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Federal Trade Commission Approves New Rule That Prohibits Non-Compete Agreements

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On Tuesday, April 23, 2024, the Federal Trade Commission (“FTC”) voted to ban almost all noncompete agreements between employers and “workers,” regardless as to whether those workers are classified as employees, independent contractors, volunteers, interns, externs, apprentices, or “sole proprietors who provide a service to a client or customer.” The Commission voted 3-2 (along political party lines) in favor of the Rule.

Under the new Rule, almost all non-compete agreements are unenforceable as of the effective date of the Rule, which will be 120 days after its official publication in the Federal Register (the publication is expected to occur within 60 days of the FTC’s vote approving the new Rule). This prohibition against non-compete agreements applies to all such agreements that were entered into *before and after* the final Rule’s effective date.

Under the new FTC Rule, the only non-compete agreements that will remain valid are (1) those already existing agreements between “senior executives” and companies that were entered into *before* the effective date of the Rule; (2) those agreements entered into between franchisors and franchisees; and (3) those agreements entered into between persons buying and selling a business entity or otherwise disposing of all of a person’s ownership in a business entity or its operating assets. Importantly, non-compete agreements between employers and “senior executives” entered into *after* the effective date of the Rule will be prohibited.

Furthermore, under the new FTC Rule, employers are required to review all existing contracts and then affirmatively rescind any non-compete agreements in place with workers (except for already existing agreements with “senior executives” as explained above). Specifically, under the FTC Rule, employers must provide written notice to any individuals subject to a non-compete agreement notifying such persons that the non-compete agreement is no longer in effect and may not be enforced. The written notice must be an “individualized communication” provided in written format, whether digital or paper format. Mass communications will not be sufficient to comply with the Rule’s notice requirement.

While the breadth and scope of the Rule is broad, it is not intended to invalidate or alter other common restrictive covenant agreements, such as non-solicitation agreements, non-disclosure agreements, or confidentiality agreements. Those restrictive covenants will only be invalidated if they are drafted so broadly that they effectively preclude the worker from working in the same field after termination of employment.

The U.S. Chamber of Commerce, with the Business Roundtable, the Texas Association of Business, and the Longview Chamber of Commerce, has already filed a Complaint in the U.S. District Court for the Eastern District

Client Alert

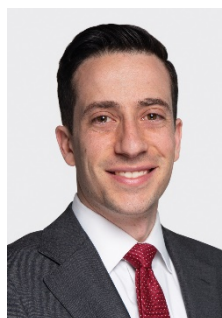
of Texas seeking declaratory and injunctive relief. Specifically, the U.S. Chamber of Commerce is seeking to enjoin implementation of the Rule or otherwise invalidate the Rule on the basis that (1) it is a violation of the FTC’s rulemaking authority; (2) it is not in accordance with the law (because it violates section 5 of the FTC Act as an unlawful interpretation of the term “unfair methods of competition” under the FTC’s longstanding interpretation of that term and relevant caselaw); (3) it constitutes an unconstitutional delegation of authority to the FTC; (4) it is an unlawful retroactive regulation; and (5) the FTC acted in an arbitrary and capricious manner in enacting the Rule by failing to engage in reasoned decision-making and consider alternative proposals.

We will send supplemental alerts to keep you apprised of further litigation developments. Please contact RSHC and the below attorneys to review your non-compete agreements and other restrictive covenant agreements if you want to ensure compliance with the new FTC Rule, and to advise you on ways to continue protecting your goodwill and other business interests with or without the new Rule.

For more information, **please contact:**



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