

## Employers Need to Consider the Impact of the Pending Ban on Non-Compete Clauses

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On April 23, 2024, the Federal Trade Commission (FTC) approved a final rule banning nearly all post-employment non-compete clauses for workers nationwide (Rule). The Rule is currently set to take effect September 4, 2024.

### ***The FTC's Non-Compete Clause Rule***

The FTC's Rule defines a "non-compete clause" broadly to include any "term or condition of employment" that would prevent a worker from "seeking or accepting work in the United States" or "operating a business in the United States" after the conclusion of their employment. The Rule does not apply to other types of restrictive covenants, such as non-solicit agreements and non-disclosure agreements, provided that such agreements are not so overbroad as to have the effect of a non-compete clause.

The FTC's Rule bans all non-compete clauses except those entered into with a person as part of a bona fide sale of a business, the person's ownership interest in a business, or substantially all of a business's operating assets. The Rule also invalidates previously entered post-employment non-compete clauses except for those entered into with "senior executives" with "policy-making authority" who earn at least \$151,164. Moreover, the Rule requires employers to provide notice to employees and former employees whose non-compete clauses are invalidated by the Rule, which must be sent on or before the effective date

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Agreements

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of the Rule (September 4, 2024). The Rule provides model language for the notice.

### ***Status of Legal Challenges to the Non-Compete Clause Rule***

Lawsuits have been filed in federal district courts in Florida, Pennsylvania, and Texas seeking to enjoin the Rule from taking effect. The court in Pennsylvania denied the plaintiffs' request to enjoin the Rule. On the other hand, the courts in Florida and Texas have enjoined the Rule, but only as applied to the named plaintiffs in those cases. Therefore, for all other employers, the FTC Rule is currently set to take effect on September 4, 2024, as scheduled.

Nonetheless, the federal court in the Texas case is expected to issue a decision on the merits by August 30, 2024, which may potentially include a broader injunction of the Rule.

### ***Next Steps for Employers***

Assuming the Rule takes effect on September 4, 2024, employers will be required to notify all current and former employees (except "senior executives") subject to a non-compete clause in writing that the clause will no longer be enforced. Employers should review any document that may contain active non-compete clauses, including but not limited to employment agreements, severance agreements, equity agreements, and restrictive covenant agreements, to identify all current and former employees who will be impacted by the rule. Employers should also prepare a draft notice and determine how the notice will be sent to affected individuals in the event the rule takes effect.

In consideration of the pending litigation, employers could wait until closer to the effective date of the Rule to send any required notices. In addition, prior to the effective date of the Rule, employers may also want to consider non-compete clauses for any "senior executives" who do not currently have such agreements because after the effective date of the Rule, an employer cannot enter into a non-compete clause of any employee, including senior executives.