

FTC Votes on Final Rule to Ban Non-Compete Agreements

April 23, 2024

Following an extended public comment period that began in January of 2023, the Federal Trade Commission (FTC) voted Tuesday, April 23 to implement a new rule that would effectively ban non-compete agreements nationwide, except in limited circumstances.

The Final Rule defines non-compete agreements as an “unfair method of competition” that violates the FTC Act. It prohibits employers from entering into new non-compete agreements with workers beginning on the effective date. The Rule uses a two-pronged approach for existing non-competes. For “senior executives,” defined as those earning more than \$151,164 annually in a “policy-making position,” existing non-competes can remain in force indefinitely. The FTC estimates that fewer than 1% of workers fall into this classification. The Final Rule prohibits businesses from entering into or enforcing new non-competes upon the effective date of the Act, including senior executives in policy-making positions. Except for senior executives in policy-making positions, existing non-competes will become unenforceable on the effective date (which will be determined when the Rule is published in the Federal Register).

The Final Rule includes a few limited exceptions, including for franchisees in a relationship with a franchisor (but not employees of the franchisee) or for non-competes related to a “bona fide sale of a business entity.” It also does not apply to trade secret laws and non-disclosure agreements. This represents a slight softening of the rule in its [original form](#). Employers may still utilize non-disclosure agreements and non-solicitation agreements which do not replicate non-competition terms as resources.

This ban is an ambitious step by the Biden administration, and it follows a [trend of pro-employee movements](#) in recent years. During the rulemaking period, the FTC received “more than [26,000 comments](#) from members of the public.” It estimates that 30 million people are currently subject to non-compete agreements, and that the ban on non-competes will result in [increased competition](#) resulting in higher worker earnings of up to \$488 billion, new business formation of over 8500 new entities, reduced health care costs, and an increase in the number of new patents. FTC Chair Lina M. Khan [characterized](#) non-compete clauses as restrictions that “keep wages low, suppress new ideas, and rob the American economy of dynamism[.]”

The non-compete ban faces scrutiny from commerce organizations and business lobbying groups, which may file lawsuits to block the implementation of the Rule. One such organization, the U.S. Chamber of Commerce, has previously issued [public comment](#) characterizing the ban as a “dismissal of business justifications for non-compete agreements” that represents an overreach of the FTC’s authority under the Administrative Procedures Act. The 2024 election cycle could also affect the implementation of the rule.

Employers will be affirmatively charged with notifying all those with whom they have a pending non-compete agreement that the agreement is no longer valid. Sample notices in a multitude of languages are available on the FTC website. Barring any legal stay via litigation or other blockage, businesses will have to be in full compliance no later than 120 days after the rule is published in the Federal Register, which has yet to be determined.

Employers should monitor the progress of this Rule and consider revising their policies, practices, and employment agreements to remain in compliance. For information about the FTC's Rule or other questions about non-competes or other employment agreements, please contact members of McGlinchey's Labor and Employment Group.

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