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連邦裁判所、競業避止契約を禁止する連邦取引委員会（FTC）の最終規則を差し止め

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Practices: 雇用／労働法／福利厚生

UPDATE: On July 3, 2024, the U.S. District Court for the Northern District of Texas (the "Court") in Ryan LLC v. Federal Trade Commission issued an order prohibiting or enjoining the Federal Trade Commission ("FTC") from enforcing its Final Rule banning non-competes (the "Rule") against the plaintiffs in the Ryan litigation only. The injunction prohibits the FTC from implementing or enforcing the Rule against the plaintiffs until the Court enters a decision on the merits, which the Court stated it will do on or before August 30, 2024 – five days before the Rule's effective date of September 4, 2024. Notably, the Court found that the FTC lacked the substantive rulemaking authority under Section 6(g) of the FTC Act to pass the Rule, citing to Loper Bright Enterprises v. Raimondo, which overruled the doctrine of judicial deference to administrative interpretation of federal laws established four decades ago in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (i.e., Chevron deference). While the Court's preliminary injunction applies only to the Ryan plaintiffs, it would not be surprising if the Court issued a merits-based decision that found the Rule to be unlawful and unenforceable generally and entered a broad permanent injunction in favor of all companies who utilize non-competes. Either way, the FTC is anticipated to appeal any merits-based decision by a court that finds the Rule unlawful. As such, continued litigation over the Rule appears inevitable. For this reason, it is recommended that employers take a wait-and-see approach as to whether non-compete covenants become unenforceable under the Rule, or remain subject to regulation under each individual state's law as has historically been the case. Stay tuned for future updates on this important topic.

On April 23, 2024, the Federal Trade Commission (FTC) voted 3-2 to adopt a broad final rule banning the use of non-compete agreements nationwide. This controversial ban comes approximately one year and six months after the FTC issued its first proposed rule and request for public comment, which resulted in the FTC receiving over 26,000 comments. The final rule is scheduled to go into effect 120 days after it is published in the Federal Register, although the effective date may be delayed or enjoined by litigation challenging the final rule.

Key Takeaways

- The final rule broadly applies to “workers,” which the FTC defines 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.” In other words, as written, the final rule is meant to broadly invalidate not only the non-competes entered into after its effective date but also those entered into prior to its effective date (subject to a couple of exemptions noted below).
- The final 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 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.” Although the FTC declined to create a categorical prohibition on non-disclosure, non-solicitation, and similar restrictive covenants, it explained that certain language within the rule is meant to cover any term or condition of employment that would have the same functional effect as prohibiting or penalizing a worker from seeking or accepting other work or starting a business after their employment ends.
- Notably, the final rule provides that existing non-competes with “senior executives” are exempted from being invalidated and can remain in force, but only until these agreements expire. The term “senior executive” refers to workers earning more than $151,164 annually who are in a “policy-making position,” such as a president, chief executive officer or equivalent, or any other person with the authority to make policy decisions controlling “significant aspects of a business entity or common enterprise.”
- The final rule’s general prohibition on non-competes also creates an exemption for non-competes entered into pursuant to the bona fide sale of a business.
- The final rule mandates that employers send a notice by the effective date to each worker with an existing non-compete clause voided by the rule, explaining that the “worker’s non-compete will not be, and cannot legally be, enforced against the worker.” This notice must be individualized for each worker with a non-compete agreement, specify their name, and be delivered to the individual by hand, mail, email, or even text message.
- The FTC’s final rule supersedes any state laws permitting enforcement of non-compete agreements. It does not, however, limit states from imposing restrictions with respect to non-compete clauses if the state law does not conflict with the final rule and imposes greater protections than those provided by the final rule.

Considerations and Next Steps for Employers

The FTC’s vote to adopt the final rule has no immediate impact, as it is presently set to become effective 120 days after its publication in the Federal Register. Further, employment law practitioners anticipate significant delays in implementation of the final rule given industry groups have announced an intent to challenge the validity of the rule in court. In fact, the U.S. Chamber of Commerce has already filed suit against the FTC in the United States District Court for the Eastern District of Texas. Given this pending litigation (and more expected)

challenging the final rule, we believe that the effective date may be delayed or enjoined, with the final rule potentially not even taking effect.

In the interim, employers should consider reviewing their existing non-compete agreements with workers and prepare to provide the above-described notice if/when it becomes necessary to do so.

If you have any questions about the contents of this publication or the potential ramifications of the new rule on non-competes utilized by your company, please contact Naureen Amjad, Kevin Borozan or any other member of Masuda Funai's Employment, Labor and Benefits Group.

Masuda Funai is a full-service law firm with offices in Chicago, Detroit, Los Angeles, and Schaumburg.