

COMPLIANCE UPDATE – STEPS EMPLOYERS SHOULD TAKE TO PREPARE FOR THE FTC NONCOMPETE BAN IF IT'S NOT ENJOINED BY SEPT. 4, 2024

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On April 23, the United States Federal Trade Commission (FTC) announced a nationwide ban on nearly all post-employment noncompetes that is set to go into effect Sept. 4. A link to our firm's initial client alert on the FTC rule is available [HERE](#). This article provides an overview of the FTC rule, a status update on pending litigation seeking to block the FTC rule and compliance next steps for employers grappling with what to do before Sept. 4.

OVERVIEW OF THE FTC RULE

What does the ban cover?

The FTC rule is a nationwide ban of post-employment noncompetes for nearly all workers after Sept. 4. If the rule goes into effect after this date, it will be an unfair method of competition—and therefore a violation of Section 5 of the FTC Act—for employers to enter post-employment noncompetes with workers.

Importantly, the ban does not apply to other restrictive covenants, such as nondisclosure agreements, nondisparagement agreements and nonsolicitation agreements. It also does not ban noncompetes with workers during employment.

Is the ban retroactive?

The enforceability of a post-employment noncompete that existed before the effective date is dependent on whether the noncompete involves a "Senior Executive."

For workers classified as "Senior Executives," existing noncompetes will remain in full force and effect subject to existing state laws. "Senior Executives" are defined as workers earning more than \$151,164

annually who are in a “policy-making position.” Though the term leaves some room for interpretation, it appears to cover only the highest-level decision makers in an organization with “policy-making authority.”

Existing noncompetes with former workers other than Senior Executives will not be enforceable after the effective date. **Employers must provide notice to any former employees under noncompetes who are not Senior Executives that their noncompetes are no longer enforceable.** More on this requirement follows under “Compliance Next Steps.”

Are there exceptions?

The FTC rule does not prohibit:

- noncompetes in connection with a sale of business;
- noncompetes during employment (concurrent employment restraints);
- noncompetes in connection with garden leave clauses (where the worker remains employed and paid, but is no longer performing work for the organization);
- nondisclosure agreements;
- nonsolicitation agreements.

In each case, however, state law may still impose restrictions on these covenants.

The FTC rule will not apply where a cause of action related to a noncompete clause accrued prior to the effective date.

The FTC rule does not apply to: certain banks, savings and loan associations, federal credit unions, common carriers, air carriers, nonprofit organizations, and businesses covered by the Packers and Stockyards Act of 1921 (meatpacking, livestock dealers, market agencies, live poultry dealers and swine contractors).

LITIGATION STATUS

As soon as the FTC rule was passed, lawsuits were filed across the country seeking to enjoin, or block, the rule from going into effect. Two of the lawsuits were consolidated in the Northern District of Texas before Judge Ada Brown. Judge Brown issued a preliminary injunction blocking the FTC rule, but only as to one of the parties in the pending litigation. More about that ruling is [HERE](#).

On July 23, a federal judge in Pennsylvania denied a motion for preliminary injunction seeking to block the FTC rule. Another case is pending in Florida, but the judge has not issued a ruling.

The Texas judge indicated that she would aim to issue a final ruling on the merits by Aug. 30, which is when we will find out whether she will expand the injunction to a nationwide injunction blocking the FTC rule from going into effect on Sept. 4. Judge Brown’s preliminary ruling signals that the FTC rule will not survive

judicial scrutiny; however, the U.S. Supreme Court has cautioned federal judges in recent years about issuing nationwide injunctions. Regardless of the decision, it will almost certainly be appealed. In the meantime, employers are left wondering what to do.

COMPLIANCE NEXT STEPS

Employers should start preparing to comply with the FTC rule in the event it is not enjoined by Sept. 4. While the Texas judge could expand her injunction to the entire country on Aug. 30 or we may get a ruling from the Florida judge, if a nationwide injunction is not entered, employers will have only a matter of days to comply with the rule.

Some employers are taking a wait-and-see approach, confident that the FTC rule will not survive judicial scrutiny. For those waiting to comply, the risk of penalties (see below) can be mitigated if the employer does not seek to enforce a noncompete until and unless we have some finality from the court system on whether the FTC rule will survive.

For employers more comfortable getting ready to comply with the FTC rule, here are next steps:

Step 1: Determine who should receive notice that their noncompete is no longer enforceable.

- Under the FTC rule, employers must provide clear and conspicuous notice to any current and former non-Senior Executive workers under post-employment noncompetes that their post-employment noncompetes cannot be legally enforced after the effective date. Note that noncompetes that apply during the term of employment are still valid and not subject to the FTC rule.
- Employers should prepare a list of every employee and former non-Senior Executive employee under an active post-employment noncompete. Determining who must receive this notice could take significant time and may involve individually reviewing employment agreements of all current and many former employees.
- Alternatively, some employers may choose to take a “shotgun” approach and prepare a general notice that goes out to all current and former (non-Senior Executive) employees, regardless of whether the employer knows if they have a post-employment noncompete or not.
- Employers should prepare the distribution list with the allowable methods of delivery for the notice in mind so the list can be easily “mail merged.” **The notice may be delivered by: 1) mail at the worker’s last known personal street address, or 2) email to the worker’s current work email address or last known personal email address or 3) by text message at a mobile telephone number belonging to the worker.**

Step 2: Work with outside counsel to prepare the notice.

- Employers should work with their outside counsel to prepare this notice so that it complies with the FTC rule while still preserving other protections the employer may have in place, such as nondisclosure and nonsolicitation agreements.

- The notice should advise the worker that the company is reserving its rights to enforce noncompetes during employment and to later enforce post-employment noncompetes if the FTC rule is invalidated in the future.
- The FTC has provided sample notices in seven languages on its [website](#). Be forewarned, the FTC sample does not provide protections for employers.

Step 3: If the FTC rule is not enjoined, send the required notice by Sept. 4.

Step 4: If the FTC rule is not enjoined, employers should review current agreements to comply with the rule and make sure their business interests are still protected.

- Work with outside counsel to revise any agreements containing post-employment noncompetes.
- Employers may consider including some contingent language in the revised agreements that accounts for the possibility the FTC rule will be struck down in the future, at which point certain additional restrictive covenants (i.e., the post-employment noncompete) would automatically apply to the employee.
- Employers should consider adding garden leave clauses for key executives and sales professionals and should ensure other restrictive covenants that are not banned, including nonsolicitation and nondisclosure agreements, are in place.
- Employers should consider a trade secret audit and review existing confidentiality agreements to ensure their most important competitive information will be protected under existing laws.

What are the penalties for noncompliance?

The FTC rule can be enforced in two ways—through FTC enforcement actions and civil litigation.

First, the FTC could initiate an action to enjoin conduct it believes violates the rule. It could not seek monetary relief in an injunction action. However, the FTC can obtain civil penalties of up to \$50,120 per violation in court if a party fails to cease and desist from a violation after being ordered to do so. To trigger this authority, the FTC will generally send a “Notice of Penalty Offenses” in an effort to obtain compliance before seeking penalties.

Second, although there is no private right of action under the FTC Act, an aggrieved employee can file a lawsuit seeking a judgment from the court declaring their post-employment noncompete unenforceable. In such a case, there may be other potential claims and damages (or fee shifting provisions) available to the employee if the employer attempts to enforce an illegal noncompete.

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