



Federal Trade Commission Makes Good on Promise to Ban Non-Competes

Client Advisories

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Well, the FTC did what it said it would do. The Federal Trade Commission ("FTC") voted 3-2 today to issue its final rule (the "Non-Compete Clause Rule") banning most new and existing non-competes, reminding us of legendary coach Dennis Green's famous remark: "they are who we thought they were." Today's final rule caps off the multi-year assault on non-competition agreements, which we have written about [here](#), [here](#), and [here](#).

The Non-Compete Clause Rule is slated to become effective 120 days after publication in the Federal Register. Once effective, the new rule would prohibit employers from entering into new non-competes with all workers, including senior executives. It would also prohibit employers from enforcing existing non-competes with all workers, except for those with senior executives—reflecting a key difference between the proposed rule and the final rule. Senior executives are defined as those earning more than \$151,164 annually who are in a "policy-making position." Finally, the Non-Compete Clause Rule would prohibit employers from representing that the worker (other than a senior executive subject to an existing non-compete) is subject to a non-compete clause.

Employers will not be required to rescind their existing non-competes, as contemplated in the proposed rule; however, the new rule does require employers to provide clear and conspicuous notice to the affected worker by the effective date that the non-compete is unenforceable.

The FTC's final rule includes a sale of business exception, which was modified from the proposed rule in response to concerns about an ownership percentage threshold. The final rule will not apply to "a noncompete clause that is entered into by a person pursuant to a bona fide 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."

Legal challenges loom for the Non-Compete Clause Rule, with one coming as soon as tomorrow from the U.S.

Chamber of Commerce. Members of our Trade Secret Protection & Restrictive Covenants Group will be following these challenges closely.

For questions about or issues concerning the Non-Compete Clause Rule or preemptive measures your business can take in anticipation of the rule's effective date, please contact **Amy Pearl** at apearl@archerlaw.com or 856.857.2790 or **Thomas Muccifori** at tmuccifori@archerlaw.com or 856.354.3056.

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