

# Locke Lord QuickStudy: The Federal Trade Commission Issues ?Non-Compete Ban, but Legal Challenges Await?

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As we [previously covered](#), on January 5, 2023 the Federal Trade Commission issued a proposed rule regarding the enforceability of non-compete agreements. The [proposed rule](#) followed President Biden's July 9, 2021, [Executive Order](#), which was aimed at "Promoting Competition in the American Economy." Sixteen months and over 26,000 public comments later, on April 23, 2024, the FTC voted along party lines and adopted its final rule. A summary fact sheet of the final rule can be found [here](#).

- *What does the final rule say?* The [FTC's final rule](#) largely tracks the proposed rule and, if left unchallenged, will invalidate nearly all future non-compete agreements after the effective date, which is in 120 days from the date the final rule is published in the Federal Register. The rule will also require employers to rescind existing non-compete agreements and notify employees that their non-compete clause is no longer in effect and may not be enforced. Importantly, the rule applies to all "workers," which includes not only employees, but also independent contractors, externs, interns, volunteers, apprentices, and sole proprietors. However, the final rule was *not* extended to include non-profit corporations or franchisors and franchisees, though Commissioner Rebecca Kelly Slaughter indicated the FTC was continuing to investigate these situations. The final rule maintains the previously contemplated carve out for non-compete agreements associated with the sale of a business in which the restricted party is an owner, member, or partner, but it eliminated the 25% ownership threshold originally contained in the proposed rule.
- *What changed?* The primary change between the proposed rule and the final rule is a new carve out for existing non-competes with "Senior Executives," which is defined as a worker earning more than \$151,164 who is in a "policy-making position." A "policy-making position," in turn, is defined as a business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority. While the final rule allows existing non-compete agreements with Senior Executives to stand, the final rule bans new non-compete agreements with Senior Executives entered into after the effective date.
- *Is the Proposed Rule law?* Not yet. The effective date is not until late August. Numerous stakeholders, including the Chamber of Commerce, have [emphatically opposed the rule from the start](#). Recently, the Chamber informed reporters that it plans to immediately challenge the final rule, as soon as tomorrow. Among other things, the Chamber and other opponents of the final rule contend there is a legitimate question whether the FTC has the authority to enact the rule in the first place. In the same way businesses challenged OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard and the CDC's temporary eviction moratorium, the FTC will likely face injunction hearings and requests to stay enforcement of the non-compete rule in the coming days. Moreover, the Chamber is expected to raise due process concerns related to the FTC's ability to retroactively invalidate existing agreements that are otherwise enforceable under applicable state laws.

- *What can employers do in the meantime?* Right now, the recommended course of action is to simply observe and let the almost-certain legal challenges play out in the near term prior to the effective date. In the meantime, employers would be wise to review their current restrictive covenant agreements to ensure they are carefully drafted to be no broader than necessary to protect their business interests, are reasonable as to the time, geography, and scope of activities to be restrained, and are compliant with applicable state laws. Moreover, companies should audit any agreements with “Senior Executives,” as there is an opportunity to enter into enforceable agreements with them for the next 120 days. This audit could also be expanded to create a roster of all existing agreements which could then be referenced in the event the portion of the final rule requiring notice to employees becomes law. Regardless of the final rule, employers remain permitted to enact non-disclosure agreements with their workforce to safeguard confidential, proprietary, and trade secret information, as long as the defined scope of those agreements are not tantamount to a non-compete agreement or otherwise serve solely to restrain competition.

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