

A workplace game changer: FAQs regarding the FTC's final non-compete rule

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On April 23, 2024, the Federal Trade Commission (FTC) unveiled and approved a final regulatory rule to ban virtually all non-compete agreements in the U.S. This undoubtedly represents the largest seismic shift ever in U.S. non-compete law. Below we have endeavored to answer some of the more common questions we anticipate being posed in response to the final rule's issuance.

Is there any background to the final rule?

Yes. As we discussed in an October 2021 [article](#) regarding the future of restrictive covenant agreements in the U.S., President Biden in July 2021 directed the FTC to explore potential ways to limit the use of non-compete agreements. On January 5, 2023, the FTC followed through on the President's directive by proposing a regulatory rule that would effectively ban such agreements.

The January 2023 proposed rule deemed it an unfair method of competition for an employer to:

- Enter into or attempt to enter into a non-compete clause with a worker;
- Maintain a non-compete clause with a worker; or
- Represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.

The proposed rule also provided that the term “non-compete clause” also “includes a contractual term that is a de facto non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker’s employment with the employer.” It also proposed to invalidate any preexisting non-compete clauses and require businesses to (i) rescind such preexisting clauses and (ii) notify workers of the same in an individualized written communication.

The proposed rule was open to public comment through April 19, 2023 and received more than 26,000 comments.

What does the final rule say?

The FTC’s [final rule](#) provides as follows:

- With respect to a worker¹ other than a senior executive, it is an unfair method of competition for a person (i) to enter into or attempt to enter into a non-compete clause; (ii) to enforce or attempt to enforce a non-compete clause; or (iii) to represent that the worker is subject to a non-compete clause.
- With respect to a senior executive, it is an unfair method of competition for a person (i) to enter into or attempt to enter into a non-compete clause; (ii) to enforce or attempt to enforce a non-compete clause entered into after the effective date; or (iii) to represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date.

In other words, once the final rule takes effect, virtually all preexisting and future U.S. non-compete agreements are and will be banned and unenforceable, with the exception of preexisting non-compete agreements with “senior executives” and the few other narrow exceptions noted below.

¹ Notably, the final rule defines “worker” extremely broadly and includes, among others, workers classified as employees, independent contractors, and interns. The term “worker” also includes a natural person who works for a franchisee or franchisor but does not include a franchisee in the context of a franchisee-franchisor relationship.

How does the final rule define “non-compete clause?”

The final rule such 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: (i) 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 (ii) operating a business in the United States after the conclusion of the employment that includes the term or condition.”

The final rule clarifies that “term or condition of employment” includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

Does the final rule apply to *preexisting non-compete agreements*?

As noted above, yes, except for preexisting non-compete agreements entered into with “senior executives.”² With respect to all other preexisting non-compete agreements, those agreements will not, and cannot legally, be enforced against the worker after the final rule’s effective date and employers must provide “clear and conspicuous notice to the worker,” by said effective date, of the same.

What sort of notice needs to be provided to workers who are subject to preexisting non-compete agreements?

The notice referenced in the preceding FAQ must (i) identify the person who entered into the non-compete clause with the worker and (ii) be on paper delivered by hand to the worker, or by mail at the worker’s last known personal street address, or by email at an email address belonging to the worker, including the worker’s current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker. **The final rule includes a model notice for employers to use.**

That said, if an employer that is required to provide notice has no record of a street address, email address, or mobile telephone number for a particular worker that is subject to a preexisting non-compete, the employer is exempt from the notice requirement with respect to such worker.

How does the final rule define “senior executive?”

Under the final rule, a “senior executive” means a worker who (i) was in a policy-making position; and (ii) received from their employer (a) total annual compensation of at least \$151,164 in the preceding year, (b) total compensation of at least \$151,164 when annualized if the worker was employed during only part of the preceding year, or (c) total compensation of at least \$151,164 when annualized in the preceding year prior to the worker’s departure (if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete clause).

“Total annual compensation,” in turn, is based on the worker’s earnings over the preceding year. Total annual compensation may include salary, commissions, non-discretionary bonuses, and other non-discretionary compensation earned during that 52-week period at issue. Total annual compensation does not include board, lodging and other facilities and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other similar fringe benefits.

Other relevant definitions to the term “senior executive” including the following:

- “Preceding year” means a person’s choice among the following time periods: the most recent 52-week year, the most recent calendar year, the most recent fiscal year, or the most recent anniversary of hire year;
- “Policy-making authority” means final authority to make policy decisions that control significant aspects of a business entity or common enterprise and does not include authority limited to advising or exerting influence over such policy

² Though, as noted above, the final rule bars employers from entering into **new** non-compete agreements with “senior executives” after the final rule takes effect.

decisions or having final authority to make policy decisions for only a subsidiary or affiliate of a common enterprise;

- “Policy-making position” means a business entity’s president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority. An officer of a subsidiary or affiliate of a business entity that is part of a common enterprise who has policy-making authority for the common enterprise may be deemed to have a policy-making position for purposes of this paragraph. A natural person who does not have policy-making authority over a common enterprise may not be deemed to have a policy-making position even if the person has policy-making authority over a subsidiary or affiliate of a business entity that is part of the common enterprise; and
- “Officer” means a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any natural person routinely performing corresponding functions with respect to any business entity whether incorporated or unincorporated.

Are there any exceptions to the final rule, such as in the sale-of-business context?

Yes, with the primary exception being that the final rule does “not apply to a noncompete clause that is entered into by a person pursuant to a bona fide sale of a business entity, of the person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets.”

The only two other exceptions are for instances “where a cause of action related to a non-compete clause accrued prior to the effective date” of the final rule and where a business enforces or attempts to enforce a non-compete agreement with a good-faith basis to believe that the final rule is inapplicable under the circumstances.

Can we still ask our workers to sign non-disclosure/confidentiality agreements and client/customer and employee non-solicit agreements?

Yes, the continued use of non-disclosure agreements, as well as customer and employee non-solicitation agreements, appears to generally be permissible – unless they are so broad as to fit within the final rule’s definition of “non-compete clause” and so long as they comply with applicable state law.

When does the final rule take effect?

The final rule will take effect 120 days after it is published in the Federal Register.

Will there be legal challenges to the final rule?

There will absolutely be legal challenges to the final rule on multiple grounds, including that the FTC does not have the authority to regulate this issue – as previewed by the two dissenting Commissioners – and also that the FTC did not sufficiently tailor the rule to the purpose/justification underlying it.

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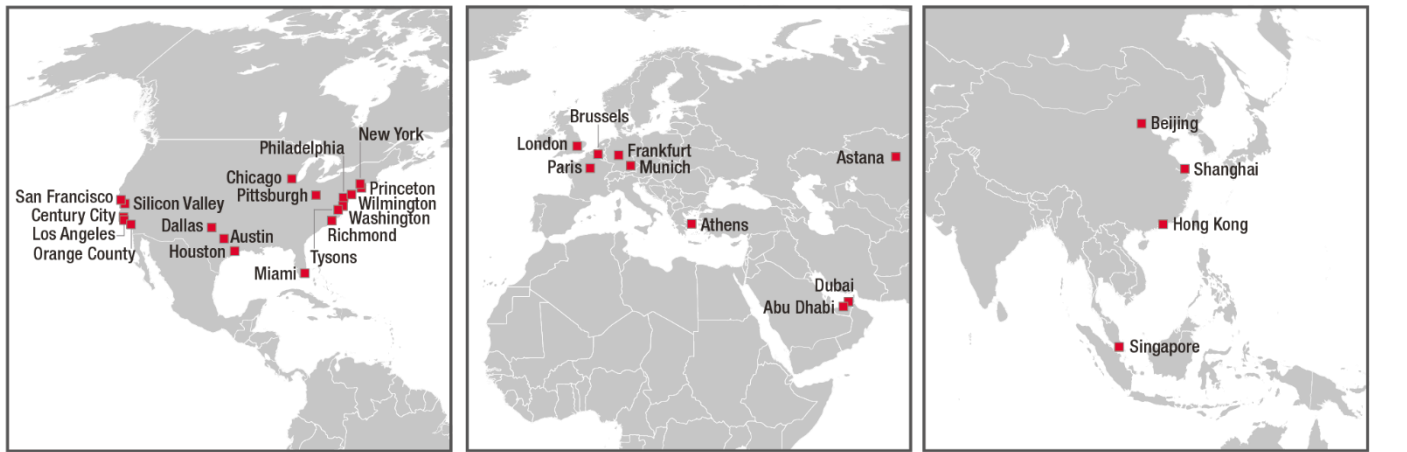


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