

FTC Votes to Approve Ban on Non-Compete Agreements. What now?

You likely know by now about the Federal Trade Commission's ("FTC") April 23, 2024, vote to implement its final rule banning non-compete agreements. The ban is scheduled to take effect 120 days following the publication of the regulations in the Federal Register, which is scheduled for May 7, 2024.

Less than 24 hours after the FTC announced this ban, the U.S. Chamber of Commerce filed a lawsuit to challenge the non-compete ban. The lawsuit raises several challenges from the overall authority of the FTC to make such a rule, on the one hand, to the FTC's attempted retroactive application of the rule to existing non-competes, on the other. Several other legal challenges have been filed across the country.

When (or if) this ban takes effect, it will bring about critical changes in the landscape of employment contracts and the methods employers may utilize to protect their business. Here's a quick Q&A to help you decide next steps.



Jodi R. Bohr
602.255.6082 | jrb@tblaw.com
<https://www.tblaw.com/attorneys/jodi->

What does the FTC Final Rule do?

The final rule effectively prohibits all new non-compete clauses. A non-compete clause is defined as "[a] term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from" either seeking or accepting work or operating a business after the conclusion of employment. The ban applies more broadly than just contractual terms; it also includes any workplace policies, whether written or oral.

Who is affected by the final rule?

The final rule prohibits companies from entering into any new non-compete clauses with all workers (i.e., employees and independent contractors). It also invalidates all existing non-compete clauses, apart from those non-compete clauses with “senior executives.” “Senior executives” are defined as workers in a “policy-making position” (any officer of the business who has “policy making authority”) with annualized compensation of over \$151,164. And, “policy-making authority” means “final authority to make policy decisions that control significant aspects of a business entity or common enterprise.” Notably this definition does not include a person whose role is limited to advising or influencing such decisions.

What are the exceptions to the final rule?

- **Exempt entities:** The final rule does not apply to entities that are not subject to the FTC Act. This includes certain financial institutions, non-profit businesses, and common carriers. Companies who claim non-profit status, who want to continue the use of non-compete agreements, should take efforts to confirm their status, as the FTC has clarified that just because a business is registered as non-profit for tax purposes does not make it exempt from the FTC Act. A registered non-profit may still be subject to FTC jurisdiction if it is a profit-making entity or organized to create profit for members.
- **Sale of a business:** The final rule does not apply to non-competes that are executed in connection with the “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.”
- **Franchise agreements:** The final rule does not apply to non-compete agreements between franchisors and franchisees.
- **Existing Breach:** The final rule does not prevent an employer from suing a worker for violation of a non-compete when the cause of action accrued before the effective date.

What must employers do to comply with the final rule?

Employers who have existing non-compete agreements with workers must provide written notice to workers that the agreement will not be enforced against them in the future. This notification should be provided within a reasonable timeframe from the effective date of the rule. The FTC has included [model language](#) in the final rule that employers may use to communicate with workers. If an employer has other restrictive covenants it intends to continue to enforce, the model language should be modified to clarify that breach of such confidentiality and non-solicitation agreements will be enforced.

Does the final rule apply to confidentiality or non-solicitation provisions?

Generally, no. Employers should take this opportunity to review their current confidentiality and non-solicitation provisions to determine whether those provisions, as written, “function[] to prevent” workers from seeking work. So long as those restrictive covenants are narrowly drafted, they are unlikely to be covered by the FTC ban and more likely to be enforceable under Arizona law.

Also, employers should be prepared to take necessary measures to revise their employment agreements and policies and remove any provisions that contravene the final rule.

Next steps?

The fate of the final rule remains uncertain, so employers should consider taking the wait-and-see approach. Employers should proactively monitor legal challenges to see if a stay of the effective date is issued. As the effective date of the final rule nears, take the necessary steps to be prepared to comply should the final rule take effect. But wait to implement the preparations until it appears a near or actual certainty that the final rule will take effect.

We encourage employers who have specific questions about the FTC’s final rule or other related employment issues to contact Jodi Bohr at jrb@tblaw.com or (602) 255-6082, to ensure your workplace is ready to comply with the currently anticipated effective date of September 4, 2024.

Tiffany & Bosco, P.A.

2525 E. Camelback Road, Seventh Floor
Phoenix, AZ 85016
602-255-6000

Jodi R. Bohr

602.255.6082 | jrb@tblaw.com
<https://www.tblaw.com/attorneys/jodi-r-bohr/>