

FTC Bans Most Non-Compete Agreements

May 30, 2024

On April 23, 2024, the Federal Trade Commission (“FTC”) issued a rule banning most employment-related non-compete agreements (the “Rule”), determining that such agreements represent an unfair method of competition. Currently, the Rule’s effective date is September 4, 2024 (the “Effective Date”). However, the Rule is being challenged in several lawsuits. In the event the Rule becomes effective, employers who use non-compete provisions with employees (other than a senior executive, as discussed below) or independent contractors need to notify those persons, in writing and by the Effective Date, that such provisions are no longer enforceable. Furthermore, if a *former* employee’s non-compete provision is in effect as of the Effective Date, such former employee must also be similarly notified.

In general, the Rule applies to all employees other than “senior executives” subject to a non-compete agreement entered into before the Effective Date. A senior executive, in general, includes a business’s president, chief executive officer, and any other person that has final policy-making authority with respect to the common enterprise of the business. A senior executive must also have received at least \$151,164 of compensation in the preceding year. Authority over only a division, subsidiary, or affiliate of a “common enterprise” does not meet the standard set forth in the Rule. Also note that after the Effective Date, a business may not enter into a new non-compete agreement with a senior executive.

The Rule does not apply to non-compete agreements entered into pursuant to a person’s “bona fide sale” of such person’s interest in a business entity or all (or substantially all) of a business’s operating assets. It is unclear whether the Rule bans non-compete provisions that may be included in such person’s employment agreement with the purchaser. The Rule also does not apply to situations “...where a cause of action related to a non-compete clause accrued prior to ...” the Effective Date.

In order to comply with the Rule, businesses should:

- Determine whether any non-compete agreements exist with respect to current employees (who are not “senior executives”);
- Determine whether any non-compete agreements exist with respect to former employees (who are not “senior executives”) which may be enforceable as of the Effective Date;
- For each person in the above categories, determine whether the business has in its records such person’s last known personal street address, current work (or last known personal) email address, and/or mobile telephone number; and
- Be prepared to provide to each such person, no later than the Effective Date, “clear and conspicuous” written notice that any non-compete agreement/provision with the business is no longer enforceable.

The Rule does not require notice to a person for whom the business does not have a record of a street address, email address, or mobile telephone number. However, the Rule does not indicate the level of review/diligence needed to locate any such contact information.

Another step that may be considered is to identify any “senior executive” that is not currently subject to a non-compete agreement, and, if desired, have such agreement entered into before the Effective Date.

This summary is for your general information and is not legal or tax advice. This memo is based on applicable law and guidance available today, which may be modified after this date. If you have any questions or if you would like specific guidance as to how we may be able to assist you in your particular situation, please contact us.