

What To Do About Noncompete Agreements

The Federal Trade Commission (FTC) published a final rule earlier this year that banned noncompete agreements. The final rule was effective on September 4, 2024.

Requirements of the rule included:

- A ban on new noncompete agreements with all workers, including senior executives
- Existing noncompete agreements could remain in force for senior executives if: (1) they make more than \$151,164 per year; including salary, commissions, performance bonuses; but not including benefits, board, and lodging and (2) senior executives have authority to make policy decisions for the entire company
- Existing noncompete agreements with workers other than senior executives are unenforceable after the rule is effective.

There are a number of exceptions to the rule.

In the meanwhile, litigation!

On July 23, 2024, a federal court in Pennsylvania refused to issue a preliminary injunction to prevent implementation of the final FTC rule. The U.S. District Court for the Eastern District of Pennsylvania said that the statutory authority of the FTC to prevent unfair methods of competition under Section 5 of the FTC Act is not limited to procedural rules for adjudications and extends to substantive rulemaking [See *ATS Tree Servs. v. Fed. Trade Comm'n*, No. 24-1743 (E.D. Pa. July 23, 2024)].

...But

In early July, a federal court in Texas granted a preliminary injunction that delayed the effective date of the final rule. The Court declined to issue a nationwide injunction [See *Ryan LLC v. Federal Trade Comm'n*, No. 3:24-CV-00986-E (N.D. Tex. July 3, 2024)].

Then, on August 20, 2024, the Judge issued an order in the Ryan case that included a nationwide prohibition on implementation of the FTC rule. The basis of this decision is that the FTC does not have authority to order a ban, and that the rule was arbitrary and capricious. Based on this ruling, employers may continue to enter into and enforce non-compete agreements with workers.

Another but...

A number of state legislatures have enacted restrictions on use of noncompete agreements. As of August 21, 2024, four states ban the use of noncompete agreements and thirty-three states plus the District of Columbia restrict the use of these agreements.

Providers must comply with applicable requirements in the states in which they conduct business. Providers who fail to do so risk enforcement action.

Comfort Keepers, for example, agreed to pay \$500,000 to resolve claims that it unfairly restricted workers' mobility according to the California Department of Justice. Comfort Keepers' Client Care Agreement that clients were required to sign before receiving care prevented clients from using, hiring, or soliciting current and former Comfort Keepers' caregivers for up to one year after the termination of services. Violations required payment of \$12,500.

So!

The current bottom line is that the FTC rule banning noncompete agreements is not in effect, but providers must comply with applicable state requirements or risk enforcement action.

Stay tuned for more!

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