**FTC Final Rule Regarding a Ban on Non-Compete Agreements**

May 7, 2024

1. **Background**

The Federal Trade Commission (FTC) published the [final version of its Non-Compete Clause Rule](https://www.govinfo.gov/content/pkg/FR-2024-05-07/pdf/2024-09171.pdf), which is already [facing a legal challenge filed by the U.S. Chamber of Commerce](https://www.uschamber.com/assets/documents/Complaint-Chamber-v.-FTC-E.D.-Tex.pdf) in the U.S. District Court for the Eastern District of Texas. If it is not enjoined by a federal court, the final rule will take effect beginning on September 4, 2024.

Generally, the final rule will ban covered persons from entering into or seeking new non-competes with “workers,” broadly defined to include current and former employees, independent contractors, apprentices, volunteers, etc. The rule also requires the recission of existing non-competes and includes a requirement that employers provide a prescribed notice to current and former workers covered by “existing” non-compete contracts, provided that existing agreements with “senior executives” may remain in force, but new ones may not be imposed. The final rule clarifies that the definition of non-compete clause is not limited to clauses in written, legally enforceable contracts and applies to all forms a non-compete might take, including workplace policies or handbooks and informal contracts. It also provides that other forms of common restrictive covenants applied to workers, like non-solicitation and non-disclosure agreements could be so onerous that they may be deemed functional equivalents of non-compete agreements and unenforceable under this rule.

The FTC [announced that it will host an online webinar](https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-host-compliance-webinar-rule-banning-noncompetes) to discuss the final rule on May 14, 2024, at 11a.m. ET. People may submit questions to the FTC in advance of this webinar by emailing asknoncompete@ftc.gov. Registration is not required for this webinar, and the link to the webinar will be [available shortly before it begins on the FTC Website](https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-host-compliance-webinar-rule-banning-noncompetes).

1. **Limits on Application of the Final Rule**
2. *The FTC Cannot Apply the Rule to Bona Fide Nonprofits*

The FTC may only enforce the Federal Trade Commission Act (Act) against “persons, partnerships, or corporations.” The Act defines the term “corporation” as an entity “organized to carry on business for its own profit or that of its members.” Therefore, nonprofit corporations, like 501(c)(3) training funds and other bona fide nonprofits may be beyond the enforcement ambit of the FTC and thus not subject to the final rule. In the final rule, however, the FTC warns that “[m]erely claiming tax-exempt status in tax filings is not dispositive.” Courts and administrative law judges have scrutinized actual private benefits being derived by an organization’s members to assess the FTC’s jurisdiction over tax-exempt organizations. The FTC explains in the final rule that, consistent with these precedents, when evaluating its jurisdiction over a tax-exempt corporation it will apply:

*a two-part test to determine whether a corporation is organized for profit and thus within the Commission’s jurisdiction. As the Commission has explained, “[t]he not-for profit jurisdictional exemption under Section 4 requires both that there be an adequate nexus between an organization’s activities and its alleged public purposes and that its net proceeds be properly devoted to recognized public purpose, rather than private, interests.” Alternatively stated, the Commission looks to both “the source of the income, i.e., to whether the corporation is organized for and actually engaged in business for only charitable purposes, and to the destination of the income, i.e., to whether either the corporation or its members derive a profit.” This test reflects the Eighth Circuit’s analysis in Community Blood Bank of Kansas City Area, Inc. v. FTC and “the analogous body of federal law which governs treatment of not-for-profit organizations under the Internal Revenue Code.”* *Under this test, a corporation’s “tax-exempt status is certainly one factor to be considered,” but that status “does not obviate the relevance of further inquiry into a [corporation’s] operations and goals.” . . . At the same time, if the Internal Revenue Service (“IRS”) concludes that an entity does not qualify for tax-exempt status, such a finding would be meaningful to the Commission’s analysis of whether the same entity is a . . . corporation organized for its own profit or that of its members under the FTC Act, bringing it within the Commission’s jurisdiction.*

Thus, many nonprofits will not be subject to FTC jurisdiction or this final rule. However, absent further guidance, the FTC may insist that a case-by-case analysis is required to make a fact-specific determination of the FTC’s enforcement jurisdiction before taking a definitive position on a particular nonprofit organization’s exposure to the final rule.

1. *Other Limits on FTC Jurisdiction Curtailing Enforcement of this Final Rule*

The FTC Act at 15 U.S.C. §45(a)(2) exempts from the jurisdiction of the FTC the following additional types of entities:

[B]anks, savings and loan institutions described in section 57a(f)(3) of [Title 15], Federal credit unions described in section 57a(f)(4) of [Title 15], common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

1. **Who is Covered by the Final Rule**

The final rule prohibits an employer under the FTC’s jurisdiction from seeking to enter into a new non-compete after the effective date of the final rule, or to enforce a non-compete entered into prior to the effective date of the final rule, except for existing non-competes for “senior executives” (as defined in the final rule) and non-competes related to the bona fide sale of a business. “Employer” is defined as a person “that hires or contracts with a worker to work for the person.” The term “person” is in turn defined to mean “any natural person, partnership, corporation, association, or other legal entity within the Commission’s jurisdiction, including any person acting under color or authority of State law.”

The final rule defines “workers” even more broadly than the proposed rule. It makes three revisions to the proposed rule’s definition of “worker” that expand the term. First, it clarifies that the term covers *all* current and former workers. Second, it removes “for an employer” from the definition of a “worker” to ensure that the final rule covers workers who are hired by one party but work for another, thereby closing the “unintended loophole” identified by commenters regarding third-party hiring. Finally, it adds “without regard to the worker’s title or the worker’s status under any other State or Federal laws” prior to the list of examples of different categories of workers that the definition covers. Cumulatively, these changes make clear that the term “worker” includes all workers, including current and former employees, independent contractors, and apprentices (among others) – regardless of their titles, status under other laws, or the details of the contractual relationship with their employer. The FTC took pains to ensure the final rule applies to independent contractors because it “agrees with commenters that contended that excluding independent contractors from the definition of ‘worker’ could increase employers’ incentive to misclassify workers as independent contractors.”

1. **Non-Competes That Can Be Enforced**
	1. *Senior Executives*

Existing non-competes for “senior executives” may remain in force under the FTC’s final rule, but employers are banned from entering into any new non-competes that involve “senior executives.” The final rule defines senior executives as workers earning more than $151,164 annually and who are in “policy-making” positions, which according to the FTC, only account for 0.75% of workers.

Under the final rule, “policy-making positions” are defined as “a business entity’s president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority.” Moreover, the definition of “policy-making position” clarifies that “an officer of a subsidiary or affiliate of a business entity that is part of a common enterprise who has policy-making authority for the common enterprise may be deemed to have a policy-making position for the business entity.” However, “a natural person who *does not* have policy-making authority over a common enterprise *may not* be deemed to have a policy-making position *even if* the person has policy-making authority over a subsidiary or affiliate of a business entity that is part of the common enterprise.”

The rule also defines certain terms used in the definition of “policy-making position” as follows: (1) “officer” is defined as a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any natural person routinely performing corresponding functions with respect to any business entity whether incorporated or unincorporated”; and (2) “policy-making authority” is defined as “final authority to make policy decisions that control significant aspects of a business entity or a common enterprise.” The FTC explains that policy-making authority *does not* include authority limited to advising or exerting influence over such policy decisions.

* 1. *Sale-of-Business*

Additionally, the final rule’s ban on non-compete agreements “does not apply to non-competes entered into by a person pursuant to a bona fide sale of a business entity”. In contrast to the proposed rule, the final rule does not impose an ownership threshold for this exception to apply.

1. **Notice Requirement**

To streamline compliance for employers, the FTC eliminated a provision in the proposed rule that would have required employers to formally rescind existing non-competes. Under the final rule, employers are only required to inform current and former workers that an existing non-compete applicable to them is no longer enforceable because of this final rule. To aid employers’ compliance with this requirement, the Commission has included model language (which can be [accessed here](https://www.ftc.gov/legal-library/browse/rules/noncompete-rule)) that employers can use to communicate to workers that their non-compete agreement has been voided. Note that, under the final rule, employers *are not* required to provide this notice in any language other than English, but they are permitted to do so. To this end, the FTC provides examples of the model language in English, Arabic, Korean, Chinese, Spanish, Tagalog, and Vietnamese.

The FTC’s example of model language for these notices in English reads:

“*A new rule enforced by the Federal Trade Commission makes it unlawful for us to enforce a non-compete clause. As of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE], [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE]:*

* *You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].*
* *You may run your own business—even if it competes with [EMPLOYER NAME].*
* *You may compete with [EMPLOYER NAME] following your employment with [EMPLOYER NAME].*

*The FTC’s new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit* [*ftc.gov/noncompetes*](https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking)*. Complete and accurate translations of the notice in certain languages other than English, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean, are available at* [*ftc.gov/noncompetes*](https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking).”

The FTC requires these notices to identify the employer who entered into the non-compete agreement with the worker. The notice must be delivered: (1) on paper by hand to the worker; (2) by mail at the worker’s last known personal street address; (3) by email at an email address belonging to the worker (including the worker’s current work email address or last known personal email address); or (4) by text message at a mobile telephone number belonging to the worker. The final rule provides an exception to the notice requirement under which the employer is not required to provide notice to an employee if the employer does not have a record of the employee’s street address, email address, or mobile telephone number.

1. **Training Repayment Agreements**

With regards to Training Repayment Agreements (TRAPs) entered into by an employer that is not exempt from the final rule’s coverage, the FTC says:

*“The Commission declines at this time to either categorically prohibit all TRAPs related to leaving employment, or to exempt such provisions altogether. The Commission agrees with comments raising substantial concerns about the potential effects of such agreements on competitive conditions. As noted in the summary of the comments, commenters cited TRAPs that impose penalties that are disproportionate to the value of training workers received and/or that claimed training expenses for on-the-job training. However, the evidentiary record before the Commission principally relates to non-competes, meaning on the present record the Commission cannot ascertain whether there are any legitimate uses of TRAPs that do not tend to negatively affect competitive conditions. When TRAPs function to prevent a worker from seeking or accepting other work or starting a business after the employment associated with the TRAP, they are non-competes under § 910.1.”*

1. **No Exemption for Construction or Industries that Rely on Apprentices**

Additionally, the FTC rejected MCAA’s comments from the Spring of 2023 requesting that the final rule exempt the construction industry from the ban on non-competes because of assertions that non-competes are necessary for investment in innovation and productivity in the construction industry. Moreover, the FTC declined to exempt industries, like plumbing, that rely on apprenticeships to train workers. It explains:

*“The Commission declines to exclude industries, such as real estate appraisal, plumbing, and veterinary medicine, in which an industry must purportedly invest in significant training or apprenticeship of workers before the employer considers them to be productive. The Commission finds that these employers have less restrictive alternatives—namely fixed duration contracts—to protect their investment in worker training. A return on investment in the training does not require that the worker be unable to work for a period after leaving employment. Moreover, employers stand to benefit from the final rule through having access to a broader labor supply—including incoming experienced workers—with fewer frictions in matching with the best worker for the job.”*

1. **Pending Litigation Involving Non-Competes**

The final rule provides that it “does not apply where a cause of action related to a non-compete accrued prior to the effective date” of the final rule. This includes, for example, where an employer alleges that a worker accepted employment in breach of a non-compete if the alleged breach occurred prior to the effective date of the final rule. The FTC notes that this “provision responds to concerns that the final rule would apply retroactively by extinguishing or impairing vested rights acquired under existing law prior to the effective date.”

1. **FTC Enforcement of the Final Rule**

Once the final rule takes effect, parties may report information about a suspected violation of the rule to the FTC Bureau of Competition by emailing noncompete@ftc.gov. Covered entities should be aware that workers and competitors have the right to submit complaints to the FTC regarding noncompliance with this final rule. The FTC has the authority to initiate investigations that are typically burdensome and costly. The FTC frequently issues civil investigative demands (CIDs) to compel targets of its investigations to produce documents, data and information related to the investigation. CIDs are enforceable in court, and  typically necessitate the target of an investigation to retain counsel to ensure compliance and minimize exposure during investigations.

The FTC may either pursue an “adjudication” (an administrative complaint that is filed against an organization and redressed by an administrative law judge) under section 5(b) or seek an injunction in federal court under section 13(b). In both instances, the FTC bears the burden of proof. Final FTC decisions stemming from adjudications may be appealed to a US Court of Appeals.

Note, however, that the FTC cannot obtain civil penalties or other monetary relief against parties for violating the final rule, although the Commission can obtain civil penalties in court if a party is ordered to cease and desist from a violation and fails to do so. Moreover, the Act does *not* provide a private right of action for violations, so enforcement is left to the FTC.