

Electronic Alert

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U.S. Federal Trade Commission Bans Non-Competition Clauses

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Yesterday, the U.S. Federal Trade Commission (“FTC”) issued its Non-Compete Clause Rule (the “Final Rule”), banning most employers across the United States from enforcing non-competition provisions as a term or condition of employment and largely voiding existing non-competition clauses.

Things to Know:

- The Final Rule is not in effect yet. It becomes effective 120 days following publication in the Federal Register (the “Effective Date”). However, a myriad of expected legal challenges could significantly delay implementation.
- The Final Rule only applies to employers subject to the FTC Act, which covers for-profit entities with some exceptions (e.g., banks, savings and loan institutions, Federal credit unions, and common carriers). Notably, the FTC Act, and thus the Final Rule, does not apply to non-profits. However, the FTC cautions that the Final Rule could extend to non-profits despite their tax-exempt status if the entity is actually organized for profit, which is determined using a two-part test.
- The Final Rule defines “non-compete clause” as “a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition.”
- The Final Rule will serve to ban non-compete clauses that are entered into after the Effective Date for all workers. However, the Final Rule allows continued enforcement of existing non-competes entered into prior to the Effective Date if the employee is considered a “senior executive.” A “senior executive” is defined as a worker earning more than \$151,164.00 annually who is in a “policy making position.” However, Oregon restrictions on non-competition provisions under ORS 653.295 will still apply and should be considered by employers in determining the enforceability of existent non-compete clauses for senior executive workers.
- Upon its effective date, the Final Rule will void all existing non-compete clauses for individuals who are not considered senior executives and will require employers to affirmatively provide employees subject to existing non-compete clauses with notice that those clauses are no longer enforceable.
- The Final Rule expressly does not apply to a cause of action related to an employee’s non-competition agreement (such as a violation of an existing non-competition agreement) which accrued prior to the Effective Date of the Final Rule.

For questions relating to the FTC's Final Rule or for any other matters involving restrictive covenants in the workplace, contact Chris Morgan at 503-276-2144 or cmorgan@barran.com, or Misyy Oakley at 503-276-2122 or moakley@barran.com.