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The FTC Ban of Non-Competition Agreements

Summary

On May 7, 2024, the Federal Trade Commission (FTC) published the final text of its Non-Compete Clause Rule (the “Rule”) banning most non-compete agreements. Non-Compete Clause Rule 89 FR 38342 (May 7, 2024) (the “Rule”). In simple terms, the Non-Compete Clause Rule bans the vast majority of non-competition agreements as an “unfair method of competition” under the Federal Trade Commission Act (FTC Act). As anticipated, the Rule sparked immediate legal challenges questioning its statutory and constitutional validity and seeking preliminary and permanent injunctive relief.

Background and Legislative Context

On July 9, 2021, the Biden Administration issued Executive Order 14036, “Executive Order on Promoting Competition in the American Economy, with the stated purpose of enhancing competition within the U.S. economy. Executive Order 14036 (July 9, 2021).

On January 5, 2023, the FTC issued a Notice of Proposed Rulemaking on “Rules Concerning Unfair Methods of Competition” that would prohibit most non-compete clauses in employment agreements and agreements with independent contractors, with limited exceptions for agreements connected to the sale of a business. *See* Fed. Trade Comm’n, Notice of Proposed Rulemaking: Non-Compete Clause Rulemaking, RIN 3084-AB74 (Jan. 5, 2023). Although the Commission’s proposal noted that worker non-competes may provide some benefits, the FTC stated that non-compete agreements suppress wages, hinder employee mobility, and dampen economic innovation, outweighing any specific benefits to individual firms 88 Fed. Reg. 3482 (Jan. 19, 2023). As part of the rulemaking process, the FTC received more than 26,000 comments on the proposed rule. 89 Fed. Reg. at 38342.

On April 23, 2024, the FTC Commissioners voted 3-2 to approve the issuance of the final Non-Compete Clause Rule, with two Commissioners dissenting on the ground that the FTC lacks authority to promulgate the rule under Sections 5 or 6(g) of the FTC Act. Fed. Trade Comm’n, *FTC Announces Rule Banning Noncompetes* (Apr. 23, 2024).¹

I. The Final Rule

A. Basics:

The new Non-Compete Clause Rule declares the use of non-competition agreements to be an “unfair method of competition” prohibited by the FTC Act. Non-Compete Clause Rule, § 910.2. FTC points to Sections 5 and 6(g) of the FTC Act as the basis for its authority to issue the rule. Rule, 89 FR at 38342 (citing 15 U.S.C. §§ 45(a)(2) (empowering the FTC to prevent covered

¹ Available at <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>

persons from using unfair methods of competition) and 46(g) (granting the FTC the authority to make rules and regulations for the purpose of carrying out the provisions of the FTC Act)).

More specifically,

- (1) With respect to a worker other than a senior executive, it is an unfair method of competition for a person to:
 - (i) Enter into or attempt to enter into a non-compete clause;
 - (ii) To enforce or attempt to enforce a non-compete clause; or
 - (iii) To represent that the worker is subject to a non-compete clause.
- (2) With respect to senior executives, it is an unfair method of competition for a person to:
 - (i) Enter into or attempt to enter into a non-compete clause;
 - (ii) Enforce or attempt to enforce a non-compete clause entered into after the effective date;
 - (iii) To represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date.

16 C.F.R. § 910.2(a).

In short, the Rule prohibits entering into non-competes with anyone after the effective date and prohibits enforcing non-competes after the effective date, with the exception of non-competes entered into with senior executives before the effective date. 16 C.F.R. § 910.2(a).

B. A Few Details

1. Effective Date

The Rule states it is effective 120 days after it is published. 16 C.F.R. § 910.6. The Rule was published on May 7, 2024, making the effective date September 4, 2024.

Person

The Rule defines “person” to be co-terminus with the FTC’s jurisdiction. 16 C.F.R. § 910.1 (“Person means any natural person, partnership, corporation, association, or other legal entity within the Commission’s jurisdiction, including any person acting under color or authority of State law.”). As the FTC acknowledges, this means entities not subject to the FTC Act are not subject to the Rule. 89 Fed. Reg. at 38356 (citing 15 U.S.C. §§ 44, 45(a)(2) and *Parker v. Brown*, 317 U.S. 341, 350-51 (1943)) (noting banks, most non-profits, and State and local governments engaging

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