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FTC ADOPTS RULE BANNING MOST NON-COMPETES AND THE LEGAL SLUGFEST BEGINS

Hodgson Russ Non-Compete, Non-Solicit, and Trade Secrets Alert
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It may be time to grab the popcorn to watch how the national drama over non-competes in employment contracts unfolds. Non-competes are restrictions upon where an employee can work after she leaves a company. On April 23, the FTC issued a final rule banning non-competes in most employment agreements. Exceptions to the rule include not-for-profit employees, business sellers, and franchisees. Non-solicitation agreements are not affected and are still viable under the rule. The FTC started the public part of this process in January 2023 when it announced the initial proposed rule in an effort to increase innovation and competition for the betterment of the national economy. Since then, the FTC accepted and analyzed 26,000 comments made on its public portal, the vast majority of which were in favor of banning non-competes. Accompanying the final rule is a 500-plus page report outlining the reasoning and support for the ban that reads like an employment law treatise mashed up with a public policy paper and a law review article.

The rule takes effect 120 days after publication in the Federal Register, which is imminent. The FTC has provided model language and some guidance for employers as to how to unwind existing non-competes, and it makes clear that "senior executives," who by definition earn at least $151,164 per year and are in policy-making positions, are grandfathered in and their non-competes remain enforceable. But after the effective date, no new non-competes for senior executives are permitted.

As expected, and as foreshadowed by legal commentators and two of the FTC's Commissioners who spoke at the hearing on April 23, the first lawsuit challenging the non-compete ban was filed just a day later. The United States Chamber of Commerce alleges that the FTC exceeded its authority by issuing the ban, and that even if the FTC could legislate, the categorical ban far exceeded permissible boundaries. While that case, (and possibly others), makes it way through the courts, the employment law landscape is in disarray. Employers and employees alike will be questioning what is enforceable and what is permissible – and what happens if the rule takes effect and then is struck down.

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Non-Compete, Non-Solicit & Trade Secrets

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The landscape of restrictive covenants has been changing over the past few years and more changes are promised. Several states have banned them or restricted their enforceability. New York State's ban made its way to the Governor's desk where it was vetoed. And New York City has pending a few different prohibitions on restrictive covenant.

Immediate radical changes to employment policies and contracts need not be made just yet. But as the effective date approaches, employers will have to take a serious look at whether they will be required to comply or risk an enforcement action and, perhaps even worse, employee dissatisfaction.

To read the full ruling, **click here**. To view a fact sheet on the FTC's ruling, **click here**. If you have questions about the ruling, please contact any member of our **Non-Compete, Non-Solicit and Trade Secrets Practice Group**.

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