

# Federal Trade Commission Bans Non-Competition Clauses

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On April 23, 2024, the Federal Trade Commission (“FTC”) announced a [final rule](#) adopting a comprehensive ban on non-competition clauses (the “Non-Compete Ban”). In doing so, the FTC determined that non-competition clauses violate Section 5 of the Federal Trade Commission Act prohibiting unfair or deceptive acts or practices by all persons engaged in commerce. We must caution you, however, that two separate lawsuits have already been filed in federal court challenging the legality of the Non-Compete Ban. Businesses should pay close attention to the status and outcome of these legal challenges over the coming months because such cases may significantly impact how businesses choose to craft and use non-compete clauses going forward.

Notwithstanding the ongoing legal challenges, we have prepared this client alert to provide businesses with an overview of the Non-Compete Ban and address several important questions.

## How does the Non-Compete Ban define a non-compete clause?

The Non-Compete Ban 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:

- (i) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; and
- (ii) operating a business in the United States after the conclusion of the employment that includes the term or condition.[1]

## What does the Non-Compete Ban do?

Once the Non-Compete Ban takes effect (as discussed below), businesses



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subject to the FTC's jurisdiction cannot enter into non-compete clauses with any covered workers.[2]

### **How does the Non-Compete Ban impact existing non-compete clauses?**

Once effective, the Non-Compete Ban will invalidate nearly all non-compete clauses in effect at that time.

However, the Non-Compete Ban will not invalidate existing non-compete clauses previously agreed to by senior executives. Once the Non-Compete Ban takes effect, however, businesses may not enter into non-compete clauses with senior executives.

### **Who is considered a senior executive under the Non-Compete ban?**

To be considered a senior executive, a worker must (i) be in a policy-making position and (ii) have received total annual compensation of at least \$151,164 in the preceding year. If a worker did not work a full year during the preceding year, the worker must have earned total compensation equal to at least \$151,164 when annualized.

### **How do I know if a worker was in a “policy-making position”?**

The Non-Compete Ban defines a “policy-making position” as “a business entity’s president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority.”[3]

Significantly, the FTC estimates that less than 1% of workers will be considered senior executives. Therefore, we recommend that businesses who are considering designating a worker as a senior executive consult with legal counsel before doing so.

### **Are businesses required to notify current and former workers with non-compete clauses about the Non-Compete Ban?**

Yes. However, a business is not required to provide notice to a senior executive with a non-compete clause.

### **If a business is required to notify a current or former worker about the Non-Compete Ban, what do they have to tell the impacted worker?**

Businesses must “provide clear and conspicuous notice to the worker by

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the effective date that the worker's non-compete clause will not be, and cannot legally be, enforced against the worker."

The form of the notice to the worker must:

(i) identify the person who entered into the non-compete clause with the worker (typically, the business for whom the employee works or worked); and

(ii) be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker.

If a worker entitled to notice has no record of a street address, email address or mobile telephone number, notice is not required.

The FTC has published a model notice which can be found [here](#). To ensure compliance with the notice obligation, we recommend businesses consider using the model notice.

### **When will the Non-Compete Ban take effect?**

The Non-Compete Ban will become effective 120 days after it is published in the Federal Register, which has not yet happened. The FTC estimates, however, that the Non-Compete Ban will take effect in early September 2024. However, as explained below, there is a chance that the effective date of the Non-Compete Ban may be delayed or enjoined in the event of a successful legal challenge.

### **Will there be any legal challenges to the Non-Compete Ban?**

Yes. The U.S. Chamber of Commerce has already filed a lawsuit in federal court in Texas against the FTC alleging that the FTC lacks the authority to adopt the Non-Compete Ban. A tax services firm filed a second lawsuit, also in federal court in Texas.

These lawsuits seek to accomplish two primary purposes: (i) to block the Non-Compete Ban from going into effect while the cases make their way through the courts; and (ii) to strike down the Non-Compete Ban entirely. As noted above, businesses should pay close attention to the status of these challenges over the coming months.

Considering these legal challenges, businesses may decide to temporarily

delay providing the required notice in light of the possibility that the effective date of the Non-Compete Ban may be delayed or enjoined.

**Are there any exceptions to the Non-Compete Ban?**

Yes. The Non-Compete Ban only applies to non-compete clauses entered into between businesses and workers. As such, the Non-Compete Ban does not apply to a non-compete clause entered into by a person pursuant to a *bona fide* sale of (a) a business entity, (b) the person's ownership interest in a business entity, or (c) all or substantially all of a business entity's operating assets.

**Does the Non-Compete Ban apply to non-solicitation and/or non-disclosure of confidential information clauses?**

No. The Non-Compete Ban does not prohibit businesses from using non-solicitation of customers and/or employees clauses, or non-disclosure clauses. However, businesses that continue to use these clauses should ensure that they are appropriately drafted and do not function to prevent a worker from seeking or accepting other work or starting a business after their employment ends. The FTC has advised that whether a non-solicitation clause violates the Non-Compete Ban is fact-specific inquiry. Businesses that intend to continue using non-solicitation and/or non-disclosure clauses should consider consulting with legal counsel to ensure they do not run afoul of the Non-Compete Ban.

**What steps, if any, should businesses consider taking in light of the Non-Compete Ban?****We recommend that businesses consider taking the following steps:**

- Continue to actively monitor developments concerning the legal challenges to the Non-Compete Ban. We will keep you apprised of any noteworthy developments and their impact on the Non-Compete Ban.
- Review existing non-compete clauses for current and former employees where the non-compete clause is still in effect. For those non-compete clauses identified, businesses should ensure that they have up-to-date contact information of the current or former employees so that they will be prepared to provide the required notice in the event the Non-Compete Ban survives the aforementioned legal challenges.
- Determine whether any current or former workers with a non-

compete clause would be considered senior executives under the Non-Compete Ban. If a business has an employee who is a senior executive but does not have a non-compete in place with the senior executive, consider whether the business wants to enter into a non-compete clause with the senior executive *prior* to the effective date of the Non-Compete Ban.

- Review existing non-solicitation and non-disclosure clauses to ensure they do not run afoul of the Non-Compete Ban. In addition, on a going-forward basis, businesses should ensure that any non-solicitation and/or non-disclosure clauses adequately protect customer goodwill, confidential information and trade secrets. When preparing such clauses, businesses must be mindful of individual state-specific restrictions and/or requirements.

**The Labor, Employment, and Employee Benefits Group here at Mirick O’Connell will continue to closely monitor the developments concerning the Non-Compete Ban, including the legal challenges that have been filed to date, as well as any new legal challenges that may be filed. Please contact any member of our team if you have any questions concerning the Non-Compete Ban, or would like assistance with any of the above recommended steps.**

[1] The Non-Compete Rule defines worker as a “natural person who works or who previously worked, whether paid or unpaid, without regard to the worker’s title or the worker’s status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person.”

[2] Virtually all businesses are subject to the FTC’s jurisdiction. Businesses outside of the FTC’s jurisdiction and, therefore, who are not subject to the Non-Compete Ban, include banks, savings and loan institutions, federal credit unions, common carriers, air carriers, and certain non-profits.

[3] The Non-Compete Ban defines “policy-making authority” as “final authority to make policy decisions that control significant aspects of a business entity or common enterprise.” Policy-making authority “does not include authority that is limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise.”

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