EMPLOYMENT LAW ALERT
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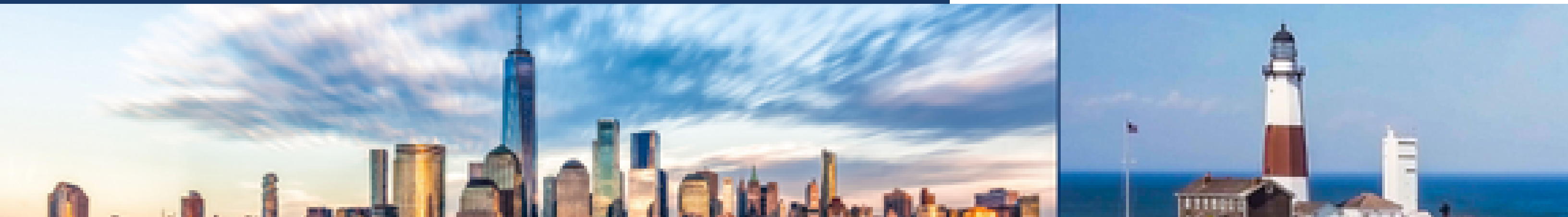

# FTC FINAL RULE: NATIONWIDE BAN OF NON-COMPETE AGREEMENTS

On April 23, 2024, the Federal Trade Commission (FTC) voted to effectively ban non-compete agreements, with limited exceptions. If the final rule survives the extensive opposition being proffered and the pending litigation, it will become effective on September 4, 2024.

**Covered Employees**

The final rule broadly defines a "non-compete clause" 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." This broad definition covers any worker, including employees, independent contractors, externs, interns, volunteers, apprentices and sole proprietors, regardless of whether the individual is paid or unpaid for the work.

**Existing Non-Competes**

The vast majority of non-compete agreements (*i.e.,* those that do not fall under one of the limited exceptions set forth below) are effectively eliminated by the final rule from the arsenal of tools that employers often use to protect their businesses. Under the rule, it will be considered an unfair method of competition to: (i) enter into or attempt to enter into a non-compete; (ii) enforce or attempt to enforce a non-compete; or (iii) represent that a worker is subject to a non-compete.

Not only does this rule eradicate non-compete agreements, it places an affirmative obligation on employers to notify employees through a "clear and conspicuous notice" that their non-compete clauses have been deemed unenforceable by the rule. Further, employees must be notified that as of the effective date the non-compete will not be, and cannot legally be, enforced. This notice must be provided to employees in writing either through hand delivery, by mail to the last known personal street address, email, or text message. To assist employers, the final rule includes model language for this notice.

**Limited Exceptions**

*Sale of a Business*

As a respite for companies seeking to enter into purchase agreements, the final rule will not apply to non-compete clauses entered into as part of the bona fide sale of a business. Specifically, the rule will not apply to the "sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets." As such, non-competes may still be entered into as part of these transactions.

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*Senior Executives – Preexisting versus New Agreements*

Preexisting non-compete clauses remain enforceable for "senior executives." A senior executive is defined as a worker earning more than $151,164.00 annually and who is in a "policy making position." Section 910.1 of the rule defines a "policy making position" at a business as a "president, chief executive officer or the equivalent, or any other officer of a business entity who has policy making authority, or any other natural person who has policy making authority for the business entity similar to an officer with policy making authority." For purposes of this rule, policy making authority means the "**final authority** to make policy decisions that control significant aspects of the business entity . . ." The rule does not include within the definition of policy making authority those that only have "authority limited to advising or exerting influence over such policy decisions" or final authority to make policy decisions for only a subsidiary or affiliate.

Significantly, as of the effective date of the rule, employers will be prohibited from entering into or seeking to enforce new non-compete clauses with senior executives.

*Ongoing Litigation*

The final rule does not apply "where a cause of action related to a non-compete clause accrued prior to the effective date." Therefore, any ongoing litigation would not be deemed moot or otherwise voided by this new rule.

*Good Faith*

The final rule also provides that it would not be considered a form of unfair competition "to enforce or attempt to enforce a non-compete clause or to make representations about a non-compete clause where a person has a good-faith basis to believe" that the rule is inapplicable.

**Proactive Steps for Employers**

While this final rule must survive numerous legal challenges to become effective, employers should begin to take steps to prepare their businesses for a world without non-competes. It is important for businesses to review their current employee and independent contractor agreements to determine who may need to receive notice under this new rule, and assess whether their current agreements violate provisions of the final rule. If changes are necessary, then businesses should consider alternatives, such as non-disclosure agreements, to protect confidential information and trade secrets in the event that the final rule becomes enforceable.

Ruskin Moscou Faltischek will continue to monitor the status of the final rule and is prepared to assist employers in staying apprised of further developments on this issue on the state and federal level. If you have any questions regarding the pending ban on non-compete agreements or any other employment related questions, please contact:

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