PREPARING FOR THE FEDERAL TRADE COMMISSION NONCOMPETE BAN TO TAKE EFFECT

As most of the public (and your employees) are aware, the Federal Trade Commission (FTC) issued an extremely broad Final Rule banning most non-competes. The Final Rule takes effect on September 4, 2024. The Final Rule includes language requiring that employers provide an individualized notice to each worker subject to a non-compete prohibited under the Final Rule. According to the Final Rule, these notices must state that the employer will not enforce the prohibited non-compete and that it is illegal. Employers need to start assessing whether this notice requirement applies to their contracts, as it is not clear that any court will intervene to stay or enjoy the Final Rule before its effective date.

The Final Rule faced immediate legal challenges. Several defendants have asserted the Final Rule is not constitutional and that it violates the FTC's rule-making authority. Many legal scholars predicted a nationwide injunction on the Final Rule while these challenges played out. To date, however, no court has initiated a nation-wide injunction. Therefore, as of this date, the Final Rule remains set to take effect on September 4, 2024. Employers need to be ready.

What will the Final Rule do?

The Final Rule bans entering into or enforcing non-competes between employers and their workers, including former employees and independent contractors. Exempt from the Final Rule are certain senior executives who entered into a non-compete prior to the effective date, industries not governed by the FTC (for example, banks, insurance companies, not-for-profits), and certain non-competes entered into as part of a sale of a business. Although the Final Rule does not prohibit nondisclosure agreements, or non-solicitation agreements, the Final Rule does state that such agreements that are overly broad may be so restrictive as to become prohibited non-competes. As part of this assessment, employers should also review these agreements to make sure they are not so broad that they are the functional equivalent of the type of activity the ban seeks to eliminate (*i.e.*, prohibiting or penalizing a worker from seeking or accepting other work or starting a business.) Employers should also review state law provisions. For example, in Virginia, non-competes are prohibited for most low-wage workers (earning less than the equivalent of $73,320 per year). Some twelve other states either prohibit or partially prohibit non-competes, and legislation in this area changes frequently.

What does this mean for businesses subject to the Final Rule?

If no nation-wide injunction delays the Final Rule, employers should be prepared to issue a notice to affected employees no later than September 3, 2024.

What to do:

1. Determine if the FTC ban covers your industry. For example, it does not cover not-for-profits (as specifically defined by the FTC), banks, insurance companies, transportation and communication common carriers, air carriers as well as some other entities.

2. Determine which workers are exempt from the notice. Senior Executives, defined as workers earning more than $151,164 and who are in a policy-making position, are generally exempt. Other non-competes entered into as part of the sale of a business may also be exempt.

3. Compile a list of current and former workers. This includes independent contractors or anyone else who worked for your business and signed a non-compete. If these workers are subject to a non-compete, the Final Rule requires them to receive the notice.

4. Determine the language of the notice. Employers may want to develop language allowing the company to adjust its position should the ban come after September 4, 2024. In other words, the company does not want to have to reissue all new contracts because it inadvertently invalidated or rescinded its existing contracts by issuing the notices. Recission is not required by the Final Rule, but no one knows how a court will later rule on the legal effect of sending the notice and then reactivating the same agreement later without a new signature.

5. Determine how to deliver the notice. The notice may be sent by mail, hand-delivery, email or text. Note that notice must be *received* before the effective date. Therefore, if you are waiting until the last minute, you will need to send electronic notice via email or text. If you are sending via mail or by hand delivery, you should create a process for documenting delivery.

6. Understand the difference between a non-compete, a non-solicit and a non-hire provision. Many non-competes are labeled "non-competes" that are not in the nature of what the Final Rule bans. Narrowly constructed non-solicitation of customer clauses are not banned, but they are often included in a paragraph labeled "non-compete." Even stand-alone non-solicitation clauses are sometimes labeled "non-compete." Understand what activities your business has included in the "non-competition" provision because you might not actually need to send the notice, and if you are required to send the notice consider sending an explanation of what is not going to be enforced and what remains that you will enforce.

7. Consider the human side of this issue. Non-competes are a hot button issue for workers. Workers do not like them. Regardless of what happens regarding the Final Rule (enjoined or not), you should consider explaining to your workers why non-competes are necessary for the viability of your business and their jobs. You should especially consider providing an explanation if you are forced to send a notice that says essentially, "we are sending this notice because we have to, but if the Final Rule is overturned, we will continue to enforce the non-compete."

8. Do not just adopt the Sample Notice you find online. Consult with your counsel before preparing the right notice for your situation.

What if you don't send the notice or send it late?

Employees do not like signing non-competes, and employers need to realize that their employees are looking forward to September 4. If your business fails to provide the notice, the worker may report the company to the FTC. There is no private right of action against an employer under the new Final Rule. This means the FTC may engage in an investigation and pursue enforcement action, possibly including civil penalties. Further, if the company tries to enforce a prohibited non-compete, the Final Rule, while in effect, operates as a bar to enforcement. Providing a worker the notice and then "taking it back" (in the event the Final Rule is stayed) is a potential PR nightmare for employers. You should carefully consider your messaging on this topic and be prepared to explain why non-competes are important to your business.

Please be advised that this information does not constitute legal advice. Please reach out to Karen Elliott or Brendan Horgan for further inquiries.



Karen Elliott
6802 Paragon Place, Suite 410
Richmond, VA 23230
KElliott@fordharrison.com | P: 804-373-1606



Brendan Horgan
6802 Paragon Place, Suite 410
Richmond, VA 23230
BHorgan@fordharrison.com | P: 804-373-1607

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