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April 2024

FTC Issues Final Rule Banning Noncompete Agreements—Future Remains Uncertain as Lawsuits Challenging the Final Rule Have Already Been Filed

Key Notes:

- Yesterday, the FTC passed a final rule banning nearly all new noncompete agreements after the effective date.
- Additionally, the final rule requires employers to inform current and past employees that they will not enforce existing noncompete agreements, with a narrow exception for employees meeting the definition of "senior executive."
- The final rule is already facing legal challenges and may never go into effect, as at least two lawsuits, one from the United States Chamber of Commerce, have been filed challenging the FTC's authority to enact the final rule.

The United States Federal Trade Commission (FTC) voted 3-2 yesterday to pass a final rule that is a near-total ban on the use of noncompetition agreements by employers. The reach of this rule is massive, with an estimated 30 million (or 1 in 5) U.S. workers currently subject to noncompetition agreements.

In the final rule, the FTC determined that noncompetes are an unfair method of competition, and are, therefore, a violation of Section 5 of the FTC Act. The final rule bans new noncompete agreements for all workers and requires companies to inform current and past employees that the companies will not enforce those agreements. The rule is also mostly retroactive. Companies will have to eliminate existing noncompete agreements for most employees.

In a change from the original proposed rule, companies are **not** required to throw out existing noncompetes for senior executives, who represent less than 0.75% of U.S. workers. Specifically, the final rule defines the term "senior executive" as workers earning more than $151,164 who are in a "policy-making position." The FTC's final rule did include a notable exception for noncompete agreements between sellers and buyers of businesses, meant to protect the value of the businesses being acquired. The two sides could still enter into a noncompete agreement provided the seller had at least a 25% ownership interest in the business being sold.

In prepared remarks, FTC Commissioner Rebecca Slaughter stated in support of the ban, "It is so profoundly unfree and unfair for people to be stuck in jobs they want to leave, not because they lacked better alternatives, but because noncompetes preclude another firm from fairly competing for their labor, requiring workers instead to leave their industries or their homes to make ends meet."

The vote comes 15 months after the FTC announced its proposed rule banning noncompetes. The FTC was originally slated to vote on that rule last April, but the vote was delayed after the FTC received nearly 26,000 comments, with over 25,000 comments in support of the FTC's proposed ban on noncompetes. The FTC claims that the final rule banning noncompetes will lead to new business formation growing by approximately 2.7% per year, resulting in more than 8,500 additional new businesses created each year.

Despite the wide-reaching intent of the rule, its future is not at all certain. The final rule is expected to go into effect in 120 days, so on or about August 21, 2024. However, the rule is already facing aggressive legal challenges. At least two lawsuits have been filed against the FTC since it issued its final rule yesterday, one by the United States Chamber of Commerce, challenging the rule as well as the FTC's authority to enact it. Dissenting FTC Commissioner Andrew Ferguson stated that "[n]o matter how important, conspicuous and controversial the issue, and no matter how wise the administrative solution, an administrative agency's power to regulate must always be grounded in the valid grant of authority from Congress. Because we lacked that authority, the final rule is unlawful." In opposition to the noncompete ban, business groups emphasize that noncompete agreements are critical for protecting proprietary information and intellectual property.

Employers should note that even if the rule survives, other agreements with employees and other workers remain permissible unless they are so broad in scope as to constitute a *de facto* noncompete. These provisions include non-solicitation and confidentiality provisions. Employers who use noncompetition agreements should consult with counsel immediately on how to navigate through this period of uncertainty.

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