

ALC 22ND Annual

SUMMIT

Montréal, Canada | September 11 - 13, 2024

Navigating the New Era:
Non-Compete Agreements and You
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Disclaimer

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Please contact your own attorney with any specific questions you have related to the information provided.

AGENDA

Non-Compete Agreements

1. Terminology
2. History and Problems
3. Current Situation in the States
4. Federal Trade Commission Final Rule
5. Strategies



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Terminology



- Non-compete: A provision where a worker agrees not to compete with a company.
- Non-solicit: A provision where a worker agrees not to solicit the company's clients for a certain period of time after employment.
- Non-solicit of employees/contractors: A provision where a worker agrees not to solicit the company's employees/contractors for a certain period of time after employment (sometimes referred to a “non-poaching provision”).

History and Problems



- Rooted in the medieval system of apprenticeship.
 - Apprentice could not complete with master after the apprenticeship.
- In the 18th century the concept of “reasonableness” was introduced in England.
 - Restraint only as to afford fair protection, but not so large to interest with the interests of the public.
- Non-compete started to be regulated in the United States as early as 1811 (for over 200 years).
 - For most of this time (up to 2007) only three states banned non-competes (California, North Dakota, and Oklahoma).

History and Problems

(con't)

- Change began in 2007.
 - State legislators started to implement law restricting the use of non-competes.
- Why?
 - Technology
 - Entrepreneurship
 - Jimmy Johns



Current Situation in the States

- Complete Bans
- Income Threshold Bans
- Industry Bans
- Scope of the Bans vary
 - Are ICs covered?
 - Are non-solicits included?
 - How long are the time limitations?
 - Is moonlighting permitted?
- More State laws are coming

<https://eig.org/state-noncompete-map/>

Federal Trade Commission

Final Rule



- Summary
 - Prevents employers from:
 - Entering into or attempting to enter into a non-compete clause with a worker;
 - Enforcing or attempting to enforce a non-compete clause with a worker; or
 - Representing that a worker is subject to a non-compete clause.
 - The term “worker” includes both employees and independent contractors.
 - Must provide written notice that company will no longer enforce non-competes.

Federal Trade Commission

Final Rule



- Caveats / Exceptions
 - Retroactive application, except for non-compete with “senior executives” signed prior the effective date of the Rule.
 - Use of limited “non-solicit” provisions are allowed.
 - Sale of Business exception exists.

Federal Trade Commission

Final Rule

- **Why?**
 - Restrict the freedom of American workers and suppress wages.
 - Stifle new businesses and new ideas.
 - Widespread throughout the U.S. economy.



Federal Trade Commission

Final Rule



(con't)

- Why?
 - By banning non-competes, the FTC estimates that:
 - New business formation will grow by 2.7%, creating over 8,500 new businesses each year.
 - American worker's earnings will increase by \$400-\$488 billion over the next decade, with worker's earnings rising an estimated \$524 a year on average.
 - Healthcare costs will be reduced by \$74-\$194 billion over the next decade in reduced spending on physician services.
 - Innovation will increase, with an average estimated increase of 17,000-29,000 more patents each year over the next decade.
 - Over 25,000 commenters supported a categorical ban.

(Source: Federal Trade Commission, Fact Sheet on the FTC's Noncompete Rule making)

Federal Trade Commission

Final Rule



- Current Status of FTC Rule
 - April of 2024: the FTC issued the Final Rule banning the enforceability of the vast majority of non-compete agreements.
 - Final Rule was set to take effect on September 4, 2024, but a federal Court in Texas entered a preliminary injunction followed by a permanent injunction, staying the enforcement of the Rule.
 - FTC lacked authority
 - Arbitrary and capricious
 - FTC has until October 19, 2024 to file an appeal

Strategies

- Implement (strengthen) Non-Disclosure Agreements.
- Non-Solicit Agreements (maybe?).
- Protect trade secrets / confidential documents / customer lists.
- Fair treatment of workers / higher salaries.





Questions?

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