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FTC NEW RULE AGAINST NON-COMPETES

America, land of the free, where industry and competition go hand in hand?

Effective August 23, 2024 the FTC Final Rule banning non-competes takes effect (“The FTC Non-Compete Rule”). The FTC Non-Compete Rule prohibits existing non-compete clauses for employees other than senior executives, and outright prohibits future non-compete clauses.

From a historical perspective, In 1911 the US Supreme Court antitrust case of *United States v. American Tobacco Co.* concerned tobacco companies violating section 1 and section 2 of the Sherman Act due to “constantly recurring” use of non-competes and other practices. 221 U.S. 106, 181-83 (1911). The FTC was created in 1914 with jurisdiction over persons, partnerships, and corporations, except for banks, savings and loan institutions, common carriers related to commerce, and nonprofits. Over 100 years later, the FTC commenced an investigation in 2021, leading to this passage of the current rule.

The FTC broadly 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.” Section 910.1. Furthermore, “term or condition of employment” includes both written and



oral contractual and workplace terms. The FTC Non-Compete Rule also prohibits post-employment non-competes with independent contractors after the effective date.

An exception to The FTC Non-Compete Rule is non-competes entered into before the effective date with an employee who is a “Senior Executive”. Senior Executives are defined as officers earning more than \$151,164 with “policy-making authority.” This raises an interesting issue with the term “officer”. Corporations typically have a limited number of corporate executive officers. However, in larger organizations there are many employees bearing the title senior vice president. Though an “officer” includes a corporate vice president, secretary, treasurer, or principal financial officer, principal accounting officer, or physician partners in a medical practice, a typical senior vice president is not involved with “policy making authority”. “Policy making authority” means policy decisions controlling significant aspects of a business entity or common enterprise. The FTC comments that one with policy making authority makes the final decision on an issue for an organization.

Another carve-out, is that the FTC Non-Compete Rule does not apply to a non-compete entered by a person pursuant to a bona fide sale of a business entity. Section 910.3(a). The FTC does not prohibit states from passing stricter laws, including California’s January 1, 2024 passage of SB 699 (Business and Professions Code section 16600.5) and AB 1076 (Business and Professions Code section 16600.1), bolstering existing prohibitions against unfair competition found in California employment agreements and related to Business and Professions Code 16600.



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Confidentiality, non-solicitation, and non-disclosure agreements do not violate The FTC Non-Compete Rule as long as they do not functionally prohibit a worker from being employed in the same field. Employers are likely to maintain a prohibitive stance on restricting post-employment conduct arising from trade secrets and solicitation issues.



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