

PREPARING FOR THE SEPTEMBER 4TH EFFECTIVE DATE OF THE NEW FTC RULE BANNING NON-COMPETES

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Latest Update: *As of August 20th, the U.S. District Court for the Northern District of Texas has blocked the implementation and enforcement nationwide of the FTC's new rule banning non-competes. On October 18, 2024, the FTC filed a notice of appeal to challenge the August 2024 ruling by the U.S. District Court for the Northern District of Texas in Ryan LLC v. Federal Trade Commission that blocked the FTC's final rule implementing the noncompete ban. The challenge will be heard by the Fifth Circuit Court of Appeals. Until then, the FTC noncompete ban remains enjoined by the Ryan case. **Read the latest information on litigation related to the FTC rule here.***

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On April 23, 2024, the U.S. Federal Trade Commission ("FTC") issued a Final Rule banning most types of non-competition clauses. The Final Rule will go into effect on September 4, 2024, unless enjoined through pending litigation. Companies must prepare now to make required notices no later than September 3, 2024.

When the Final Rule becomes effective early next month, companies will no longer be able to enter into *new* non-competition clauses with workers (including both employees and independent contractors), except in the limited circumstance of a bona fide sale of a business entity or a person's ownership interest in a business entity. To qualify for this exception, the sale must be an arms' length transaction with a reasonable opportunity to negotiate the terms of the sale. In addition, companies will no longer be able to enforce *existing* non-compete clauses, except with certain senior executives, who are narrowly defined as workers earning more than \$151,164 per year and who are in policy-making positions (further defined as the President, CEO, or others with final

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authority to make policy decisions that control significant aspects of a business entity or common enterprise). Companies will be prohibited from entering into *new* non-competition clauses with senior executives after the September 4, 2024 effective date.

For all other workers, both current and former, companies must provide a clear and conspicuous written notice that their existing non-competes will not be, and cannot legally be, enforced against the worker. The notice must be provided in either digital format (such as e-mail or text message) or in paper form *no later than September 3, 2024*. The FTC has included model notice language in the Final Rule that companies may use as a safe harbor in their communication to workers.

Several pending legal challenges to the Final Rule could delay or even prevent its implementation. Both the U.S. Chamber of Commerce and Ryan, LLC, a tax services firm based in Dallas, have sued the FTC in federal court in Texas. (The U.S. Chamber dismissed its case after it was allowed to intervene as a plaintiff in the Ryan, LLC case.) On July 3, 2024, the Texas Court issued a preliminary injunction staying the September 4, 2024 effective date for the Final Rule and prohibiting FTC's implementation of the Final Rule during the pendency of the case. Notably, however, the injunction only applies to the parties in that case. The Texas Court has announced its intent to issue a final ruling on or before August 30, 2024, which could stay enforcement of the Final Rule nationwide. However, in a similar case filed in federal court in Pennsylvania, *ATS Tree Servs., LLC v. FTC*, the Court issued an Order on July 23, 2024, refusing to delay implementation of the Final Rule. A third case, *Properties of the Villages, Inc. v. FTC*, was filed on June 21, 2024, in federal court in Florida, but the Court has not yet ruled on the plaintiff's request for a stay and a preliminary injunction. Given the conflicting decisions, this issue may ultimately be headed to the U.S. Supreme Court.

Unless one of these legal challenges prevails, and implementation of the Final Rule is delayed or enjoined on nationwide basis (not just as to the parties involved in these cases), the Final Rule will become effective September 4, 2024. Companies should act now to take inventory of all existing non-competes (including those that bind former workers), determine which of those non-competes may meet the "senior executive" exception and thus remain enforceable, and prepare written notice to all other affected workers that the company will not be enforcing any non-competes against them.

Our FAQ Guide discussing the Final Rule in more detail is available for download at <https://www.cwlaw.com/newsroom-publications-ftc-issues-final-rule-banning-non-compete-clauses>. If you have questions or if you would like assistance with this or any other matter, please do not hesitate to contact us.