

# Employment and Labor Insight: Navigating the FTC's New Rule Banning Non-Compete Agreements

Insights

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On April 23, 2024, the Federal Trade Commission (FTC) issued a rule banning employers from entering into non-compete clauses with workers and rendering existing non-compete clauses unenforceable for everyone except high-ranking “senior executives.” The rule is scheduled to take effect 120 days from publication, but is already subject to legal challenges that could delay or even prevent its implementation. If the rule does become effective, in addition to refraining from using and enforcing non-competes, employers will be required to issue notices by the effective date of the new rule to each worker who is subject to an existing non-compete clause that such worker’s non-compete clause will not, and cannot legally be, enforced against such worker.

## Key Takeaways: Understanding the FTC’s Non-Compete Ban

### When will the rule go into effect?

The FTC’s new rule is scheduled to go into effect 120 days after publication in the Federal Register (approximately August 2024), but is facing significant legal challenges that could delay or prevent the rule from taking effect. Indeed, opponents have already filed lawsuits challenging the legality and enforceability of the rule; the U.S. Chamber of Commerce filed a lawsuit on April 24 seeking to enjoin the rule from going into effect, and a tax services and software provider has filed litigation in Texas challenging the regulation. It is too early to know whether these lawsuits will be

successful or whether the courts will prevent enforcement of the new rule until all judicial challenges and appeals have been resolved.

### **What is a “non-compete clause”?**

The rule defines “non-compete clause” as 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. The definition would appear to be broad enough to include not only prohibitions on competition, but also “forfeiture-for-competition” provisions, and the FTC commentary suggests that even overly broad non-solicitation provisions could fall under the definition if they effectively prevent a worker from getting a new job or starting a business.

### **Which workers are covered by the rule?**

The rule prohibits employers from entering into non-compete clauses with any and all “workers” nationwide, whether full-time or part-time, including employees, independent contractors, interns, externs, volunteers, apprentices, and others. This forward-looking prohibition applies to all workers, including senior executives. Further, all workers, past or present, that are subject to existing non-compete clauses are relieved of their obligations not to compete, except senior executives.

### **Who qualifies as a “senior executive” under the rule?**

The rule defines the term “senior executive” to refer to workers earning more than \$151,164 annually who are in a “policy-making position.” 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. Policy-making positions include an organization’s president, CEO, and others with authority to make policy decisions for the entire company.

### **What do employers have to do in response to this rule?**

While the rule does not require rescission (i.e., legal modification) of existing non-compete clauses, the rule does prohibit enforcement of existing non-compete clauses after the effective date and requires the employer to provide clear and conspicuous notice to the worker, by the effective date, that the worker’s non-compete clause will not be, and cannot legally be, enforced against the worker.

The notice must:

(1) identify the employer who entered into the non-compete clause with the worker; and

(2) be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker.

A model notice for employers to provide workers is available [here](#).

### **Which employers are covered by the rule?**

The rule covers all types of businesses in nearly all industries. Some employers are outside the FTC's jurisdiction and therefore not subject to the rule. This includes banks, savings and loan institutions, federal credit unions, common carriers, air carriers, and certain non-profits.

### **Is there an exception for the sale of a business?**

The rule doesn't apply to non-compete clauses between a buyer and seller of a business (or potentially the seller's share of a business). The seller can agree to a non-compete clause individually, but not for any of the business's workers. The rule prohibits non-compete clauses for workers, including in a sale of business context.

## **What Happens Next?**

While the legal outcome of the regulation is uncertain, employers may want to prepare for potential changes but hold off on implementing them until the situation becomes clearer. During this window, employers should:

1. **Maintain Status Quo:** Employers that require workers to enter into non-compete clauses should continue to do so. There is no prohibition on entering into non-compete clause between now and the effective date, which will be in mid-August at the earliest. For workers who may meet the definition of "senior executive," employers will want to ensure that they meet the compensation threshold and that the job description is consistent with the rule's requirement. Employers should also consider enforcing existing non-compete clauses in cases where warranted, as the rule does not have any current impact on enforceability (except that some judges may be reluctant to enforce a non-compete clause with a federal ban looming).
2. **Contract Review:** To prepare for the rule's potential implementation, employers should start to identify existing non-compete clauses with current and former

workers, including other contractual provisions that might be interpreted as non-compete clauses under the regulation (such as non-disclosure and non-solicitation clauses).

3. **Alternative Protective Measures:** Employers should bolster contractual strategies to safeguard intellectual property and trade secrets and consider using stronger nondisclosure and trade secret protections.
4. **Legal Consultation before Attempting to Enforce Agreements:** Confer with Gunderson attorneys before attempting to enforce, or threatening to enforce, any non-compete clause.

For more information on the rule, please see the FTC's [Fact Sheet](#).

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