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FTC Final Rule Banning Non-Competes: The Deadline Approaches

Alert

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As discussed in [our previous Client Alert](#), on April 23, 2024, the U.S. Federal Trade Commission (the “**FTC**”) issued a [Final Rule](#) enacting a nationwide ban on non-compete clauses, effective as of September 4, 2024.

Given the short time remaining before the Final Rule’s effective date, and the significant possibility that it will not be stayed or overturned by legal proceedings before then, employers should review the requirements of the Final Rule and begin an analysis and preparations for compliance, as discussed below.

Court Challenges

Several lawsuits challenging the Final Rule are currently in progress, and the preliminary relief rulings for two of these cases have resulted in notably different outcomes.

On July 23, 2024, a Pennsylvania federal court denied the plaintiff’s motion seeking a stay of effective date and preliminary injunction against enforcement of the Final Rule in *ATS Tree Services, LLC v. Federal Trade Commission, et al.*, No. 24-cv-1743 (E.D. Pa.), after finding that the plaintiff failed to establish a likelihood of success on the merits. Although the foregoing was only in response to a request for preliminary relief, and plaintiff could seek emergency relief from the circuit court, this case seems unlikely to result in a stay of the Final Rule’s effective date.

In contrast, on July 3, 2024 a Texas federal court preliminarily enjoined the enforcement of the ban against the plaintiffs in *Ryan, LLC v. FTC*, Case No. 3:24-cv-00986 (N.D. Tex), after ruling that the plaintiffs are likely to succeed in establishing that the Final Rule is unlawful under the federal Administrative Procedure Act on arbitrary-and-capricious grounds.^[1] The Ryan court limited the initial relief to the plaintiffs in that specific lawsuit and did not issue a nationwide injunction because it had not received evidence on why nationwide relief is necessary, but also noted that the plaintiffs could address that gap before the final ruling. The court’s ruling on the ultimate merits of the Ryan case is expected to be forthcoming on or before August 30, 2024, and there is a significant possibility that the Ryan case will result in a stay of the Final Rule’s effective date before September 4. However, uncertainty remains whether that final ruling will lead to a nationwide injunction or whether relief will once again be limited to the plaintiffs in that case.

Yet another challenge to the Final Rule is pending in a Florida federal court in *Properties of the Villages v. Federal Trade Commission*, No. 24-cv-316 (M.D. Fla), a case which has not yet issued any rulings as of the date of this Client Alert. Given how recently this case was filed, it is unclear whether it might lead to a timely stay of the Final Rule’s effective date.

Accordingly, there is inherent uncertainty as to whether any of the foregoing cases will result in a stay of the Final Rule’s effective date before September 4 and, in any case, any resulting rulings are likely to be appealed to the federal circuit courts and possibly the U.S. Supreme Court.

Certain Requirements; Mandatory Notices

Given the significant possibility that the Final Rule will become effective on September 4, 2024, employers should start planning for compliance with the Final Rule's requirements.

Some key requirements to keep in mind are as follows:

- After its effective date, the Final Rule bans new "non-compete clauses" for any "worker" and renders existing non-compete clauses against any worker unenforceable, in each case subject to certain exceptions. There is also an exemption for non-compete clauses of "senior executives", but only if the clause existed prior to the Final Rule's effective date.
- In addition, the Final Rule mandates that employers send to all workers (excluding senior executives) who are subject to existing non-compete clauses a written notice that the employer will not enforce non-compete clauses against them. The notice must "be on paper," delivered by hand, by mail, by email, or by text message on or prior to the rule's effective date. A copy of the FTC's model form of notice, as provided in the Final Rule, is attached as [Annex I](#) to this Client Alert.

For further details as to the Final Rule's requirements, see [our previous Client Alert](#) and the discussions therein regarding (i) the definitions of "worker", "non-compete clause" and "senior executive", (ii) the bona fide business sale exception, (iii) exemptions for entities that fall outside the FTC's jurisdiction (e.g., banks and certain non-profit organizations), and (iv) how non-disclosure or non-solicitation clauses may sometimes be deemed "de facto" non-compete clauses.

What Companies Should Be Doing

Companies should identify all current and former workers who may be required to receive a written notice of non-enforceability and prepare a plan for delivering notice if the Final Rule becomes effective. Companies should also promptly commence a process to gather files and, in consultation with their legal counsel, make assessments concerning:

- What contracts do they have with current or former workers containing active non-compete clauses, or non-disclosure or non-solicitation clauses that may be deemed non-competes?
- Do they have any company policies or manuals which include non-compete clauses, or non-disclosure or non-solicitation clauses that might be deemed non-competes?
- Consider whether to seek amendment of any of the foregoing non-disclosure or non-solicitation clauses, so as to protect their enforceability.
- For workers with existing active non-competes, do any qualify under the "senior executives" exemption?
- For any "senior executives" who are not currently subject to a non-compete, should one be signed before the Final Rule's effective date, in order to take advantage of the exemption for existing senior executive non-competes?
- Should any equity incentive or phantom equity plans or other employee benefit arrangements be modified to remove non-competes and implement alternative approaches (e.g., longer vesting periods to encourage lengthier employee retention, or garden leave).

What if I have Legal Questions?

Our firm has closely followed the FTC's non-compete ban since it was first proposed and will continue to monitor the Final Rule for any updates. If you would like assistance from our law firm, including how the non-compete ban may affect you, please do not hesitate to contact your Windels Marx relationship lawyer, **Scott Matthews** or **Marky Suazo** of our Employment and Employee Benefits Practice Group, or **Jonathan Gray** of our Corporate and Securities Practice Group.

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[1] In early May, a Texas federal court stayed *Chamber of Commerce of the United States of America et al v. FTC and Lisa Khan, Case No. 6:24-cv-00148 (E.D. Tex)* (filed April 24, 2024), another lawsuit challenging the Final Rule, under the "first to file rule" so that the Ryan lawsuit could proceed first. The plaintiffs in the *Chamber of Commerce* case were permitted to intervene in the Ryan lawsuit.

ANNEX I

FTC MODEL FORM OF NOTICE

A new rule enforced by the Federal Trade Commission makes it unlawful for us to enforce a non-compete clause. As of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE], [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] following your employment with [EMPLOYER NAME].

The FTC's new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit ftc.gov/noncompetes. Complete and accurate translations of the notice in certain languages other than English, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean, are available at ftc.gov/noncompetes.