

April 24, 2024

## FTC ANNOUNCES RULE TO BAN NON-COMPETES

In a groundbreaking move on April 23, 2024, the Federal Trade Commission (FTC) approved a final rule ("Final Rule") banning non-compete agreements in most employment contexts. A non-competition agreement or clause (also called a non-compete) is a contract or contractual provision that many employers across the United States require their employees to sign, preventing the employee from working for a competitor after leaving the company. While some courts have determined that they unfairly limit competition in some contexts, they have been largely upheld despite judicial scrutiny. Until now, the enforceability of non-competes has been a state issue. The FTC's vote to ban non-competes nationwide concerning most employees is a monumental departure from the status quo.

### Key Provisions of the Final Rule

The Final Rule bans non-competes for all workers, including senior executives, after the effective date—which will be 120 days after publication of the rule in the Federal Register. This means that employers will no longer be permitted to enter into any new non-competes with any "worker" starting on the effective date. Under the Final Rule, a "senior executive" is an individual earning more than \$151,164 annually and is directly involved in policy-making decisions for the company. Not every executive will qualify.

For pre-existing non-competes (i.e., non-competes entered into before the effective date), non-competes with senior executives (as defined above) will remain in place and are enforceable. However, for those employees who are not senior executives, employers should be aware that their non-competes will no longer be enforceable after the effective date. As of the effective date, employers will be required to issue notice to these employees, informing them that their non-competes are no longer enforceable. This notice must (i) identify the employer who entered into the non-compete with the worker, and, to the extent the employer possesses the following information, (ii) be delivered by hand to the worker, by mail to the worker's last known personal street address, or by email or text to the worker's last known email or personal cell phone. The final rule provides sample notice language to help employers comply with this requirement.

### What the Rule Does Not Apply To

There are a couple of important things that this rule does not apply to. First, the rule does not prevent non-competes entered into pursuant to the sale of a business. Second, the rule does not invalidate any cause of action based on a non-compete that accrued before the effective date. So to the extent an employer has an existing claim against a former employee for violation of a non-compete, that

claim will not be affected. Third, the rule does not prevent an employer from enforcing or attempting to enforce a non-compete clause or to make representations about a non-compete clause where the employer has a good-faith basis to believe the rule is inapplicable. Finally, the rule does not prevent an employer from entering into non-disclosure agreements with employees to prevent the disclosure of confidential or proprietary information, nor does it impact non-solicitation agreements, so long as such agreements do not fall within the scope of the FTC's rule – that is, they may not have the practical effect of preventing a worker from finding comparable work or engaging in a similar business.

## Pushback and Legal Challenges

Don't hang your non-competes up just yet. There is still a significant amount of time before the rule goes into effect, and judicial challenges are already mounting. The Final Rule will impact countless employers and employees nationwide – by the FTC's estimate, nearly 30 million employees nationwide are bound by non-competes. At least one lawsuit has already been filed by a Dallas, Texas company, seeking to prevent enforcement of the rule. The U.S. Chamber of Commerce has promised to "sue the FTC to block this unnecessary and unlawful rule and put other agencies on notice that such overreach will not go unchecked."

## JAH Can Help

Our attorneys at JAH can help you plan and navigate this potential change. [Click here to contact a member of our Employment Practice Group if you require assistance.](#)

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