



LEHR MIDDLEBROOKS  
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

August 1, 2024

### **FTC Non-Compete Ban Update and Recommendations**

As we discussed in April, the FTC announced a new rule which would ban non-competition agreements in most situations for all employers. The new rule would make it illegal to enter or attempt to enforce an agreement which would prevent a former employee (or independent contractor) from working for a different employer or starting their own business. The rule is slated to take effect on September 4, 2024.

The rule contains a grandfather clause that exempts pre-existing agreements with “senior executives.” “Senior executives” are those in policy-making positions who make at least \$151,164 per year. The cut-off date to fall under the grandfather clause is September 4, 2024. The rule also includes very narrow exceptions for non-competes entered in association with the sale of a business and those which are currently in enforcement proceedings (litigation).

The rule requires that you take proactive measures to provide written notice to employees who have signed a non-competes to inform them that the restriction will not be and cannot legally be enforced. This applies to both current employees and former employees who are still in their restricted period. The FTC provided a model notice which will satisfy the requirement, but, in our opinion, the model notice goes much further than the rule requires.

Notably, the rule does not prevent you from requiring non-solicitation agreements (which prohibit the solicitation of your customers) or confidentiality agreements (which protect competitively sensitive information). However, the FTC previously indicated that such agreements could be considered non-competes if they are so broad as to prevent the employee from obtaining employment in the same industry.

As expected, the rule has been subject to multiple legal challenges. On July 23, 2024, a federal judge in Philadelphia refused to stop the rule from taking effect. Another challenge is pending in Texas, where most observers predict the judge will strike the rule down. The Texas judge is expected to rule by August 30, 2024 – just five days before the rule is scheduled to take effect.

Because of the legal uncertainty and the looming deadline, we recommend that you prepare for compliance, but hold off on implementation to see if the Texas court will put on the brakes. Specifically, you should evaluate whether you have any “senior executives” who would qualify for the grandfather exception and evaluate whether their restrictive covenants need to be updated. Most importantly, you should identify all current or former employees who are subject to non-competes and prepare appropriate notices that the agreements are not enforceable and will not be enforced.

It is noteworthy that the risk of non-compliance is limited. The rule does not create a private cause of action so employees could not sue you for violating it. The FTC (which has limited enforcement resources) could seek a cease and desist order but could not seek penalties unless you violate a cease and desist order.

Click here for a [Sample Notice to Employees](#).

If you have any questions or would like additional information, please contact Al Vreeland at 205-323-9266 or [avreeland@lehrmiddlebrooks.com](mailto:avreeland@lehrmiddlebrooks.com).