Does the FTC Non-Compete Rule Apply to Your Multifamily Housing Business?

May 16, 2024

Categories:

Blogs
Multifamily Matters

Authors:

Jennifer L. Bame
S. Bradford Butler

Businesses across all industries routinely have key employees leave and start competing businesses. This is particularly common in the multifamily housing industry on both the developer and investor side. Whether your multifamily housing business is sold to a private equity shop, a family office, or a larger business, or if a key employee leaves to start a similar business, it's crucial that key executives understand the potential limitations that may soon be imposed on non-compete agreements.

As you've probably heard by now, on April 23, 2024, the Federal Trade Commission (FTC) issued a Final Rule (the "Rule") prohibiting companies from entering into and enforcing non-compete agreements with most workers. The Rule was published in the Federal Register on May 7, 2024, and it is scheduled to become effective on September 4, 2024.

Under the Rule, it would be unlawful to enter into a non-compete clause with any worker after the Rule's effective date. "Non-compete" is defined broadly to include any agreement, policy, or provision, whether verbal or in writing, that has the effect of preventing workers from working or operating a business in the U.S. The Rule also would make it unlawful to enforce or attempt to enforce a non-compete clause, except for those entered into with "senior executives" before the effective date.

"Senior executive" is defined as a worker who earned more than $151,164 in total compensation the prior year, and who holds a "policy-making position." This includes a business entity's president, CEO, or any other officer or person who has final authority to make business decisions that control significant aspects of a business entity or common enterprise. It does *not* include those whose authority is limited to advising or exerting influence, or those having final authority to make policy decisions for only a subsidiary or affiliate of a common enterprise.

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

FBT Gibbons

With respect to all workers other than senior executives, companies must provide notice that their non-compete clauses are no longer enforceable by the effective date of the Rule. The Rule provides model notice language. However, companies need not rescind their agreements altogether, and other agreements, like non-disclosure or non-solicitation provisions, can remain in effect so long as they do not function to prevent competition.

There are exceptions to the Rule. For example, the Rule only applies where the FTC has jurisdiction. Generally, that means all for-profit entities, *including* mortgage companies, mortgage brokers, creditors, and debt collectors. However, it *excludes* banks, savings and loan institutions, federal credit unions, common carriers, non-profits, and some others. These entities are outside the FTC's jurisdiction and are not subject to the Rule.

Importantly, not all tax-exempt entities meet the definition of "non-profit" under the FTC Act. To qualify as a non-profit exempt from the FTC's jurisdiction, the entity must show: (1) a nexus between its activities and its alleged public purpose, and (2) that its net proceeds are properly devoted to a recognized public, rather than private, interest. If an organization engages in business on behalf of for-profit members, for example, or where a non-profit has ceded effective control to a for-profit partner, then the FTC might have jurisdiction.

In addition, non-competes entered into pursuant to a bona fide sale of a "business entity" would remain lawful. But the sale must be made in good faith, and certain non-competes, like those arising out of repurchase rights or mandatory stock redemption programs, would not be permitted.

Ultimately, the Rule could have significant impacts on the multifamily housing industry, and its status should be monitored as we approach its currently projected effective date of September 4, 2024.

Frost Brown Todd counsels investors, developers and other key stakeholders on multifamily housing transactions in states across the country. We stay at the forefront of all legislative and administrative efforts affecting the industry, and we are ready to

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

assist clients with navigating the ever-changing legal environment. For more information, please contact the authors or any attorney on Frost Brown Todd's Multifamily Housing industry team.

Multifamily Matters Blog

Providing relevant legal perspectives to keep developers, investors, and lenders at the forefront of the multifamily industry in our footprint.

Subscribe for Updates

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

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

FBT Gibbons