

Client Alert

Global Human Capital and Compliance

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FTC Final Rule on Non-Competes: Employers Should Consider Compliance Preparations and Implications

At present, the Federal Trade Commission's (FTC) final rule on non-competes (the "Rule") is set to go into effect on September 4, 2024 for virtually every for-profit employer in the United States.

Though legal challenges remain pending, there is uncertainty as to whether any nationwide injunction will be entered prior to September 4.

Given the existing uncertainty, employers should consider preparing for compliance. At the very least, employers should focus on the potential implications of non-compliance.

THE FINAL RULE: SCOPE AND REQUIRED, INDIVIDUAL NOTICE

As a reminder, subject to limited exceptions discussed below, the Rule invalidates existing non-competes and prohibits future non-competes, regardless of industry and regardless of whether a worker is an employee or an independent contractor.

The Rule bans all non-competes nationwide, including *de facto* non-competes, with narrow exceptions for (1) existing non-competes with "senior executives"; (2) non-competes entered into in connection with the sale of a business; (3) non-competes in franchisor/franchisee relationships; and (4) non-competes imposed by non-profits.

The Rule invalidates all other existing non-competes, prohibits enforcement of such non-competes, and prohibits entering into new non-competes with any employees, including senior executives.

Additionally, by September 4, 2024, employers must inform all workers (other than "senior executives") who are subject to covered non-competes that such non-competes will not be, and cannot legally be, enforced against the worker.



The notice must:

- Be individually sent to the worker;
- Be delivered to the worker by hand, by mail to the worker's last known address, by email to the worker's work email or last known personal email address, or by text message; and
- Identify the particular non-compete and the parties to the non-compete.

The FTC's final rule provides model language that can be used to notify employees.

STATUS OF LEGAL CHALLENGES – NO UPDATES EXPECTED UNTIL AUGUST 30

There are three pending challenges to the non-compete rule:

- *Ryan LLC v. FTC* (Northern District of Texas);
- *ATS Tree Services v. FTC* (Eastern District of Pennsylvania); and
- *Properties of the Villages v. FTC* (Middle District of Florida).

On July 3, the *Ryan LLC* court granted the plaintiff and intervenors' request for a preliminary injunction. However, the injunction is limited to the parties and intervenors (who are each trade associations) and does not include members of the intervenors or any other entities. Merits briefing is ongoing, and the *Ryan LLC* court is scheduled to issue its final decision by August 30. The court may expand the scope of the preliminary injunction once the merits are fully briefed.

On July 23, the court in *ATS Tree Services* denied the plaintiff's motion for preliminary injunction, and contrary to the decision by the *Ryan LLC* court, reasoned that the Rule was a valid exercise of the FTC's authority and complied with the Administrative Procedure Act.

The remaining case, *Properties of the Villages*, does not presently seek a nationwide injunction. A preliminary injunction of the FTC's rule only as it applies to the plaintiff.

In all, unless the court in *Ryan LLC* expands the scope of its injunction on August 30, the Rule will become effective for virtually all employers as scheduled, on September 4.

IMPLICATIONS FOR COVERED NON-COMPETES AFTER SEPTEMBER 4

Because of the looming effective date, employers must decide whether to come into compliance or risk the consequences of non-compliance. In this case, the primary consequence is a potential FTC enforcement action, wherein the FTC orders compliance (i.e., requiring the employer to notify employees, in an individual manner, that the non-compete clause is invalid and will not be enforced) and then files an action in court seeking an injunction to enforce the compliance order. The FTC could also seek civil penalties in the event the employer violates an order to comply (up to \$51,744 for each violation).

Additionally, separate from compliance enforcement, the Rule could hamper employers' ability to enforce non-competes, as defendant-workers could raise the FTC rule as a defense that the non-compete is contrary to public policy. Similarly, workers may choose to bring actions in court (such as declaratory judgment actions) seeking to invalidate a non-compete as contrary to public policy. The risks associated with such actions will vary by jurisdiction (based on the jurisdiction's laws concerning declaratory judgments).



NEXT STEPS FOR EMPLOYERS

As King & Spalding advised previously, employers may want to develop an immediate plan for compliance, particularly given the lingering uncertainty concerning the Rule and its pending September 4 effective date.

Such compliance steps include:

- reviewing existing agreements and policies for compliance with the Rule;
- identifying current and former workers subject to non-compete agreements (or similar post-employment restrictive covenants);
- preparing appropriate notice language and developing a distribution plan to provide individual written notice to current and former workers, as applicable, by September 4;
- developing a plan for compliance going forward, including assessing and revising existing agreements/templates to eliminate non-compete clauses and *de facto* non-compete clauses; and
- assessing additional steps, short of non-compete clauses or *de facto* non-compete clauses, to protect their legitimate interests in trade secrets and confidential information.

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