

UPDATED CLIENT ALERT: Federal Trade Commission Issues Final Rule Broadly Banning Non-Compete Clauses, Legal Challenges Expected

On April 23, 2024, the Federal Trade Commission ("FTC"), by 3-2 vote, issued its **final rule** to prohibit the use of employee non-compete clauses (the "Final Rule"). The Final Rule comes after the FTC issued its **proposed rule** to ban all employee non-compete clauses on January 5, 2023. The Final Rule is scheduled to go into effect 120 days after it is published in the *Federal Register*, but it is expected to undergo significant legal challenges. If upheld, the Final Rule would radically change how businesses operate and eliminate the use of many types of post-employment restrictive covenants typically used to protect confidential information and customer goodwill.

Consistent with the FTC's proposed rule, the Final Rule provides that it is an unfair method of competition for employers to enter into or attempt to enter into a non-compete clause; enforce or attempt to enforce a non-compete clause; or to represent that a worker is subject to a non-compete clause. However, unlike the proposed rule, the Final Rule allows for existing non-compete clauses (i.e., those entered into prior to the Final Rule's effective date) with "Senior Executives" to remain in effect. The FTC defines a "Senior Executive" as a worker who: 1) is in a "policy making position"; and 2) earned an actual or annualized sum of at least \$151,164 in the preceding year, excluding fringe benefits, payments for medical insurance, and retirement contributions. Existing non-compete clauses with workers who are not "Senior Executives" would no longer be enforceable after the effective date and employers are required to provide such workers with notice that those clauses can no longer be enforced. The Final Rule also provides a limited exception for non-compete clauses entered into in connection with the sale of a business. Accordingly, non-compete clauses entered into by a person pursuant to the sale of their business or the person's ownership interest in the business will still be enforceable if the Final Rule is enacted. Notably, the Final Rule also does *not* apply where a cause of action related to a non-compete clause arose prior to the effective date.

The Final Rule passed by a slim 3-2 margin. Notably, the two commissioners who dissented from the majority stated that they believed the Final Rule to be "unlawful" and that it would not "survive legal challenge". Indeed, the United States Chamber of Commerce (the "Chamber") filed a **lawsuit** on Wednesday, April 24, 2024, challenging the Final Rule. Regarding the lawsuit, a spokesperson for the Chamber stated that the economy "will suffer as start-ups and small businesses are unable to prevent dominant firms from hiring their best employees and gaining access to their confidential information." Individual employers, including a tax service firm, are also filing their own challenges to the Final Rule.

Employers will have 120 days from the Final Rule's publication in the *Federal Register*, which is expected to occur in the coming days, to comply with these new requirements. However, the legal challenges may delay implementation of the Final Rule and make its future uncertain.

MBJ will monitor these challenges as they make their way through the courts. In the meantime,



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employers should assess which of their employees has any form of a non-compete agreement so they are prepared to take action if the Final Rule is ultimately implemented. Additionally, employers should be aware that the FTC is clearly active in the area of noncompetition agreement reform. Employers must not only be mindful of state laws that impact the drafting and enforcement of post-employment restrictive covenants, but also the FTC's position on **enforcement**. Employers are encouraged to contact their MBJ attorney with any questions about drafting and enforcing noncompetition agreements.

UPDATE: The FTC published the **Final Rule** in the Federal Register on May 7, 2024. Should the rule survive legal challenge, it is scheduled to go into effect in 120 days, or September 4, 2024. Employers are encouraged to contact their MBJ attorney with any questions.

Shane R. Goodrich and Mario Nimock are attorneys with Morgan, Brown & Joy, LLP, and may be reached at (617) 523-6666, or sgoodrich@morganbrown.com and mnimock@morganbrown.com, respectively. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

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