

FTC's Final Rule Banning Non-Competes: What Is It and How "Final" Is It??

Labor & Employment Workforce Watch

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On April 23, 2024, the Federal Trade Commission issued its long-awaited [Final Non-Compete Clause Rule](#), which operates to ban most post-employment non-compete agreements between employers and their workers. However, the Final Rule does not take effect until September 4, 2024, which provides an opportunity for employers to challenge the Final Rule in court. This article summarizes the major provisions of the Final Rule, the legal challenges currently pending, and best practices for employers to consider while monitoring those legal challenges.

Major Provisions of the Final Rule:

- *Ban on post-employment non-compete agreements* – The Final Rule prohibits an employer from entering into, enforcing, or representing that a worker is subject to a non-compete clause. Importantly, the term “worker” is defined to include not only employees, but also independent contractors, interns, volunteers, and others who provide services to the employer. Moreover, a “non-compete clause” is expansively defined to include any term or condition of employment that “prohibits a worker from, penalizes a worker for, or functions to prevent a worker from” seeking a new job or operating a business after the conclusion of their employment. Thus, the FTC has made clear that, in certain circumstances, a broadly worded non-solicitation or non-disclosure provision could be considered a prohibited non-compete clause if they are functionally equivalent in practice.
- *Grandfathering of non-compete clauses with “Senior Executives”* – The only employment-based exception within the Final Rule permits employers to maintain non-compete clauses with “Senior Executives,” defined as persons who received at least \$151,164 in annual compensation and were in a “policy-making position” such as a company’s president, CEO or the equivalent. While the Final Rule permits enforcement of existing non-compete clauses with Senior Executives, the Final Rule prohibits employers from entering into new non-compete clauses with them after September 4, 2024.
- *Exception for non-compete clauses entered into pursuant to a “bona fide sale of a business”* – The Final Rule does not apply to non-compete clauses entered into by a person pursuant to a bona fide sale of a business, a person’s ownership interest in a business, or substantially all of a business’s operating assets. Thus, companies are still free to negotiate and obtain non-compete clauses with individuals who are selling their ownership interests as part of a merger or sale transaction.
- *Mandatory notice requirement* – By September 4, 2024, employers must provide notice to workers subject to a non-compete clause via mail, email, or text message, that the clause will not be, and cannot legally be, enforced. The Final Rule provides model notice language within its text ([page 566 of the Final Rule](#)).

[Read a high-level Fact Sheet and summary of the Final Rule drafted by the FTC.](#)

Legal Challenges

- In the days following the Final Rule's announcement, separate lawsuits challenging the Final Rule were filed in the Northern District of Texas, Eastern District of Texas, and Eastern District of Pennsylvania.
- The lawsuits all make similar arguments: (1) the FTC exceeded its statutory authority in issuing the Final Rule; (2) the Final Rule is an unconstitutional delegation of legislative power to an administrative agency; and (3) the Final Rule is arbitrary and capricious, with less intrusive means available to fulfill the FTC's stated goal of stimulating competition in the American economy.
- On May 3, 2024, the Eastern District of Texas case was stayed and transferred to the Northern District of Texas, which had the first-filed case. The Northern District of Texas court has set an expedited briefing schedule on the plaintiff's motion to stay, which is set to be completed in early June, with a potential hearing set for June 17, 2024. We expect the Northern District of Texas court to issue a ruling on the parties' motion to stay the effective date of the Final Rule by July 3, 2024. Similarly, the Eastern District of Pennsylvania indicated it would issue a ruling on the motion to stay pending in that lawsuit by July 23, 2024.

Best Practices for Employers to Consider While the Legal Challenges are Pending

- Until employers know if the legal challenges succeed in preventing the Final Rule from going into effect, some steps can be taken to prepare for its implementation, but full implementation should be delayed. Since the legal challenges are currently scheduled to have rulings in July 2024, there is plenty of time to send notices or implement new agreements after that and before the effective date of September 4, 2024.
- Identify any workers who meet the definition of a Senior Executive and are not currently subject to a non-compete clause, to determine if one is necessary; companies have until September 4, 2024 to enter into these agreements to have them remain enforceable (subject to applicable state laws).
- While there is a September 4, 2024 deadline to send notice, employers should not send notices until closer to the deadline, as there is a high likelihood the rule will be enjoined and tied up in appeals for the near future. Instead, continue to monitor the status of pending litigation and be prepared to send notices if necessary.
- Take steps to enforce agreements currently in place. The Final Rule expressly does not apply where a cause of action related to a non-compete clause accrued prior to September 4, 2024. There are some internal inconsistencies in the Final Rule as to whether the facts which form the basis of the cause of action alone must happen before September 4, or whether the enforcement action must be filed before September 4, so the safest course would be to file by the Effective Date if possible.
- Conduct an audit of existing non-compete clauses with current and former employees with relevant contact information to prepare for the event that pending litigation does not result in a stay of the Final Rule's effective date.
- Review existing confidentiality, non-solicitation, and other similar agreements to ensure compliance with applicable state and federal law and determine if there are opportunities to narrow the restrictions, to ensure that they would not be subject to the Final Rule's ban.

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