete agreement.” The Rule defines it 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 is a very broad definition, and it is clearly designed to capture any and all agreements or practices which have the effect of restricting worker mobility or leaving a job for a competitor. Notably, this definition does not appear on its face to apply to agreements restricting the use of an employer's confidential information or to customer non-solicitation agreements. However, some commenters have cautioned that the Rule is potentially broad enough to ban customer non-solicitation agreements.

The Rule, should it go into effect, will affect both existing and future non-compete agreements. After the effective date, no new non-compete agreements will be allowed for any individual. Regarding existing non-compete agreements, no existing non-compete agreements will be enforceable after the effective date unless the agreement involves a "senior executive" employee. The Rule defines "senior executive" as an individual in a "policy-making position" who earns at least \$151,164 per year. Whether an individual meets this definition will be a fact-intensive question.

A third key highlight is that employers must give notice to employees who have existing, unenforceable non-compete agreements (which will be all of them) by the effective date of the Rule that the non-compete clause is no longer enforceable. Senior executives are excepted from this notice provision as their existing agreements are not banned under the Rule. The FTC has created a model notice for employers to consider using. The Rule permits employers to provide employees with the notice by mail, email, hand-delivery, or text message. If an employer genuinely has no way of getting in contact with the employee, the employer is exempted from this notice requirement.

Conclusion

As noted, there are expected legal challenges to the Rule which may prevent this Rule from ever taking effect. However, employers should familiarize themselves with the Rule now to be best prepared in the event it does become effective. We encourage employers to reach out to a member of the Boardman Clark [Labor & Employment Practice Group](#) with questions.

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consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

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