

FTC Issues Final Rule Banning Most Non-Competes In The Employer/Employee Context

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Following an Open Commission Meeting on April 23, 2024, the FTC issued a Final Rule rendering most non-compete agreements in the employer/employee context unenforceable. The Final Rule applies nationwide, to all employers that are organized for-profit.

Unlike the draft of the rule that was proposed in January 2023, the Final Rule makes a distinction between Senior Executives and other employees. A "Senior Executive" is defined as an employees who earns more than \$151,164 per year and is in a "policy-making position."

The main points of the Final Rule are as follows:

Employees That Are Not Senior Executives

- All non-competes with employees who are not Senior Executives, including those that already exist, are unenforceable.
- Employers have an obligation to inform employees that their non-compete is unenforceable.
- The Final Rule does not apply where a cause of action related to a non-compete clause accrued prior to the effective date.

Senior Executives

- Non-competes with Senior Executives that are entered into after the effective date of the Final Rule are unenforceable.
- Existing non-competes with Senior Executives remain in effect under existing applicable law.

The Final Rule will go into effect 120 days after it is published in the Federal Register. The two dissenting Commissioners, Melissa Holyoak and Andrew Ferguson, argued that the FTC lacks the Constitutional authority to promulgate this sweeping rule. It is likely that the Final Rule will be challenged by the business community, and that the effective date may be delayed.

Nevertheless, all employers must be aware of this Final Rule, and must take an immediate inventory of their existing non-compete agreements to determine which of those agreements are enforceable under the Rule. Employers should also analyze and revisit the strategies being utilized to protect confidential information and trade secrets. A large part of the FTC's reasoning in banning non-competes is that there are other mechanisms, such as trade secret law,

confidentiality agreements, and non-disclosure agreements that can be utilized to protect confidential information, without stifling competition. With the new Final Rule in place, now is the time for employers and employees to look at existing restrictive covenants to evaluate whether they are enforceable and effective.