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FTC APPROVES SWEEPING NATIONWIDE BAN OF NONCOMPETES

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On April 23, 2024, the United States Federal Trade Commission (FTC) announced a nationwide ban on nearly all noncompetes. According to the FTC's estimates, one in five—*i.e.,* nearly 30 million—U.S. workers are subject to noncompetes. The FTC's unprecedented ban will therefore have a massive impact on the contractual rights and obligations and recruiting and retention strategies of employers and employees across the county and create a tidal wave of litigation.

How did we get here?

The FTC's sweeping ban—the agency's first competition regulation in over 50 years—is a response to President Biden's 2021 executive order directing the FTC to curtail the unfair use of noncompetes and other clauses or agreements that unfairly limit worker mobility. In response, the FTC issued a proposed rule in January 2023 outlining a nationwide ban on noncompete agreements in all but a limited number of instances. The FTC's proposed rule was subject to a public comment period in which the FTC received more than 26,000 comments—over 25,000 of which were purportedly in support of the FTC's proposed ban.

On April 23, 2024, the FTC's five commissioners voted 3-2 along party lines to adopt a final version of the rule. Shortly, after the FTC announced its decision, President Biden posted the following on X:

"[T]he @FTC is cracking down on non-compete agreements, contracts that employers use to prevent their workers from changing jobs even if that job will pay a few dollars more, or provide better working conditions."

When does the ban go into effect?

The effective date of the ban is 120 days after the final rule is published in the Federal Register, which should occur imminently.

What does the ban cover?

The FTC rule is a nationwide ban of noncompetes for all workers after the effective date. Specifically, after the effective date, it is an unfair method of competition—and therefore a violation of Section 5 of the FTC Act—for employers to enter noncompetes with workers.

Is the ban retroactive?

Yes and no. The enforceability of a noncompete that existed before the effective date of the final rule 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 workers other than senior executives will not be enforceable after the effective date. The FTC estimates that fewer than 1% of workers will be classified as senior executives. Not only will these agreements be rendered useless upon the effective date, but employers must also proactively provide workers with existing noncompetes written notice that their noncompetes are no longer enforceable.

Are there exceptions?

The FTC rule includes exceptions for "bona fide sales of business" and "existing causes of action." Specifically, the rule provides:

- The requirements of [the FTC rule] shall not apply to a noncompete clause that is entered into by a person pursuant to a 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.
- The requirements of [the FTC rule] do not apply where a cause of action related to a noncompete clause accrued prior to the effective date.

Are nonsolicitation agreements also banned?

Nonsolicitation clauses are not expressly covered by the FTC rule. Generally, a nonsolicitation agreement prevents an employee from soliciting a company's clients and employees for a specified time after termination; whereas a noncompete agreement prevents an employee from competing with (*e.g.*, accepting a job with a competitor) for a specified time after termination.

Will there be legal challenges?

The FTC's noncompete ban will face substantial legal challenges.

Historically, the enforceability of noncompetes has been determined on a case-by-case basis according to state law or, in the antitrust context, by applying the "rule of reason." All but four states—California, Oklahoma, North Dakota, and Minnesota—allow noncompetes. Opponents of the ban reject the notion that the FTC—an agency of the Executive Branch comprising unelected federal employees—has the power to nullify the laws of 46 states and simply dismiss millions of negotiated contracts. The FTC's noncompete ban also implicates serious constitutional and separation-of-powers issues. The Constitution vests all legislative powers in Congress. Congress may delegate rulemaking responsibilities in limited, statutorily defined circumstances. Here, it is questionable that the FTC Act—the statute upon which the ban is based—bestows the FTC with sweeping, substantive rulemaking authority. Opponents of the ban also question whether the FTC's ban violates long-established U.S. Supreme Court precedent that holds "major questions" are the prerogative of Congress.

Ryan LLC, a Dallas-based tax advisory firm, filed the first lawsuit contesting the FTC's authority to adopt the noncompete ban in the U.S. District Court for the Northern District of Texas, Dallas Division, just hours after the FTC announced its final rule. The United States Chamber of Commerce, one of the country's most influential pro-business lobbying groups, immediately announced: "The Chamber will sue the FTC to block this unnecessary and unlawful rule and put other agencies on notice that such overreach will not go unchecked." On April 24, 2024, the Chamber of Commerce filed a lawsuit against the FTC in the U.S. District Court of the Eastern District of Texas, Tyler Division, seeking a declaratory judgment and injunctive relief.

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