LEGAL MINUTE

FTC Non-Compete Ban: What You Need to Know

It happened! The Federal Trade Commission (FTC) issued a new rule on April 23, 2024, which bans post-employment non-compete clauses between employers and their workers. The Final Rule becomes effective September 4, 2024.

The rule applies to anyone who works for a for-profit employer, whether paid or unpaid, and to independent contractors, externs, interns, volunteers, apprentices and certain sole proprietors. Specifically, the new rule prohibits employers from entering into new non-competes with any employee, including senior executives, or representing to any employee that the employee is subject to a non-compete.

Employers may continue to enforce existing non-competes with "senior executives". However, "senior executives" are only those employees who receive total annual compensation of at least $151,164 for employment in a policy-making position. This will not cover employees who only *influence* policy makers.

Exceptions

The new rule does not prohibit any of the following:

1. Non-compete clauses related to a bona fide sale of a business.
2. Pending litigation where a cause of action related to a non-compete clause accrued prior to the effective date of the new rule.
3. The enforcement, attempted enforcement or representations about a non-compete clause if the employer has a good-faith basis to believe the new rule is inapplicable.

Notice Requirement

Before the Effective Date, employers must notify all other current and former workers that any existing non-competes are no longer enforceable.

The rule is already being challenged, and while there are no guarantees, based on recent Supreme Court decisions regarding the major questions and non-delegation doctrines, there is a significant chance of the rule being put on hold before it goes into effect. It could be quite some time before this question is resolved in the courts.

How this new rule affects other restrictive covenants, such as non-solicitation and confidentiality clauses, is nuanced and fact-specific. Employers should consult with experienced employment counsel to consider how they can proactively address their existing non-compete agreements, and related employment agreements, to mitigate the impact if the Final Rule takes effect several months from now.

THIS INFORMATION IS NOT PROVIDED WITH THE INTENT TO ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP OR TO PROVIDE SPECIFIC LEGAL ADVICE TO YOU. DUE TO THE RAPIDLY CHANGING NATURE OF THE LAW, INFORMATION CONTAINED IN THESE MATERIALS MAY BE OUTDATED. TO OBTAIN ACCURATE AND RELIABLE LEGAL ADVICE REGARDING YOUR SITUATION, CONTACT AN ATTORNEY.



ATTORNEY NICOLE MARKLEIN

CROSS JENKS MERCER & MAFFEI LLP
221 THIRD AVENUE P.O. BOX 556
BARABOO, WI 53913
TEL: 608-356-3981
EMAIL: NMARKLEIN@CJMMLAW.COM

Cross Jenks Mercer & Maffei LLP
ATTORNEYS SINCE 1889