Apr 30, 2024

Categories:

Publications
Quick Legal Hits

Authors:

Jeffrey N. Lindemann
Jennifer L. Bame

FTC Final Rule Banning Non-Compete Agreements Appears Far from Final

On April 23, 2024, the Federal Trade Commission (FTC) issued a Final Rule (the "Rule") prohibiting employers from entering into and enforcing non-compete agreements with most workers. Under the Rule, "worker" is defined as an employee, independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides services. The Rule continues a recent trend among states and another federal agency seeking to curtail the use of non-compete agreements. Four states (California, Minnesota, North Dakota, and Oklahoma) already ban non-compete agreements, while many other states, including Colorado, Idaho, Illinois, Maryland, Montana, and Washington D.C., permit them subject to strict limitations. And almost one year ago, on May 30, 2023, the General Counsel of the National Labor Relations Board opined that non-compete agreements violate the National Labor Relations Act.

Continue reading the article below or watch this short video for key points and takeaways.

What Would the Rule Do?

The Rule would prevent employers subject to the FTC's jurisdiction from entering into non-compete agreements with *any* worker, regardless of title or income level, unless the agreement is part of a

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

bona fide sale of a person's ownership interest in a business. The FTC's jurisdiction generally extends to all for-profit companies but excludes non-profit entities, certain financial institutions, and common carriers. The Rule also would make *existing* non-compete agreements unenforceable for all employees *except* "senior executives." The Rule defines "senior executive" to include employees making more than $151,164 in total compensation per year who also hold "policy-making positions." The FTC estimates this would represent less than 1% of all U.S. workers. Upon the Rule's effective date, employers also would be required to provide notice to applicable workers that their non-compete agreements are no longer enforceable, but employers would not be required to rescind (legally modify) the agreements altogether, as would have been required under the Proposed Rule. Other provisions, like non-solicitation and confidentiality agreements, could remain in effect.

When Will the Rule Go Into Effect?

The FTC's Rule is set to take effect on September 4, 2024, 120 days after it was published in the Federal Register. However, interest groups have already begun filing lawsuits seeking to prevent implementation of the Rule. The U.S. Chamber of Commerce filed a lawsuit in the Eastern District of Texas seeking an injunction, and tax services firm Ryan, LLC filed a similar lawsuit in the Northern District of Texas. The Chamber of Commerce lawsuit has been stayed while the Ryan, LLC lawsuit progresses. If an injunction is entered, the Rule will not go into effect until those lawsuits are concluded and only if the Rule is ultimately upheld.

What Are the Arguments For and Against the Rule?

The Rule was passed by a margin of 3-2 along party lines. In support of the Rule, the FTC Democratic majority found that non-compete agreements violate Section 5 of the Federal Trade Commission Act because they are an "unfair method of competition." The FTC further claims that non-competes "are often the product of unequal bargaining power," and that they "negatively affect competition in labor markets" and "suppress[] new business formation and

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

innovation." According to the FTC, it received 26,000 public comments, and 25,000 of those expressed support for a ban on non-compete agreements. This included "numerous businesses who struggled to hire talented workers."

The two Republican FTC members who opposed the Rule opined that the Rule is unconstitutional and violates federal rulemaking procedures. Specifically, they argue that the FTC lacks the authority to engage in rulemaking on a substantive competition rule (rather than procedural rules); that the Rule is barred by the "major questions doctrine"; and that implementation of the Rule would be an impermissible delegation of legislative authority. Indeed, the Rule would nullify more than 30 million existing contracts nationwide and preempt the laws of 46 states. Opponents of the Rule argue that only Congress can implement a ban with such massive impact.

What Protections Do Employers Have?

If the Rule becomes effective, employers will still maintain important protections. The Rule would not prevent litigation relating to non-compete agreements if the cause of action accrued prior to the effective date of the Rule. This includes, for example, claims for breach of contract relating to a non-compete agreement where the breach occurred before September 4, 2024. As such, employers who want to pursue such claims should do so now. The Rule also would not prevent employers from entering into lawful non-solicitation agreements. Even under the Rule, employers can still restrict employees from soliciting customers and employees, so long as those restrictions do not have the end result of preventing competition by preventing workers from seeking or accepting other work or starting a business after their employment ends.

Notably, employers can continue to implement lawful confidentiality agreements that prevent employees from taking and/or using confidential information for the benefit of themselves or a competitor company. Employers also retain the protections provided by state and federal trade secrets laws prohibiting the misappropriation of an employer's trade secrets. In addition, employers still may be able to bring claims for breach of fiduciary

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

duty, tortious interference, theft, and unjust enrichment.

What Should Employers Do Now?

It is likely the Rule will be litigated for some time before it goes into effect, if it goes into effect at all. Accordingly, employers should continue to monitor legal developments before assuming non-compete agreements are unenforceable. If an injunction is not entered by August, it may become necessary for employers to begin preparing notices to applicable workers regarding any existing non-compete agreements. The FTC's Rule includes "model language" that employers can use to satisfy the notice requirement.

Regardless of what happens with the Rule, the FTC's announcement is a good reminder to ensure that existing agreements, including non-solicitation and confidentiality provisions (which remain in effect), comply with existing law. For example, in most states, restrictive covenants are only lawful if they are reasonable in scope and necessary to protect a legitimate business interest. Similarly, trade secret protections typically only apply if an employer has taken appropriate steps to maintain the confidentiality of the trade secret information. Employers also may consider entering into non-compete agreements with "senior executives," while it is still lawful to do so, if they have need for such agreements. As always, employers should work with counsel to evaluate the enforceability and effectiveness of their agreements and business practices.

We are closely monitoring the FTC Final Rule litigation and will keep you apprised of all key future developments. For more information about the FTC's Final Rule, please contact the authors or any member of Frost Brown Todd's Labor and Employment practice group.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons