

LEGAL ALERT

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THE FEDERAL TRADE COMMISSION ISSUES RULE BANNING MOST NON-COMPETES

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On April 23, 2024, the Federal Trade Commission voted 3-2 to issue a final rule that bans most worker noncompete agreements. See Fed. Trade Comm'n, Non-Compete Clause Rule, RIN2084-AB74 (Apr. 23, 2024). The final rule, which becomes effective 120 days after its publication in the Federal Register, provides that it is an unfair method of competition for employers to enter into non-compete agreements with workers.

The final rule defines “non-compete clause” as “a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition.” In addition, the final rule defines “worker” as “a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker’s title or the worker’s status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person.” Importantly, the final rule does not apply to non-competes entered into by a person pursuant to a bona fide sale of a business entity. Moreover, the final rule does not apply where a cause of action related to a non-compete accrued prior to the effective date.

With respect to existing non-compete restrictions, specifically, non-compete restrictions entered into before the final rule’s effective date, the Commission adopts a different approach for senior executives versus other workers. Existing non-compete restrictions with senior executives may remain in force, as the final rule does not cover such agreements. The final rule defines “senior executive” as “a worker who: (1) was in a policy-making position; and (2) received from a person for the employment: (i) total annual compensation of at least \$151,164 in the preceding year; or (ii) total compensation of at least \$151,164 when annualized if the worker was employed during only part of

the preceding year; or (iii) total compensation of at least \$151,164 when annualized in the preceding year prior to the worker’s departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete clause.”

For workers who are not senior executives, existing non-compete restrictions are no longer enforceable after the effective date. Notably, employers must provide these workers with existing non-compete restrictions notice that the non-compete restriction is no longer enforceable. The final rule includes model language that satisfies this notice requirement.

Within 24 hours of the Commission’s vote on the final rule, two lawsuits were filed challenging the Commission’s authority. At present, no court has made a ruling that would prevent the final rule from going into effect. Hahn Loeser’s labor and employment team is monitoring the status of the lawsuits and will update this alert if a court issues an injunction that stops the final rule from going into effect.

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