FTC Announces Ground Breaking Limitations on Non-Competes

On April 23, 2024, the Federal Trade Commission ("FTC"), by a 3-2 vote, approved and issued a Final Rule prohibiting nearly all non-compete agreements between employers and workers as unfair methods of competition ("Final Rule"). The Final Rule will broadly impact existing and new employment agreements and policies. This alert explains the scope of the rule and provides guidance on permissible alternatives for employers. Absent judicial intervention, the Final Rule will become effective 120 days after its publication in the Federal Register.

Summary of the Final Rule

- Prohibits non-compete clauses between employers and workers going forward;
- Nullifies existing non-compete clauses for non-senior executives;
- Requires employers to provide notice to workers who have non-competes stating that they are no longer enforceable;
- Allows for certain non-compete provisions associated with the sale of a business; and
- Impacts post-employment restrictive covenants but does not generally extend to restraints on concurrent employment.

Final Rule's Prohibitions

The Final Rule adopts a comprehensive prohibition on new non-competes with all workers. The FTC defines non-competes as "a term or condition of employment that prohibits a worker from… (1) 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; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition."

The FTC does not just prohibit non-competes for employees but casts a wide net to prohibit them for workers broadly. "Worker" is defined as including employees, independent contractors, externs, interns, volunteers, apprentices or sole proprietors who provide a service to a client or customer. However, for existing non-competes, the Final Rule distinguishes between senior executives and other workers.

Existing non-competes for non-senior executives will no longer be enforceable. Employers must provide notice to non-senior executives to inform them that any existing non-competes are no longer enforceable. Existing non-competes for senior executives, however, may remain in force.

"Senior executive" is defined as an individual who earns more than $151,164 annually and holds a "policy-making position." A policy-making position includes 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." Further elaborating, the Final Rule states that "a natural person who does not have policy-making authority over a common enterprise may not be deemed to have a policy-making position even if the person has policy-making authority over a subsidiary or affiliate of a business entity that is part of the common enterprise."

While the Final Rule broadly prohibits non-compete provisions, it permits other restrictive covenants such as restrictions on concurrent employment and non-solicitation provisions. Furthermore, it allows employers to utilize confidentiality and other intellectual property protections. The Final Rule also permits employers to implement garden leave policies or fixed-term employment agreements in place of traditional post-employment restrictive covenants.

Judicial Challenges

Since the FTC announced the Final Rule, organizations including the Chamber of Commerce have filed suit challenging its enforceability and Constitutionality. It is possible that a court could issue a stay that would temporarily delay the effective date of the Final Rule. However, employers should be aware that they may be subject to other limitations on non-competes at the state level. For example, California has implemented considerable limitations on the use of non-competes and other states like New York have attempted to enact similar limitations on the use of non-competes. Furthermore, the National Labor Relations Board ("NLRB") General Counsel has taken the position that non-competes constitute unfair labor practices. The FTC Final Rule may bolster the NLRB's position.

Action Items for Employers

In the event that the Final Rule goes into effect, Employers should reevaluate their existing agreements, internal policies, and procedures, including but not limited to:

- Employment agreements, including severance and release agreements;
- Employee handbooks;
- Proprietary information and confidentiality agreements;
- Non-solicitation of clients and employees provisions;
- Independent contractor agreements; and
- Severance policies including but not limited to the use of garden leave.

Enforcement

The FTC could potentially commence an administrative proceeding or seek an injunction in the event that an employer is utilizing an impermissible non-compete. At this juncture, it does not appear that the FTC can seek monetary penalties in connection with enforcing the Final Rule.

Bochner PLLC's employment and corporate attorneys are available to assist with any questions you might have regarding the Final Rule. Should you have any questions, please contact Jeffrey Douglas at jdouglas@bochner.law; Brent Britton at bbritton@bochner.law or Chloë D. Brownstein at cbrownstein@bochner.law.