Sterne Kessler
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Client Alert

FTC Issues Final Rule Banning (Almost All) Non-Compete Agreements

On May 7, 2024, the Federal Trade Commission (FTC) issued a Final Rule that renders invalid non-compete clauses in standard employment agreements. 16 C.F.R. § 910. Although some limited exceptions apply, this new regulation imposes a nationwide and retroactive ban on non-compete clauses and also requires employers to notify their current and former employees to tell them that existing non-compete agreements are no longer effective. Although the regulatory objective is to improve competitive conditions for employees, the Final Rule has significant implications for companies whose competitive edge depends on protecting their trade secrets from unauthorized disclosure. In particular, companies should now take care to ensure compliance with their trade-secret policies by current, former, and prospective employees.

Overview of the FTC's Final Rule

The Final Rule has both prospective and retroactive reach. Going forward, the Final Rule makes it unlawful to enter into a non-compete agreement with any "worker" on or after September 4, 2024—where the term "worker" is defined to include employees as well as independent contractors. *See* 16 C.F.R. § 910.1. This ban on non-competes also applies retroactively to any "worker"—except a "senior executive," who is defined as a "worker" in "a policy-making position" that meets certain minimum compensation criteria. *See id.*

For an existing non-compete agreement (i.e., a non-compete agreement entered into before the effective date of the Final Rule), an employer must provide "clear and conspicuous notice" to its existing and former employees by the effective date that the non-compete agreement "will not be, and cannot legally be, enforced" against those

employees. § 910.2(b)(1). The Final Rule includes model language that satisfies this notice requirement. § 910.2(b)(4).

The Final Rule has three limited exceptions. *First*, it does not apply to the bona fide sale of a business. § 910.3(a). *Second*, it does not apply to "a cause of action related to a non-compete clause [that] accrued prior to the effective date." § 910.3(b). *Third*, it is not unlawful to enter into or enforce a non-compete agreement "where the person has a good-faith basis to believe that [the Final Rule] is inapplicable." § 910.3(c).

The FTC's authority to promulgate such an expansive rule—which impacts millions of employers, millions of employees, and billions of dollars of economic productivity—rests on shaky footing and is already the subject of several legal challenges. The ultimate fate of this Final Rule, and whether it will go into effect on September 4, 2024, as currently scheduled, remains an open question.

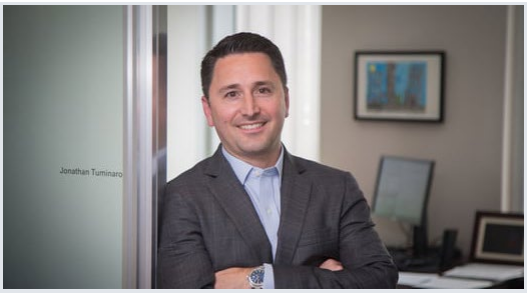
Practical Implications: The Heightened Importance of Trade-Secret Protection

Non-compete agreements have traditionally been used as one tool to prevent a company's intellectual property from going to a competitor when an employee leaves. But the continued effectiveness of this strategy is uncertain. Although litigation to stop the Final Rule from going into effect is pending, the final resolution of that litigation could take years to resolve in the courts. In the meantime, companies should look to other forms of protection—like trade secrets—to safeguard their intellectual property. In particular, companies should consider the following:

- Review existing on-boarding and off-boarding procedures to be sure that trade-secret policy compliance issues are addressed;
- Ensure that access to trade-secret information among employees is limited to only those with a "need to know"; and,
- Consider tracking of post-employment activities by key employees who had access to trade-secret information to ensure compliance with post-employment confidentiality obligations.

We will monitor this issue and provide updates as they become available. For questions, please reach out to Sterne, Kessler, Goldstein & Fox, including the contacts on this alert.

Authors



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