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The FTC vs. Noncompete Agreements: And the Winner Is...??



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In an expected but still potentially paradigm-shifting move for employers, the Federal Trade Commission (FTC) has issued a “Final Rule” banning most noncompete agreements *nationwide*. The FTC justified its position by declaring that such agreements – which generally prohibit an employee from working for another employer in the same business for some period – are an “unfair method of competition” in violation of Section 5 of the FTC Act.

The Final Rule marks a definitive break with most states, which have traditionally employed a “reasonableness” standard to determine whether a noncompete agreement is “narrowly tailored” to protect an employer’s “legitimate business interests.”

While some states (like Illinois) have passed laws banning noncompete agreements for lower-earning workers, the Final Rule applies to *all employees* with only three narrow exceptions. The first is for “senior executives” making over \$151,164 per year who have an *existing* noncompete and possess “final policy-making authority over significant aspects of a business entity” (think “C-Suite” executives). The second is a “sale of business exception,” where a person sells their ownership interest in a business entity or substantially all of the business’s operating assets. The third exception is for a person already engaged in a lawsuit over a noncompete agreement.

For all other workers, any noncompete agreement is unenforceable after the “effective date,” which is 120 days after publication of the Final Rule in the Federal Register. For those employees, employers will be required to provide written notice to their employees that their noncompete agreements are no longer enforceable.

But will that day come? The same day the FTC announced the Final Rule – April 23, 2024 – several lawsuits were filed in Texas federal courts challenging the FTC’s authority to enforce it, and more such filings are expected.

While we have seen a recent trend of courts curtailing the authority of federal agencies, employers should still consider utilizing other methods of protecting their businesses. The FTC notes that “trade secret laws and non-disclosure agreements (NDAs) both provide employers with well-established means to protect proprietary and other sensitive information.” In addition, the Final Rule does not ban “non-solicitation” agreements, whereby former employees can be prevented from “poaching” their former employer’s customers (though such agreements may still be subject to state law restrictions).

Stay tuned for further developments in this extremely important area of employment law and do not hesitate to contact any of the Human Resources and Employment Law attorneys at Gould & Ratner to review the specifics of your situation.