

FTC Bans Most Non-compete Clause

OVERVIEW:

On Tuesday, April 23, 2024, the Federal Trade Commission (FTC) issued a [final rule](#) banning most non-compete clauses. It is estimated that about 30 million employees are subject to a non-compete clause.

What does this final rule do?

Other than for senior executives with an existing non-compete clause, it is illegal for an employer to:

- enter into or attempt to enter into a non-compete clause with a worker;
- enforce or attempt to enforce a non-compete clause with a worker; or
- represent that the worker is subject to a non-compete clause.

What is a non-compete clause?

A written or oral contractual term or workplace policy that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:

- (i) 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 non-compete clause; or
- (ii) operating a business in the United States after the conclusion of the employment that includes the non-compete clause.

Does the final rule apply to more than an employee?

Yes. It also applies to an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer.

Are senior executives exempt?

Only senior executives with existing non-compete clauses are exempt from the rule. The rule bans non-compete clauses for senior executives entered into after the effective date of the rule.

Who is a senior executive?

Essentially, it includes an entity's president, CEO, or any other officer that had policy making authority for the entity and earned \$151,164 in the preceding year. The rule contains more detailed definitions of terms to determine if one can be considered a "senior executive."

Are any employers exempt from the final rule?

Yes. The final rule does not apply to the following types of employers:

- Savings and loan institutions;

- Federal credit unions;
- Common carriers;
- Air carriers and foreign air carriers;
- Persons and businesses subject to the Packers and Stockyards Act, 1921; and
- Most non-profit organizations

Does the final rule also ban non-solicitation and non-disclosure clauses?

Not necessarily. The final rule does not specifically ban these type of clauses. However, the final rule bans contractual terms and policies that function to prevent a worker from seeking or accepting work or operating a business. The FTC noted that an overly broad non-disclosure clause could violate the rule. Whether a policy or contractual term violates the rule will be a fact specific determination, but it is clear that the FTC is not automatically banning non-disclosure and non-solicitation clauses.

Are any non-compete clauses exempt from the final rule?

Yes. There are three exemptions:

1. *Sale of business.* The final rule does not apply to a non-compete clause that is entered into pursuant to a sale of a business entity, the sale of the person's ownership interest in the business entity, or the sale of all or substantially all of a business entity's operating assets.
2. *Existing causes of action.* The final rule does not apply to a non-compete clause where a lawsuit pertaining to the non-compete clause was filed before the effective date of the rule.
3. *Good faith.* A person does not violate the final rule if the person enforces or attempts to enforce a non-compete clause or makes representations about a non-compete clause where the person has a good-faith basis to believe the rule does not apply.

Are employers required to notify workers that the non-compete clause is unenforceable?

Yes. By the effective date of the rule, an employer must notify the worker with an existing non-compete clause (other than "senior executives") that the non-compete clause will not be, and cannot be, enforced against the worker. The employer can hand deliver, mail, email, or text the notice. An employer is exempt from the notice requirement only if the employer has no record of a street address, email address, or mobile phone number for the worker.

The FTC provides a model notice that an employer should use to notify the worker.

What happens to state non-compete laws?

The final rule supersedes any state non-compete law that conflicts with the final rule, but does not affect any state law that provides greater protection to a worker.

Will there be a lawsuit challenging this final rule?

Yes. Employers and trade organizations are ready to file lawsuits challenging the FTC's authority to issue such a rule. The challengers will also be asking the court to issue an injunction stopping the implementation of this final rule until a final legal decision can be made. We expect this case to eventually reach the U.S. Supreme Court.

What is the effective date of the final rule?

The effective date is 120 days after the FTC publishes it in the Federal Register. The FTC should be publishing it soon.

What happens if an employer violates the final rule?

The FTC can assess substantial monetary penalties and issue a cease and desist order for a violation of the final rule. Workers may also be entitled to traditional remedies if they file a private lawsuit.

What should employers do now?

Considering the 120-day waiting period and the court challenge, employers do not need to do anything right now. Employers should start gathering information on current and former employees who are subject to existing non-compete clauses in case the courts do not temporarily postpone the effective date of the final rule pending a final decision.

If you have any questions regarding non-compete clauses or the FTC's final rule, please contact partners [Michael Crocenzi](#), [Jill Sebest Welch](#), [Jennifer Craighead Carey](#), [Justin Tomevi](#) or any member of the [Barley Snyder Employment Practice Group](#).

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