SAXTON & STUMP
LAWYERS AND CONSULTANTS

NEWS & INSIGHTS

FTC’s ban on noncompete clauses looms

BY: RICHARD L. HACKMAN | INSIGHTS | ARTICLE

AUGUST 8, 2024

When the Federal Trade Commission in April passed its rule prohibiting noncompete clauses in employment contracts, it seemed unlikely that the rule would make it to its Sept. 4 effective date.

The rule faced high levels of opposition from many in the business community, with promised legal challenges throughout the country.

Now, approximately one month from Sept. 4 compliance deadline, the rule has survived legal challenges and remains on track to go into effect. In light of this limited timeframe, employers need to take steps now to prepare for compliance and potential ramifications.

How did we get here?

In April, the FTC passed the ban on noncompete clauses in employment agreements, contending those clauses restrict people's right to work. Employers use noncompete clauses to limit former employees to protect their business interests and goodwill, and to prevent other organizations from "poaching" employees.

The FTC estimates that about 30 million American workers – approximately one in five – are under noncompete clauses restricting where they can work after leaving their current company.

Not only would the rule allow the majority of workers to leave a company unencumbered by restrictions, but the FTC also estimates the rule could result in some 8,500 new business formations annually through entrepreneurship otherwise stifled by noncomplete clauses.

However, businesses, especially small and medium-sized employers, worry that larger companies – with significantly more financial resources — will now have the ability to simply and easily hire those employees, in whom a smaller employer has invested significant time and resources (and made valuable introductions to customers and referral sources).

The ban would affect both current and future noncompete clauses.

While there exists a "senior executive" exemption that would allow current noncompete clauses to remain in effect for those making more than $151,164 annually and who are employed in a policy-making position, if the ban goes into effect, this exemption will no longer be allowed in future contracts.

Where does the rule stand?

While a federal court in Texas ruled against the FTC in July – and specifically ruled against its power to regulate competition – another federal court last week in Philadelphia sided with the FTC. Notably, both rulings were specific to the facts, circumstances, and plaintiffs in those cases, and do not involve nationwide implications.

While the courts continue to differ, and the effective date gets closer, businesses should be ready to inform employees that they will no longer enforce noncompete clauses.

However, companies should wait until the Sept. 4 effective date. Once a business informs its employees it is no longer enforcing its noncompete bans, it likely cannot put them back into effect, even if the rule is later overturned.

What should companies do now?

The FTC's rule does not categorically prohibit customer non-solicitation, anti-poaching, confidentiality, or non-disclosure provisions within employment agreements. However, these provisions likely will be evaluated on a case-by-case basis to determine whether they prevent workers from obtaining a new job. Consult experienced legal counsel as to the enforceability of these alternative provisions.

If you haven't already, your company should plan as though the rule will go into effect. Companies should conduct an internal review to identify all employees currently subject to noncompete clauses and the implications to their business should those agreements become voided by the FTC's ban, and for purposes of providing notice.

If you have any questions on how to proceed in the next month, please contact Ben Pratt, Rick Hackman, or any member of the Saxton & Stump Labor and Employment Group.

Related People

Richard L. Hackman

Related Services and Industries

Labor and Employment