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Insights

FTC BANS EMPLOYEE NONCOMPETES

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On April 23, 2024, the Federal Trade Commission issued a final rule that would ban all non-compete clauses ("noncompetes") with employees in the United States going forward.

The rule, which would create a new regulation at 16 C.F.R. §910.1-910.6, is slated to take effect 120 days after it is published in the Federal Register.

The new rule bans all new noncompetes with "workers" in the United States. "Worker" is defined broadly to mean any natural person who provides services, whether paid or unpaid, and regardless of title or status (including contractors and volunteers).

A prohibited noncompete is defined as:

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

1. 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

2. operating a business in the United States after the conclusion of the employment that includes the term or condition.

Existing noncompetes with "senior executives" may still be enforced, but new noncompetes will be banned after the rule takes effect. "Senior executives" are defined as workers who are in a policy-making position and have annualized cash compensation of at least $151,164.

Not later than the effective date, employers must provide written notice to all workers who have existing noncompetes and are not "senior executives" that their noncompetes "will not be, and cannot legally be, enforced against the worker." The rule includes a model notice for this purpose.

The rule does not expressly address other common covenants with employees, such as nondisclosure agreements, employee-nonsolicitation (no-poaching) agreements or customer-nonsolicitation agreements. However, the commentary to the rule explains that: "the definition of non-compete clause also applies to terms and conditions that restrain such a large scope of activity

that they function to prevent a worker from seeking or accepting other work or starting a new business after their employment ends." Therefore, employers should ensure that any covenants other than noncompetes are narrowly tailored and crafted in a way that allows the worker ample room to compete after employment ends.

The rule provides exceptions for: (1) sale-of-business noncompetes, (2) enforcement of a noncompete where a cause of action already exists as of the effective date, and (3) good faith belief that the rule did not apply to a particular noncompete (e.g., because it was entered into with a "senior executive" prior to the effective date).

Because the rule will not take effect for at least 120 days, and noncompetes with "senior executives" that are in existence on the effective date will continue to be permissible, employers may wish to consider entering into noncompetes with senior executives now, before the rule takes effect.

Industry groups have threatened immediate legal action, and it is possible that the rule will be enjoined before it can take effect. But until such time as that actually occurs, U.S. employers should plan accordingly.

BCLP regularly advises employers regarding best practices for noncompetes and employee agreements, and we encourage you to reach out to one of our members to discuss how we can assist in achieving your business objectives.

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