

APRIL 24, 2024

FTC RULE NON-COMPETES

The FTC passed its long-awaited final rule regarding non-competes (the “Rule”) yesterday, April 23rd. The Rule goes into effect 120 days after it is published in the Federal Register. The Rule has not been published as of the time of writing, but we expect the Rule to be published this week as the Federal Register is regularly updated.

The Rule defines non-competes broadly as any contractual term or condition of employment that prevents a worker from (1) seeking or accepting work in the United States with a different person/company after the end of the worker’s engagement with an employer or (2) operating a business in the United States after the end of the worker’s engagement with an employer.

In other words, it does not matter what a contract term or condition of employment is called (whether a confidentiality clause, non-solicit clause or something else). The relevant question is whether the term or condition prevents a worker from seeking or accepting work elsewhere or operating a business. This has wide ranging ramifications for employers outside of “non-compete” agreements particularly with regards to non-solicitation clauses that prohibit workers from seeking or accepting new employment after the end of employment with their previous employer.

That said, there are exceptions to the Rule in connection with “senior executives” and the sale of a business. The “senior executive” exception would allow for the enforcement of non-compete clauses entered into with qualifying employees before the effective date of the Rule (more below). The sale of a business exception permits non-compete clauses in connection with the sale of a person’s ownership interest in a business entity or of all or substantially all of a business’ operating assets.

The most likely questions being asked by business owners are (1) what do I need to do and (2) when do I need to do it by.

The short answer is nothing right now. We expect the Rule will be challenged in court by several groups (and there are reports that at least one lawsuit was filed this morning). Future action will depend on that litigation.

If the Rule is upheld in litigation and goes into effect, employers would need to stop entering into and enforcing non-competes or otherwise representing that workers are subject to non-competes (subject to a limited exception for senior employees and in connection with the sale of a business). Importantly, Employers would also need to provide notice to affected workers informing them their non-competes are unenforceable.

While we await the results of litigation, if employers want to be proactive they can (1) start compiling lists of workers (note that a “worker” means more than current and former employees and extends to independent contractors amongst others) that would need to be notified if the rule is upheld and (2) review existing agreements for problematic clauses.

We will continue to monitor the Rule and its impending litigation.

Schneider Smeltz Spieth Bell’s Business Group is here to help! Please contact attorney, **Michael Schauer** with any questions at 216.696.4200 x1133 or mschauer@sssb-law.com