

MAY 2, 2024 | AI/TECHNOLOGY, PRIVACY & DATA SECURITY

FTC Finalizes Non-Compete Rule – Prohibiting All New Non-Compete Agreements

As many of you may have heard by now, on April 23, 2024, almost exactly one year after it set forth its Proposed Rule regarding Non-Compete Clauses, the Federal Trade Commission (FTC) issued a pre-publication version of its final [Non-Compete Clause Rule](#) (the “Final Rule”). Barring judicial interference, the Final Rule will likely go into effect in August (120 days after it is published in the Federal Register).

As expected, the Final Rule bans nearly all non-compete agreements between employers and workers – including employees, independent contractors, and even unpaid workers. Indeed, under the Final rule, an employer generally will be prohibited from entering or attempting to enter into a non-compete with a worker, maintaining a noncompete with a worker, or representing to a worker that the worker is subject to a noncompete. The Final Rule will also require employers to cease enforcement of existing non-competes (aside from agreements with senior executives, as we will explain below) and actively inform workers that existing non-compete clauses will no longer be enforced. The FTC will provide model language to help employers comply with the notification requirements. 

Last year, during the Proposed Rule’s review process, [our Labor and Employment team](#) submitted comments on behalf of a coalition of businesses requesting certain revisions to the Proposed Rule. We realized that the Proposed Rule was going to be passed in some way, shape, or form. Thus, we submitted extremely focused comments, in which we advocated for only three substantive revisions to the Proposed Rule: (i) that the sale of business exemption should not be limited to those with a 25% ownership but rather should apply to all business owners; (ii) that the Proposed Rule should not apply retroactively; and (iii) that the Proposed Rule should exclude executives, highly paid employees, highly skilled employees, and those with access to a company’s confidential information. Although we will never know for sure how much weight the FTC gave to our comments, there is no disputing that a significant portion of these desired outcomes were achieved.

As we had asked for, the Final Rule removed entirely the Proposed Rule’s requirement that the seller have at least 25% ownership. Now, the exception to the Final Rule, found in § 910.3(a), provides that it does not apply when a non-compete clause “is entered into pursuant to a bona fide sale of a business entity, of the person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets.”

Additionally, although the Final Rule is still retroactive for most employees, there is now an exception to retroactive application for senior executives. Indeed, the Final Rule explicitly allows the enforcement of existing

non-compete agreements for senior executives, who are defined as a worker who was in a policy-making position and received at least \$151,164 in total annual compensation in the preceding year. In other words, if a senior executive already has a non-compete agreement in place before the rule's effective date, that agreement can still be enforced.

This exception is essential because these individuals typically have access to sensitive information and play essential roles in strategic decision-making. Thus, we at least achieved partial success regarding a combination of our second and third requests.

Legal Challenges

As expected, the Final Rule has sparked immediate legal challenges, led by the U.S. Chamber of Commerce – arguing that the FTC has exceeded its regulatory authority. The lawsuit was filed in a U.S. District Court in Texas, only one day after the FTC announced the Final Rule. The core of the lawsuit is the assertion that the FTC does not have the statutory authority to define what constitutes unlawful methods of competition to this extent. The Chamber of Commerce argues, among other things, that the sweeping nature of the Final Rule, which applies broadly across all levels of employment – represents an overreach of the FTC's powers as it lacks the authority to prohibit unfair methods of competition through rulemaking and that as a result of this Final Rule, "millions of workers and businesses will instantly lose bargained-for contractual protections." These arguments challenge the FTC's power to create such a rule and the extent of its influence on the economy.

Others, including Ryan LLC which filed a separate lawsuit, argue that non-compete agreements are vital for protecting trade secrets and investing in employee training without the risk of them immediately joining a competitor. The choice of Texas as the venue for these lawsuits could be strategic, placing the cases in front of conservative judges and potentially the Fifth Circuit Court of Appeals, known for its conservative leanings.

It will be interesting to say the least to follow these lawsuits, and the others that inevitably arise, as many expect these challenges to be successful. We will continue to closely monitor the status of the Final Rule and will keep you apprised of any developments.