

FTC Publishes Non-Compete Ban, Legal Challenges Promptly Follow

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(by [Alex Farone](#))

On April 23, 2024, the Federal Trade Commission (FTC) voted 3-2 to publish its proposed final rule banning most noncompetition agreements, or “non-competes.” The final rule was published on May 7, 2024, in the *Federal Register* and therefore becomes effective 120 days later, on September 4, 2024, but legal challenges to the FTC’s authority to issue this ban will likely result in a stay in enforcement of the ban until litigation is resolved.

As of the effective date, the final rule would ban new non-competes with employees, independent contractors, and volunteers nationwide, on the basis that non-competes are an unfair method of competition and therefore a violation of Section 5 of the FTC Act, with one exception. The ban will not apply to a non-compete that is entered into pursuant to the bona fide sale of a business, the person’s ownership interest in a business entity, or all (or substantially all) of a business entity’s operating assets.

The final rule will also void pre-existing non-competes, with two exceptions. First, existing non-competes for senior executives will remain enforceable after the effective date of the final rule. A “senior executive” is defined as a worker earning more than \$151,164 annually who is in a policy-making position, meaning a company president, chief executive officer or equivalent, or any other person who has final authority to make policy decisions that control significant aspects of a business entity. Second, the ban will not apply to an existing non-compete that has been breached and where a cause of action accrued prior to the effective date.

The final rule will also require employers to provide “clear and conspicuous notice” to all workers, other than senior executives, with existing non-competes by the effective date stating that the non-compete will not be, and cannot legally be, enforced.

This final rule originates from the notice of proposed rulemaking the FTC issued in January 2023, which was subject to a 90-day public comment period. The FTC received over 26,000 public comments prior to the April 23, 2024 vote. The same day it voted to publish the final rule, tax services and software company Ryan LLC filed a lawsuit in the U.S. District Court for the Northern District of Texas seeking an injunction to stop the implementation of the ban. The following day, the U.S. Chamber of Commerce and three other business groups filed a similar lawsuit in the Eastern District of Texas challenging the ban.

There is a reasonable likelihood that legal challenges to the ban will be successful. In *West Virginia v. EPA*, 597 U.S. 697 (2022), the U.S. Supreme Court recently demonstrated skepticism of sweeping rulemaking from regulatory agencies, due to potential violation of the separation of powers doctrine. The Court adopted the major questions doctrine, which holds that in extraordinary cases of political and economic significance, where an agency makes “unheralded” use of its authority, the agency must be able to identify a clear statement from Congress authorizing that particular action. Given the broad scope of the final rule, it is likely that the Court would consider a national non-compete ban to be an extraordinary case of political and economic significance that would have to clear the major questions doctrine hurdle to survive.

Employers who use non-competes should certainly plan for the upcoming effective date and think strategically about implementing stronger non-disclosure and/or confidentiality agreements in the event that we reach the effective date of the final rule without pending litigation resulting in a stay of enforcement of the ban. As the effective date is not until

September 4, 2024, employers should not jump to conclusions about the immediate or ultimate enforceability of the FTC's non-compete ban.

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