How Should Employers Respond to the Federal Trade Commission's Ban on Non-Competition Agreements?

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On April 23, 2024, the Federal Trade Commission (FTC) issued a final rule adopting a comprehensive ban on non-competition agreements and clauses, which prevent workers from leaving for a competitor for a certain period of time. Because the FTC deems noncompetes to be an unfair method of competition, the final rule provides:

1. New Agreements: Employers are prohibited from entering into new noncompete agreements with ALL workers, including senior executives, moving forward (except in the context of the sale of a business entity or as part of a franchise agreement).
2. Existing Agreements for Non-executives: Employers are prohibited from enforcing existing noncompete agreements on non-executive workers. Employers must notify non-executive workers bound by an existing noncompete agreement that it will no longer be enforceable**.**
3. Existing Agreements for Senior Executives: Existing noncompete agreements that affect senior executives can remain in effect. Senior executives are workers "in a policy-making position" earning at least $151,164 annually.

The FTC's final rule will not take effect until 120 days after it is published in the Federal Register, which will likely occur in a few days. However, legal challenges to the final rule are already underway, which may delay or block the rule from being enforced. In other words, there is a decent chance that the FTC's ban does not go into effect at all. Our best advice — sit tight for the next 30 days or so to see whether the legal challenges are successful and this storm blows over.

In the meantime, employers should consider alternatives in the event the FTC's ban on noncompete agreements becomes law. Employers can take steps to protect themselves through properly drafted non-solicitation and confidentiality provisions aimed at protecting proprietary information. The new rule does NOT ban non-disclosure or non-solicitation agreements per se. However, it cautions companies not to try to turn these into de facto non-competes by making them so arduous that they effectively prevent a worker from seeking or accepting work or operating a competing business. Example – restricting a worker from being able to solicit or accept work from a certain limited number of customers could be acceptable. But having some type of blanket non-solicitation covenant which says a worker cannot accept work from any customer for X period of time could be deemed to be unduly restrictive under the new rule. And also, be thinking about compiling a list of non-executive employees notice would have to be given to if the rule actually goes into effect.

We Can Help

As always, if you have questions about this new FTC rule or your current or planned non-competition, non-disclosure, and/or non-solicitation agreements, please contact Chuck Lee, Stacie Caraway, Erin Steelman, or any other member of our Labor & Employment Law Practice Group.