

# The FTC's New and Final Rule Regarding Non-Competes: What Businesses Need to Know Now



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On 23 April 2024, the Federal Trade Commission<sup>1</sup> (FTC) voted<sup>2</sup> to finalize a rule prohibiting employers from enforcing non-competes against all workers — both employees and independent contractors — with only narrowly tailored exceptions.<sup>3</sup> Without judicial intervention, this Non-Compete Clause Rule (referred to moving forward as “the Rule”) takes effect on 4 September 2024 (the “Effective Date”) but the Rule already faces multiple legal challenges that may invalidate it or delay its enforcement.

## What Are Non-Compete Covenants and Why Have They Caught the Attention of the FTC?

Section 910.1 of the Rule defines a “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 (1) seeking or accepting work in the U.S. with a different person where such work would begin after the conclusion of the employment that includes the term or condition or (2) operating a business in the U.S. after the conclusion of the employment that includes the term or condition.”<sup>4</sup>

According to the FTC, non-competes are a method of unfair competition, which it has the right to police as these non-competes now violate the Federal Trade Commission Act.

## What Will the Rule Do (When/If It Takes Effect)?

First, it will prohibit employers from entering into non-competes with workers on and after the Effective Date. Second, it will void existing non-competes and require employers to notify affected workers that existing non-competes will not be enforced.

## Will There Be Exceptions?

Yes. The Rule carves out a few exceptions.

### “Senior Executive” Limitation For Existing Non-Competes

The Rule does not ban existing non-competes with senior executives (those workers earning more than US\$151,164 in the preceding year who are in a “policy-making position”). The Rule defines a “policy-making position” as a business entity’s president, chief executive officer, or the equivalent, and any other officer of a business

<sup>1</sup> A Federal government agency created in 1914, the Federal Trade Commission’s mission is to protect consumers and promote competition. <https://www.ftc.gov/about-ftc/history>.

<sup>2</sup> The vote was 3 to 2.

<sup>3</sup> <https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule>.

<sup>4</sup> Id. at 38342.

entity who has policy-making authority. “Policy-making authority” is defined as final authority to make policy decisions that control significant aspects of a business entity or common enterprise.

### Bona Fide Business Sale Exception

Employers are allowed to enforce non-competes that are entered in accordance with the bona fide sale of a business entity, a person’s ownership in a business entity, or an entity’s operating assets.

### Existing Causes of Action

If a cause of action related to a non-compete arises prior to the Effective Date, this Rule does not void the action.

### Industry-Specific Exceptions

The Rule does not apply to banks, savings and loan institutions, federal credit unions, common carriers, air carriers and foreign air carriers, and persons and businesses subject to the Packers and Stockyards Act.

### Does This Rule Only Apply to Non-Competes?

Yes and no. The rule as written only applies to non-competes and therefore does not ban other restrictive covenants, such as confidentiality or non-solicitation provisions. However, the Rule does prohibit other restrictive covenants if they have the same effect as a non-compete. The Rule provides that non-disclosure and non-solicitation provisions may be characterized and treated as a non-compete when they “span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their employment.”

### Is the Legality of the Rule Being Challenged?

Yes. At least three federal lawsuits have now been filed against the FTC. These suits attempt to cease/delay its implementation and, ultimately, invalidate the Rule. The first suit was filed in Texas by a tax preparation services

provider: *Ryan LLC v. Federal Trade Commission*, Case No. 3:24-cv-00986, in the United States District Court for the Northern District of Texas. Another suit was filed in Pennsylvania by a tree service company: *ATS Tree Services LLC v. Federal Trade Commission, et al.*, Case No. 2:24-cv-01743, in the United States District Court for the Eastern District of Pennsylvania. The United States Chamber of Commerce filed suit in Texas seeking a preliminary injunction and a stay of the Effective Date of the rule: *Chamber of Commerce of the United States of America et al. v. Federal Trade Commission*, Case No. 6:24-cv-00148, in the United States District Court for the Eastern District of Texas (Tyler Division). Each of these lawsuits generally challenges the Rule on the grounds that (1) the FTC lacked or exceeded its authority in issuing this Rule; (2) this Rule is an unconstitutional delegation of legislative power; and (3) this Rule is arbitrary and capricious. If an injunction is granted, the enforcement of this Rule will be halted, or the Rule’s Effective Date will be delayed. The court hearing the *Ryan* case is expected to rule on the motion to stay by 3 July 2024.

If none of these legal challenges results in a stay, the Rule will become effective as scheduled. Congress and the Government Accountability Office will have a chance to review it before its Effective Date. If both the House and Senate pass a resolution of disapproval and the president signs it, or if both houses override a presidential veto, the non-compete ban is void and cannot be reinstated as written without Congressional approval.

### What Should Employers Do in the Meantime?

Employers should closely monitor the legal challenges. If these challenges do not appear likely to keep the Rule from taking effect, employers should begin to take steps to provide written notice to each worker subject to a non-compete violating this rule. The notice must (1) identify the worker subject to the non-compete and (2) be delivered to the worker by hand, mail, email or text. The Rule provides model language for employers to use as their notice.<sup>5</sup> ♦

<sup>5</sup> [https://www.ftc.gov/system/files/ftc\\_gov/documents/English.docx](https://www.ftc.gov/system/files/ftc_gov/documents/English.docx)