LITIGATION AND LABOR AND EMPLOYMENT
INFORMATION MEMO
APRIL 24, 2024

Non-Compete Clauses May Be A Thing Of The Past: Analyzing the FTC's Final Rule Banning Non-Compete Clauses

In a 3-2 vote on April 23, 2024, the Federal Trade Commission ("FTC") issued its final rule on non-compete clauses, declaring all non-compete clauses to be unfair methods of competition, resulting in a national ban on non-compete clauses.[1] The FTC's final rule will have a wide-reaching impact and is analyzed more fully below.

The FTC's Final Rule

The FTC's final rule adds a new subchapter J, consisting of part 910, to Title 16, Chapter 1 of the Code of Federal Regulations. Section 910.2(a) declares it is an unfair method of competition for a person (i) to enter into or attempt to enter into a non-compete clause; (ii) to enforce or attempt to enforce a non-compete clause; or (iii) to represent that a worker is subject to a non-compete clause. Non-compete clauses are defined broadly under the final rule, encompassing all clauses that prohibit a worker from, penalize a worker for, or functions to (i) prevent a worker from seeking or accepting work in the United States with a different person where such work would begin after the conclusion of their employment; or (ii) operating a business in the United States after the conclusion of their employment.

This prohibition applies generally to all employees – from entry-level positions all the way up to high level executives. There appears to be only three exceptions to this sweeping ban. First, nothing prevents a company from entering into an agreement that prevents an employee from competing with their employer during the term of their employment - only those clauses impacting an employee's ability to seek or accept work after the employment relationship terminates are prohibited. Second, this ban does not apply to a non-compete clause entered into by a person through a bona fide sale of a business, of that person's ownership interest in a business, or of all or substantially all of a business entity's operating assets. Finally, this ban does not apply to non-compete agreements with "Senior Executives" in existence prior to the effective date of the ban. "Senior Executives" are workers in a "Policy-Making Position," *i.e.*, president, CEO or other high-ranking employees with final authority to make policy decisions controlling significant aspects of the business, who make at least $151,164.00 annually.

Otherwise, all non-compete clauses, including non-compete clauses already in existence, are prohibited under the FTC's final rule. To this end, employers are required to clearly and conspicuously notify every employee who is subject to a non-compete clause that the non-compete clause will not be, and cannot legally be, enforced against the employee. The final rule contains

1 The FTC's press release on its final rule banning non-compete clauses can be found here: https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes

model language for this notice, which, when used, automatically satisfies the notice requirement. Such notice must be delivered in person, by mail (at the employee's last known personal address), by email (to the employee's current work email or last known personal email address), or by text message (to the employee's mobile telephone number) within 120 days after the final rule is published to the Federal Register.

The Regulation's Potential Impact

Although the FTC's final rule contains a clearer definition of what constitutes a non-compete clause (as compared with its original proposed regulation), the final rule will still have a wide-ranging impact on all manner of businesses, big and small, across all industries. The final rule unequivocally precludes classic non-compete clauses entered into as a condition of employment. In addition, the FTC's definition of non-compete clauses, which includes clauses that function to prevent a worker from seeking or accepting competing work, creates the potential that broadly drafted non-disclosure, non-solicitation, anti-poaching and other types of restrictive covenants meant to protect trade secrets, confidential business information and/or the exploitation of customer relationships and goodwill could violate the FTC's final rule and be effectively nullified.

As a result, businesses will not only be prohibited from using non-competition clauses, but they must also carefully review (and, if necessary, revise) their employment and post-employment contracts to ensure that any non-disclosure, non-solicitation, anti-poaching or other agreements intended to protect the business are narrowly tailored to avoid potential nullification through the FTC's final rule.

With respect to ongoing and potential litigation, the FTC's final rule contains a provision that expressly states it does "not apply where a cause of action related to a non-compete clause accrued prior to the effective date" of the final rule. It therefore appears that the rule will not impact active litigation (or causes of action that accrued prior to the effective date but have not yet been sued), though the provision does conflict with other requirements of the rule. We will have to wait and see how courts apply this provision once it goes into effect.

The Future Of The FTC's Proposed Regulation

The FTC's final rule will almost certainly face substantial litigation on various grounds, including, without limitation, that it exceeds executive authority and infringes on the States' ability to regulate a field that has almost entirely been left to the States since the Nation's inception. Bond will, of course, provide updates if and when the FTC's rule is challenged on these and other legal grounds, and further insight and guidance on the final rule as it becomes available.

Conclusion

Non-compete clauses as we know them are now a thing of the past under the FTC's final rule. This rule, however, will likely face many challenges in the weeks and months to come and may be tied up with legal challenges for the foreseeable future.

That is not to say employers should wait and see how things shake out before complying with the final rule. Rather, employers should review their employment and post-employment agreements to identify whether they contain any non-compete clauses so that they are in the best position possible

to comply with the requirements of the rule by its effective date. Employers should further consider having their non-disclosure, non-solicitation, anti-poaching and other types of agreements reviewed and, if necessary, revised, to better ensure they are no broader than necessary to protect against the use and disclosure of confidential and trade secret information or the exploitation of customer relationship and goodwill, so as to not run afoul of the rule's broad definition of a non-compete.

For any questions about this issue, please feel free to contact Bradley A. Hoppe, Kevin Cope or any attorney in Bond's litigation or labor and employment practices or the attorney at the firm with whom you are regularly in contact.

BOND SCHOENECK & KING ATTORNEYS