



## FTC's Noncompete Rule – Final Rule Prohibits Employers from Enforcing Non-Competes Against Workers

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### SUMMARY:

Today, April 23, 2024, the Federal Trade Commission (“FTC”) announced a new rule banning non-competes with workers (the “Rule”). The FTC determined that non-competes are an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act.

As a result, the Rule (i) prohibits employers from entering into new non-competes with workers on or after the effective date, and (ii) prohibits employers from enforcing existing non-competes with workers other than senior executives. The Rule will take effect 120 days after it is published in the Federal Register (likely in early September).

### THE SCOPE AND REACH OF THE RULE:

According to the FTC, a “non-compete” clause is a term or condition, often in an employment contract, that prohibits, penalizes, or functionally prevents a worker from getting a different job or starting a business after leaving their employment.

The Rule covers employers that fall within the FTC’s jurisdiction and does not include, for example, banks, savings and loan institutions, federal credit unions, common carriers, air carriers, and certain non-profits. The Rule applies to all workers, whether full-time or part-time, including employees, independent contractors, interns, externs, volunteers, apprentices, and so on.

The Rule only applies to non-competes between businesses and workers and therefore *does not apply to non-competes between businesses* (i.e., franchisor/franchisee contracts – but it does apply

between an employer and its workers at a franchise), or between a buyer and a seller of a business (i.e., the seller can agree to a noncompete individually, but not for any of the business's workers). The Rule also does not prohibit confidentiality agreements or, more importantly, nonsolicitation agreements. However, the FTC has stated that nonsolicitation agreements which function to essentially make it impossible for an employee to work for a competitor or start their own business would be prohibited under the Rule. The FTC further stated that this would be a 'fact-specific' analysis – meaning that although the FTC specifically found that nonsolicitation agreements were permitted under the Rule, their exact boundaries have yet to be determined.

#### **WHAT TO DO NOW:**

**Nothing.** The Rule does not take effect for at least 120 days – and it is a certainty that it will be challenged in Court. We expect that the Rule will be temporarily stayed pending such challenge. Further, the FTC is on shaky ground here – whether it actually has the authority to issue the Rule is yet to be seen. Expect a fierce fight in the courts on this matter. Until the Rule is final and not stayed, there is nothing employers must do. We will monitor the progress of any challenge to the Rule and will issue Client Alerts on important developments. If it appears likely that the Rule will become enforceable, employers will want to take precautionary steps to protect themselves and their businesses, such as reviewing all non-compete agreements and policies, documents that may be ruled “non-competes” by the FTC, the scope of non-solicitation agreements and whether to put in place other agreements or policies to take effect once non-competes are banned.

#### **WHAT TO DO IF THE RULE BECOMES EFFECTIVE:**

**Give notice to workers.** Once the Rule is effective, employers may no longer enforce non-competes against workers (other than senior executives) and must give notice to current and former workers with an active noncompete that the noncompete is no longer enforceable.

A “senior executive” is a worker that (i) earns more than \$151,164 in compensation a year, and (ii) is in a “policy-making position.”

**Discontinue use of non-competes.** On and after the Rule's effective date, employers may no longer enter into non-competes with workers, including senior executives. So, businesses should discontinue use of non-competes in their employment contracts, employee handbooks and workplace policies, etc.

**Discontinue enforcement of non-competes.** For workers other than senior executives, employers may no longer enforce non-competes in court or threaten workers or former workers with enforcement.

However, employers may still enforce (i) existing non-competes with senior executives, as well as (ii) claims for breach of a noncompete that occurred before the Rule's effective date.

**Review agreements and policies that may function as non-competes.** Agreements and policies that would effectively function as a noncompete are also banned by the Rule. Allowing these to stay in place once the Rule is effective will expose employers to liability. Therefore, a thorough review of your agreements, policies and practices is recommended.

If you have questions or need assistance complying with this new FTC Noncompete Rule, please contact a member of Wisler Pearlstine's Business, Corporate and Tax Practice Group.

**About the Authors:**

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