



G U N D E R S O N D E T T M E R

UPDATES ON THE FTC'S NEW RULE BANNING EMPLOYEE NON-COMPETES

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We represent *what's next.*

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Agenda

A close-up, slightly blurred photograph of a silver fountain pen with a black grip section, lying diagonally across an open, spiral-bound notebook. The notebook has lined pages and is resting on a dark, textured surface.

- **FTC'S NEW RULE BANNING NON-COMPETES**

- Definition of non-compete agreement
- Covered agreements, and exception
- Covered employees, and exceptions
- Timing and notice requirements

- **LEGAL CHALLENGES**

- Pending litigation
- Other legal arguments

- **WHAT SHOULD EMPLOYERS DO NOW?**

- **ALTERNATIVES TO NON-COMPETES**

- Contractual options
- Non-contractual options



FTC's New Rule Banning Non-competes

FTC Non-Compete Ban

Federal Trade Commission now classifies post-termination employee non-competes as unfair methods of competition under Section 5 of the FTC Act.

Violations include:

- Entering into, or attempting to enter into, a post-termination non-compete agreement;
- Enforcing, or attempting to enforce, a post-termination non-compete agreement; and
- Representing that an employee is bound by a post-termination non-compete agreement.

Definition of Non-Compete

A term or condition of employment that either “prohibits” a worker from, “penalizes” a worker for, or “functions to prevent” a worker from:

- (A) seeking or accepting work in the United States with a different person where such work would begin **after the conclusion** of the employment that includes the term or condition; or
- (B) operating a business in the United States **after the conclusion** of the employment that includes the term or condition.

Employers may still use non-competes to prevent competition during employment.

Covered Agreements

- ☐ Prohibitions on Competition
- ☐ Forfeiture-for-Competition
- ☐ Severance agreement where employee must refrain from competing in order to receive funds

Potentially Covered Agreements

- ☐ Training Repayment Agreements
- ☐ No-hire agreements
- ☐ Non-solicitation agreements
- ☐ Non-servicing agreements
- ☐ Non-recruitment
- ☐ Non-disclosure clauses

Any challenge to such covenants would need to be evaluated on a case-by-case basis.

- Comes down to whether the agreement functions to prevent a worker from seeking or accepting other work or starting a business after the employment.
- If the final rule survives, this gray area will certainly provide fertile ground for litigation.

Exceptions to *Non-Compete Ban*

- **Bona fide sales of business.** The ban shall not apply to a non-compete clause that is entered into by a person pursuant to a *bona fide* sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets.
 - *The seller can agree to a non-compete individually, but not for any of the business's workers. The rule prohibits non-competes for workers, including in a sale of business context*
- **Existing causes of action.** Causes of action concerning non-competes that accrued prior to the effective date
- **Good faith belief.** Enforcement or attempt to enforce a non-compete, or making representations about a non-compete, where the person has a good-faith basis to believe that the ban is inapplicable
- **Franchisee/Franchisor contracts.**

Covered Employees

- ☐ Full-time employees, regardless of job title or role
- ☐ Part-time employees, including temporary or seasonal workers
- ☐ Independent contractors, including freelancers, and other workers who provide services to the employer
- ☐ Interns and externs
- ☐ Volunteers
- ☐ Apprentices and other individuals participating in training programs

Exception to Covered Employees

Senior Executive Exception:

- C-Suite position or equivalent
- Policy-making position with authority to make policy decisions for the entire company
- Earning more than \$151,164 annually.

Compensation can include salary, commissions, performance bonuses and any other compensation agreed to that the worker knows and can expect, but does not include items like benefits or board and lodging.

Non-competes with Senior Executives that were entered into before the effective date, are not nullified retroactively and remain enforceable.

Covered Employers

The rule applies to nearly all private employers across all industries.

Not Covered Employers

Exempt from the FTC's Jurisdiction

- ☐ Non-Profits
- ☐ Banks and Credit Unions
- ☐ Common Carriers and Air Carriers

Covered Employers' Obligations

- Provide **notices to employees** explaining that non-compete provisions are no longer enforceable.
- No record-keeping requirements.
- Not required to nullify non-competes with senior executives.

Application of Rule

- Rule applies retroactively and invalidates most existing agreements.*
* *Except for certain agreements with senior executives.*
- Rule supersedes state laws, unless they are more restrictive.

Penalties

- FTC can seek an **injunction in federal court** against a party that has engaged in an unfair method of competition.
- FTC can obtain **civil penalties** in court if a party is ordered to cease and desist from a violation and fails to do so.
- No private right of action.

Note:

- The rule will not be implemented immediately, providing a transition period for compliance.
- If Trump wins election, enforcement could be influenced by prosecutorial discretion.

Timing and Notice Requirements

- **If not enjoined, the rule will go into effect 120 days following formal publication in the Federal Register.**
 - Rule was published in Federal Register on May 7, 2024
 - Effective date of September 4, 2024
- **On or before the effective date, “clear and conspicuous notice” must be provided to any affected worker that their non-compete clause will not be, and cannot legally be, enforced against them.**
 - FTC provides a model notice. (Translations into numerous languages on FTC website.)
 - Notice must be:
 - delivered by hand or by mail to worker’s last known address; or
 - by email to current work email address or last known personal email address; or
 - by text message to a mobile phone number belonging to the worker.
 - Exception where employer has no record of street address, email address, or mobile phone number.
 - FTC provides safe harbor for employers that comply with notice requirement.

Legal Challenges

Pending Cases and Legal Theories

Pending Litigation

- ***Ryan, LLC v. FTC, C.A. No. 3:24-cv-986 (N.D. Tex.), including Amicus filings.***
 - Filed on April 23, 2024.
 - Motion for Stay of Effective Date and Preliminary Injunction filed on May 1, 2024.
 - U.S. Chamber of Commerce intervened (adding Chamber's Motion to Stay and for Preliminary Injunction) on May 10, 2024.
 - Two amicus briefs challenging FTC rule filed on May 15, 2024. Third amicus brief opposing FTC rule will be filed soon.
 - Filed: National Retail Federation, the National Federation of Independent Business Small Business Legal Center, Inc., the International Franchise Association, the Associated Builders and Contractors, Inc., the American Hotel & Lodging Association, the National Association of Wholesaler-Distributors, the Independent Electrical Contractors, Consumer Technology Association, the United States Council for International Business, the Home Care Association of America, and the Restaurant Law Center. National Association of Manufacturers.
 - Upcoming: Many, including Securities Industry and Financial Markets Assoc., the Futures Industry Assoc., the Managed Funds Assoc., and the American Investment Council.
- ***U.S. Chamber of Commerce of the United States of America, et al. v. FTC and Lina Khan, C.A. No. 6:24-cv-00148 (E.D. Tex.)***
 - Filed on April 24, 2024. Case stayed pending *Ryan* litigation.
- ***ATS Tree Services, LLC v. FTC, et al., C. A. No. 2:24-cv-1743 (E.D. Pa.)***
 - Filed 4/25/24.

Pending Litigation: Upcoming Dates and Deadlines

- *Ryan, LLC v. FTC*, C.A. No. 3:24-cv-986 (N.D. Tex.), including Amicus filings
 - Briefing Schedule:
 - May 29 – FTC’s response to motions to stay due
 - June 12 – Ryan’s & Chamber’s replies in support of motions due
 - June 17 – Court hearing on motions, if requested by court
 - July 3, 2024 – Court’s self-imposed deadline for ruling on the merits
- *ATS Tree Services, LLC v. FTC, et al.*, C. A. No. 2:24-cv-1743 (E.D. Pa.)
 - FTC Response to Motion for Stay/Injunction due June 4; Reply by June 25. Hearing (if necessary July 10); Court’s self-imposed deadline for ruling by July 23.
- **Appeals expected**
 - U.S. Court of Appeals for the Fifth Circuit – Considered conservative (employer friendly); **ED Pennsylvania and Third Circuit may be more neutral re: employee vs. employer.**
 - U.S. Supreme Court – Considered conservative (employer friendly)
 - Strong likelihood that appellate courts will rule against FTC

Legal Arguments and Theories Raised by Opponents to FTC Rule

1 FTC lacks substantive rule making authority.

- History and structure of the FTC Act show that Section 6(g) authorizes only procedural rules.

2 “Major Questions” and “Non-Delegation” Doctrines

- Congress must make “clear statement”
- Congress cannot delegate law-making power

3 FTC’s action is “arbitrary and capricious” and “abuse of discretion”

- Evidence does not support rule; Alternatives were not considered
- Very disruptive new rule, unexpected

4 Unlawful interpretation of Section 5 of FTC Act.

- FTC inappropriately presumes non-competes violate Section 5
- FTC deviates from established precedent, interpretations



What Should Employers Do Now?

Remain Vigilant

- **NO NEED FOR IMMEDIATE ACTION**

- Decision expected by July 4, 2024
- Strong likelihood that FTC's ban will be rejected or stayed

- **MONITOR RELEVANT STATE AND LOCAL LAWS**

- Dozens of states regulate non-compete provisions
- Increasing number of states are putting restrictions on non-competes, including:
 - minimum salary threshold requirements
 - unique job requirements
 - notice requirements
- Many states are passing laws to protect employees' rights to complain about misconduct. Be aware of how these laws might overlap with restrictive covenants in employment agreements.

- **CONTACT YOUR GUNDERSON ATTORNEY IF YOU HAVE SPECIFIC CONCERNS**

Gunderson Dettmer Contract Generator

- GD clients can easily create customized employee PIAs by answering a few simple questions.
- Contains both confidentiality obligations and state-specific non-compete restrictions.
- Kept up to date in real-time.

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Gunderson Dettmer Contract Generator

Company Information

Engaging a New Consultant

Instructions and Information

Welcome to Gunderson Dettmer's Contract Generator!

Purpose of the documents you're creating today:

- ☐ Hire a new Employee (PIIA and Offer Letter)
- ☐ Reissue PIIA for Employee moving to California (PIIA)
- ☐ Engage a new Consultant (Consulting Agreement)
- ☐ Expand the work of an existing Consultant (Statement of Work)
- ☐ Bring on an Advisor (Advisor Agreement)
- ☐ Protect your confidential information (NDA)

Employees are individuals who work directly for your company, and your company will decide how, when and where the individuals will complete their work. All employees should sign a PIIA (Proprietary Information and Inventions Agreement) and Offer Letter. For this purpose, interns are considered employees.

- [Existing employees moving or planning to move to California](#) may require a new CA-specific PIIA. A previously-signed PIIA from another state may no longer be enforceable.
[Click here for additional important information.](#)

Consultants are individuals or companies who provide services or work product to your company but are not the same as employees. The Consultant, not your company, will decide how, when and where they will complete their work.

Advisors are individuals who will serve on your advisory board or otherwise offer you primarily advice and guidance (as opposed to providing services or creating work product).

NDAs (non-disclosure agreements) protect your confidential information when you need to share it. These are frequently used during preliminary discussions with people or companies to explore the possibility of a business relationship.

Which new employee documents do you want to generate?*

- ☒ PIIA and Offer Letter
- ☐ PIIA only

Employee Proprietary Information and Inventions Agreement (PIIA)

Every employee should sign a PIIA on or before the day they start working for you.
[Why is this important?](#)

The information requested below is **required** to generate a PIIA and Offer Letter.

Do you know your new employee's state of residence?*

- ☒ Yes
- ☐ No

[Additional Guidance](#)

Select the state where the employee will live and work:*

New York

Should the employee be bound by a 12-month post-term non-compete?*

- ☒ Yes
- ☐ No

Alternatives to Non-Competes

Options in a World Without Non-Competes

Available Contractual Options

- **GARDEN LEAVE / MANDATORY PAID NOTICE PERIOD**
 - During or post-employment
 - FTC's approach to garden leave agreements is notably lenient, which was surprising.
- **NON-SOLICITATION AGREEMENTS**
 - Customers and/or employees
- **NONDISCLOSURE / CONFIDENTIALITY AGREEMENTS**
- **TERM CONTRACTS**
 - Used in California

Beware of entering into illegal no-poach agreements with competitors!

Other Available Non-Contractual Options

■ **CREATE AND MAINTAIN A CULTURE OF COMPLIANCE**

- Help employees understand the “why” not just the “what” and “how”

■ **POLICIES AND PROCEDURES**

- Onboarding, including offer letters that clearly outline authority and restrictions for executives.
- Ongoing
- Offboarding

■ **COMMITMENT TO TRAINING**

■ **ENHANCED CYBERSECURITY / PHYSICAL PROTECTIONS**

- Implement technical measures, such as blocking USB drives on laptops, and restricting uploads to systems (like Salesforce) to safeguard proprietary information.

■ **USE CARROTS IN ADDITION TO STICKS**

- Retention bonuses
- Equity grants/options
- Happy employees are typically more loyal

Confidentiality and Trade Secret Restrictions

Confidentiality

- Prevent employees from disclosing company's proprietary information
- Must be set out in a written agreement
- Can't be overbroad – no *de facto* non-competes

Trade Secrets

- Federal and State laws
- Trade secrets are:
 - Information
 - With Independent Economic Value
 - “Reasonable Measures” taken to keep Secret
- What are “reasonable measures”?

Non-Compete restrictions (if permitted) still complement confidentiality and trade secret obligations.



Questions?

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