

FEDERAL TRADE COMMISSION ISSUED A FINAL RULE BANNING NONCOMPETE

*Labor and Employment Department
April 25, 2024*

On April 23, 2024, the Federal Trade Commission (FTC) issued a Final Rule banning non-compete agreements and introducing pivotal changes designed to promote fair competition and employee mobility across various industries.

Key Aspects of the FTC's Final Rule

Effective Date:

The Final Rule will take effect 120 days following its publication in the Federal Register. This grace period will allow employers to adjust their practices accordingly.

Prohibition of Non-Compete Clauses:

From the effective date forward, it will be considered an unfair method of competition to enter into non-compete agreements with employees. This applies to all sectors and levels of employment, from entry-level to senior executives, with specific nuances for different categories of workers.

Covered Persons:

Only a person within the FTC's jurisdiction will be subject to the Final Rule. According to the Final Rule, a person is defined as "any natural person, partnership, corporation, association, or other legal entity within the Commission's jurisdiction, including any person acting under color or authority of State law."

Existing Non-Competes with Senior Executives:

Non-compete agreements that are already in place with senior executives prior to the Final Rule's effective date will remain enforceable. This decision comes after considering potential practical impacts on business operations and the unique position of senior executives.

Notice Requirements for Current Non-Competes:

Employers are required to notify all other employees that their existing non-compete agreements will no longer be enforceable from the rule's effective date.

The FTC provides model language to facilitate compliance and ensure clear communication.

Application to US Territories:

The Final Rule is uniformly applicable across all U.S. states and territories, ensuring a consistent regulatory approach nationwide.

Understanding Restrictive Covenants: Non-Solicitation vs. Non-Compete Agreements

This Final Rule applies only to non-compete agreements. While non-compete agreements restrict former employees from working in competing businesses within a certain geographical area and time period, non-solicitation agreements serve a different purpose. Non-solicitation agreements prevent former employees from soliciting the company's clients, customers, or employees. These are often used to protect a business's relationships and internal stability without broadly prohibiting former employees from working in their field or industry.

Other restrictive covenants might include confidentiality agreements, which require employees to keep proprietary information confidential, and non-disclosure agreements that prevent the sharing of sensitive business information.

These types of agreements do not by their terms prohibit a worker from or penalize a worker for seeking or accepting other work or starting a business after they leave their job, and in many instances may not have that functional effect. Therefore, employers may continue to use non-solicitation and/or non-disclosure agreements to protect their legitimate business interests, such as maintaining customer relationships and preserving workforce stability. However, if an employer adopts a non-solicitation and/or non-disclosure agreement with terms or conditions that are so broad or onerous that it has the same functional effect as a term or condition prohibiting or penalizing a worker from seeking or accepting other work or starting a business after their employment ends, such agreements would be considered equal to a non-compete clause under the Final Rule.

Implications for Your Business:

Although the Final Rule aims to enhance job mobility and competition, it is expected to have far-reaching implications for both employers and employees and therefore most likely face potential legal challenges. Nevertheless, businesses should be observant of legal challenges to this new regulation and start reviewing their current employment contracts and practices to align with the

forthcoming changes and consider the long-term impacts on their workforce management.

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For any questions or inquiries regarding this topic do not hesitate to contact us at info@oneillborges.com or your prime contact attorney at O'Neill & Borges LLC. Please refer to www.oneillborges.com.

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