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A Workplace Law Update

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Who is a "Senior Executive" Under the FTC's Non-Compete Clause Rule? It's More Narrow Than You Think.

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The FTC's non-compete ban is ***the*** topic of conversation for most in the HR world. As we all have heard, the FTC issued the Non-Compete Clause Rule (the "Rule") which would ban nearly all non-compete provisions with limited exceptions. One exception is for **existing** agreements with "senior executives."

The FTC defines "senior executive" based on both an earnings test and a job duties test – and the job duties test is quite restrictive.

To be a senior executive, one must:

1. Be in a "policy making position," AND

2. Receive total annual compensation of at least $151,164 in the preceding year (or annualized if the worker has not worked a full year).

I've heard a number of questions about what "annual compensation" means, and the FTC is clear that this is fairly broad. If a worker makes $151,164 inclusive of salary, commissions, nondiscretionary bonuses, and other nondiscretionary compensation, then they meet the earnings test. The earnings test does not include things like benefits, lodging, and other discretionary payments. But thankfully the Rule does account for many of the unique compensation structures that true senior executives have.

Where companies will face a hurdle trying to enforce a non-compete against many highly compensated individuals is at the "policy making position" prong. The FTC defines this as the entity's:

- President, CEO, or equivalent,

- any other officer (Vice President, Secretary, Treasurer, CFO, comptroller, or

principal accounting officer) of a business entity who has policy-making authority,

- or any other person who has policy-making authority for the business entity.

Companies can continue to enforce existing non-competes against officers of the company, and those with policy-making authority for the business entity. Here, the FTC makes clear that it looks for the authority to make final policy decisions controlling significant aspects of the entity - it is not enough to have advisory authority, or to have final decision-making authority over a segment or department.

The moral of the story

If you do not have an existing non-compete with a senior executive as of September 4, 2024, the Rule will not permit you to enter into one.

If you have existing non-competes, you can enforce them against, for example, the CEO, the CFO, and a CHRO with policy-making authority over the business (so long as they make at least $151,164 annually)

You likely cannot enforce a non-compete against a Sales Manager who makes $250,000 annually, a Department Head with policy-making authority over only his segment of the business, a mid-level manager who owns a small share of stock in the Company, or a highly-compensated Chief People Officer who only has advisory authority but cannot make final policy decisions.

What to do next

1. Understand who in the company is currently subject to a non-compete agreement.
2. Once you understand the number of non-compete agreements, determine who qualifies as a “senior executive” and list the employees against whom you may not be able to enforce the agreement in the future.
3. Determine if there are true “senior executives” without existing non-competes who should enter into them before September 4, 2024.
4. If you have a number of workers against whom you will not be able to enforce a non-compete under the Rule, gather the information you will need in order to provide them with the required notice under the Rule – but do not send anything yet!
5. Stay informed – although you need to be prepared either way, it is highly likely that this Rule will be stayed by the courts and not go into effect in September. Practice patience but keep up-to-date on the latest developments.

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