



THEY FINALLY DID IT

FTC BANS ALL NON-COMPETE AGREEMENTS

We have written about this subject for more than a year -- and this ruling has been coming for months -- but it is indisputably here. On April 23, 2024, the Federal Trade Commission's (FTC) final rule was put into place, banning all non-competes with several exceptions for senior executives. Once this new rule goes into effect, which will occur 120 days after its publication in the Federal Register, employers will also be required to provide notice to employees who are currently bound by non-compete agreements, but who do not qualify as senior executives, that they will not be enforced. Existing non-competes for senior executives can remain in force.

The final rule defines a "non-compete clause" as "(1) 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 with a different person 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" which includes, but is not limited to, a contractual term or workplace

policy, whether written or oral. One saving grace is that the final rule does not apply to non-competes entered into by a person pursuant to a "bona fide sale of a business entity" and do not apply where a cause of action related to a non-compete clause accrued prior to the effective date of the Ruling. In general, the Commission considers a bona fide sale to be one that is made between two independent parties at arm's length, and in which the seller has a reasonable opportunity to negotiate the terms of the sale.

Further, the rule provides that it is not unlawful to attempt to enforce a non-compete where a person has a "good faith basis" to believe the final rule is inapplicable. What that means is anyone's guess as the final rule is very clear about what it hopes to achieve, we can safely say this "exception" will not be found often, if at all.

Finally, giving nothing more than ice and winter, the final rule does not limit enforcement of non-compete clauses under state law, provided such laws do not conflict with the final rule, which is essentially all-encompassing with rare exceptions. Based on this, whether necessary or not, we

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can expect New York State to pass an identical ban consistent with the FTC’s ruling, putting an end to non-competes that have existed for hundreds of years in common law.

As for what is a “senior executive,” at a minimum, a senior executive refers to workers earning more than \$151,164 annually who are in a “policy making position.” According to the FTC, a “policy making position” is the business entity’s president, chief, executive officer or equivalent, or any other natural person who has “policy making authority” for the business entity which includes the president, vice president, secretary, treasurer or principal, financial officer, controller, or principal, accounting officer, and any natural person routinely performing corresponding functions. “Policy making authority” is defined as “final authority to make policy decisions that control significant aspects of a business entity or common enterprise and does not include authority limited to advising or exerting influence over such policy decisions.”

But all hope is not lost as the FTC found that less restrictive alternatives to non-competes, including appropriately tailored NDAs and non-solicitation agreements, are sufficient to address disclosure of confidential information and concerns related to client business. The FTC has made it clear that the final rule does not ban non-solicitation clauses unless they meet the definition of a non-compete clause, making the need for precise drafting all that more important.

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