

## FTC Bans Noncompetition Clauses

On April 23, 2024, the Federal Trade Commission announced a nationwide rule formally banning most forms of noncompetition clauses. In a 3-2 vote, the FTC issued a 570-page final rule, 16 CFR Part 910, that will have dramatic consequences for non-compete clauses in employment agreements. Under Part 910.2(a), the new FTC rule provides that it is an unfair method of competition for a person, partnership, corporation, association or other legal entity within the United States:

- (i) to enter into or attempt to enter into a non-compete clause;
- (ii) to enforce or attempt to enforce a non-compete clause; or
- (iii) to represent that the worker is subject to a non-compete clause.

A non-compete clause means a term or condition of employment that *prohibits* a worker from, *penalizes* a worker for, or *functions to prevent* a worker from:

- (i) seeking or accepting work in the United States for a person or entity where such work would begin after the conclusion of the employment that includes the term or condition; or
- (ii) operating a business in the United States after the conclusion of the employment that includes the term or condition.

Forfeiture for competition and severance benefits conditioned on compliance with noncompetition clauses are likely to be construed to “penalize” a worker under § 910.1 and should be avoided.

Under the FTC final rule, noncompetition covenants for senior executives who are in policy-making positions entered into prior to the effective date of the new rule can remain in force. Employers, however, are prohibited from entering into or enforcing new noncompetition covenants with senior executives after the effective date of the rule. The final rule defines senior executives as workers earning more than \$151,164 annually and who are in policy-making positions.

There is a notice requirement for existing noncompetition clauses set forth in Part 910.2(b)(1). The notice must be delivered by hand to the worker, by mail to the worker’s last known personal street address, or by email at an email address belonging to the worker at his work or personal email, or by text message at a mobile telephone number belonging to the worker by the date the new FTC rule becomes effective (i.e. 120 days after publication in the Federal Register). The notice provision needs to be given to those employees who are not senior executive under the FTC rule and who are subject to non-compete clauses after the effective date of the rule. This notice provision includes current and former employees. There is no obligation to rescind the prior agreements and enter new ones without the noncompetition provision. Under the final rule, employers simply have to provide notice to workers bound to an existing non-compete that the noncompetition will not be enforced against them in the

future. A model notice provision with a sample notice letter that provides a safe harbor for compliance with Part 910.2(b)(1) is set forth in Part 910.2(b)(4).

There are some recognized exceptions to the FTC rule banning noncompetition provisions. Under Part 910.3, the FTC rule does not apply to the *bona fide sale of business*, or to existing causes of action related to a noncompetition covenant clause that accrued prior to the effective date of the rule. The new rule also does *not* categorically apply to non-solicitation provisions, NDA's, or Training Repayment Agreement Provisions (TRAP's), "no-hire" agreements or "no business" agreements, unless such provisions are so broad and onerous as to "function to prevent" or "penalize" a worker from accepting another job.

Under Part 910.4, the new FTC rule will not be construed to annul or exempt any person from complying with any state statute, regulation, order, or interpretation applicable to a non-compete clause, such as state antitrust and consumer protection laws and state common law, except that Part 910 "supersedes such laws to the extent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition under § 910.2(a) or conflict with the notice requirement in § 910.2(b)."

Under Part 910.5, if any provision of the new FTC rule "is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law and such invalidity shall not affect the application of the provision to other persons or circumstances or the validity or application of other provisions. If any provision or application of this part is held to be invalid or unenforceable, the provision or application shall be severable from this part 910 and shall not affect the remainder thereof."

In its announcement, the FTC notes that its purpose in issuing its final rule is to promote competition by banning noncompetition covenants nationwide, protect the fundamental freedom of workers to change jobs, and increase innovation and foster new business formation. The FTC contends that noncompetition provisions keep wages lower, suppress new ideas, and "rob the economy of dynamism, including the more than 8,500 new startups that would be created once noncompetes are banned" according to FTC Chair Lina M. Khan. Once the FTC's new rule becomes effective, existing noncompetition covenants for the vast majority of workers will no longer be enforceable.

The FTC's ban on non-compete clauses will almost certainly face legal challenges in court on the FTC's rulemaking authority. According to some legal commentators, Section 6(g) of the FTC Act, which is the statutory provision the FTC relies upon, makes only a passing reference to the authority to issue rules contained in a list of investigative powers. Additionally, the U.S. Supreme Court took a narrow view of the FTC's rulemaking power in *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. 67, 141 S. Ct. 1341 (2021), raising

questions whether the rule could be an unconstitutional delegation of legislative authority requiring “major questions” to be reserved to Congress. The U.S. Chamber of Commerce has filed a lawsuit against the FTC in the United State District Court, Eastern District of Texas, seeking to overturn the new FTC rule.

*Quo vadis* -- What you need to be prepared do - - The FTC Rule has not yet been published in the Federal Register, but it will go into effect 120 days after it is published. Be prepared to comply with the FTC rule within that period unless and until the FTC rule is overturned, or the action filed by the US Chamber of Commerce results in a stay.

The FTC announcement and the FTC Non-Compete Clause Final Rule are set forth in the links below:

<https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>

[https://www.ftc.gov/system/files/ftc\\_gov/pdf/noncompete-rule.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf)

If you have any questions about the content or applicability of the new FTC rule banning noncompetition clauses and its implications for your business, you should contact one of our Todd & Weld LLP employment lawyers.