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Federal Trade Commission votes on final rule banning most noncompete agreements

By John David Gardiner and Cameron D. Ritsema

On April 23, 2024, the Federal Trade Commission (FTC) voted 3-2 to issue a final rule that would ban the vast majority of noncompete agreements for nearly all workers of for-profit employers in the United States.^[1] The effective date of the final rule is September 4, 2024, which is 120 days after publication in the *Federal Register*.

This article supplements and expands upon the April 2023 article in *CEP Magazine*, “Federal Trade Commission proposes a noncompete ban: Five things to know.”^[2]

Background

As discussed in the 2023 article, noncompete agreements are typically governed by state-specific law, whether statutory, common law, or both. Some states, such as California and Oklahoma, ban noncompete agreements with few, if any, exceptions. Other states, such as Colorado, Illinois, and Washington, limit noncompete agreements based on the individual worker’s earning threshold. States that permit noncompete agreements have varying requirements.

FTC determination, coverage, and requirements

The FTC determined that it is an unfair method of competition, and therefore a violation of Section 5 of the FTC Act, for employers to enter into noncompete agreements with workers and to enforce certain noncompete agreements against workers.

The term “worker” is important. The final rule defines “worker” as “a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker’s title or the worker’s status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person. The term worker includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.”^[3]

After the effective date, the final rule effectively disregards state law and bans *new* noncompete agreements with all workers, including senior executives.

The FTC takes a different course regarding *existing* noncompete agreements (entered into prior to the effective

date) for senior executives than for other workers. For senior executives, existing noncompete agreements can remain in force. The final rule defines “senior executive” as workers earning more than \$151,164 annually and who are in a “policy-making position” (i.e., those who have final authority to make policy decisions that control significant aspects of a business).

In addition, by the effective date, employers will be required to provide “clear and conspicuous” notice to workers other than senior executives who are bound by an existing noncompete agreement that the noncompete agreement will not be, and cannot legally be, enforced against the worker.

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