



Featured News

ALERT

US FTC RULE BANNING NON-COMPETES

On April 23, 2024, the U.S. Federal Trade Commission (“FTC”) issued a final rule banning most non-compete agreements (hereinafter referred to as “non-competes”) nationwide. This rule is set to take effect 120 days after being published in the Federal Register, although enforcement could be further delayed or barred by legal challenge.

Under the FTC’s new rule, existing non-compete agreements for the vast majority of workers will no longer be enforceable after the rule’s effective date. Existing non-competes with senior executives (defined as those earning more than \$151,164 annually and in policy-making positions) may remain in force; however the rule bans employers from entering into or attempting to enforce new non-competes with any employee, including senior executives. Notably, the non-compete would be unlawful under this rule even if valuable consideration is paid to the worker.

Under the new rule, employers must notify current and former workers – other than senior executives – who are bound by an existing non-compete that the employer will not be enforcing any non-competes against them in the future. In order to facilitate compliance and minimize the burden to employers, the final rule includes model language that satisfies this notice requirement.

As an exception to this broad rule, non-competes entered into pursuant to a bona fide sale of a business entity, when a cause of action related to a non-compete accrued prior to the effective date, or franchisee-franchisor relationships (but not workers who work for a franchise) would still be valid and enforceable.

Because there is no private right of action for FTC violations, complaints may be filed with the FTC, which can seek injunctive relief, but cannot enforce civil penalties or other monetary relief against parties for using non-competes, with an exception for sanctions if an FTC cease-and-desist order is disregarded or violated.

The FTC found that employers have several alternatives to non-competes that still enable



companies to protect their investments without having to utilize a non-compete. Trade secret laws and non-disclosure agreements (“NDAs”) both provide employers with well-established means by which they can protect their proprietary and other sensitive information.

Notably, a California law that went into effect on January 1, 2024 (AB-1076 and SB-699) already voids post-employment non-compete agreements, including those signed outside the state with employees working outside of California, with the limited exceptions that restrictive covenants executed and negotiated in the sale or dissolution of corporations, partnerships, and limited liability companies are enforceable. Furthermore, and differently from the FTC rule, California employees have a private right of action to sue employers who enter into or attempt to enforce a non-compete and to seek injunctive relief, damages and attorneys’ fees. Moreover, California employers were already required to notify employees who are subject to unlawful non-competes that their non-competes were void by February 14, 2024, and failure to do so constitutes an act of unfair competition subject to a \$2,500 penalty per violation.

What this means for employers: California employers are already subject to AB-1076 and SB-699, and therefore cannot enforce non-compete agreements against former employees regardless of where and when the contract was signed and regardless of whether the contract was signed and the employment was maintained outside of California.

Furthermore, California law is stricter than the FTC’s rule in that it does not provide an exception for existing non-competes entered into with senior executives. Additionally, California law only allows non-competes against business owners who sell (i) the goodwill of a business, (ii) all of their ownership in a business entity; or (iii) all or substantially all of the assets of a business together with the goodwill of that business. Accordingly, California employers should review their employment agreements and update them as necessary, with a particular focus on implementing NDAs.



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