

Federal Trade Commission Follows Through on Promise to Issue Rule Banning Virtually All Non-Compete Agreements

By Karen D. Adinolfi

In January 2023, the Federal Trade Commission (FTC) published a proposed rule that would invalidate existing non-competition agreements and prohibit employers from entering into new non-competition agreements, with very limited exceptions. On April 23, 2024, the FTC, on a 3-2 vote, issued its final rule, which largely leaves the proposed rule unchanged, except as provided below.

The agency's reasoning in January 2023 for the creation of this rule is that non-competition clauses are anti-competitive, keep wages low, hamper the development of new businesses and ideas, and exploit workers. The proposed rule follows a gradual constricting of employers' ability to enter into non-competition agreements with employees over the past several years, albeit mostly at the state level.

Specifically, the final rule provides as follows:

- It declares that non-competition agreements are an unfair method of competition.
- It bans employers from entering into non-competition agreements with their employees and independent contractors.
- In a change from the proposed rule, the final rule eliminated a provision in the proposed rule that would have required employers to legally modify existing non-competition agreements by formally rescinding them. Instead, under the final rule, employers will simply have to provide notice to workers bound to an existing noncompete that the non-competition agreement will not be enforced against them in the future.
- Another major change from the proposed rule is to permit existing non-competition agreements with senior executives (defined as those earning \$151,164 or more annually and in policy-making positions) to remain in place.

The commentary offered by the FTC today states that the rule does not affect confidentiality or non-disclosure agreements or clauses and that such agreements or clauses are permitted alternatives to non-competition agreements.

This rule has drawn significant opposition from the business community as well as challenges to the FTC's ability to promulgate such a rule. Immediate legal challenges are likely, and the United States Supreme Court's expected decisions in the pending cases of *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce* may determine that the FTC does not have the power to issue and enforce such a rule.

We will keep you posted on developments related to this proposed rule but contact any of the listed Roetzel attorneys if you have specific questions. In the meantime, we recommend that you proceed

as usual with your non-compete practices, whether requiring them of employees or enforcing the ones that you do have.

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