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Ken Carlson
Winston-Salem, NC

Jackie Johnson
Austin, TX
Dallas, TX

CO-CHAIRS,
EMPLOYMENT
LITIGATION
PREVENTION &
DEFENSE
PRACTICE GROUP

David Kurtz
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Los Angeles, CA
Orange County, CA

Sarah Robertson
San Francisco, CA

EDITOR IN CHIEF

Robin Shea
Winston-Salem, NC

FTC votes to ban most employment-related noncompetes

By Jackie Johnson
Dallas Office

and

Jonathan Persky
Boston Office

Yesterday, the Federal Trade Commission voted 3-2 to issue a [Final Rule](#) banning virtually all noncompetition agreements between employers and employees. Employers may enforce pre-existing noncompetes with “senior executives” but will not be able to enter into them going forward. As to employees who are not “senior executives,” the Final Rule will void all existing noncompete agreements *and* will require employers to issue notices to employees that their existing noncompetition agreements cannot be enforced.

The Final Rule will take effect 120 days after it is published in the *Federal Register*.

The FTC’s action follows its [January 2023 Notice of Proposed Rulemaking](#), which prompted more than 26,000 comments from members of the public. During yesterday’s vote, the FTC stated that more than 25,000 of these comments were in favor of the ban.

The FTC’s Final Rule concludes that all noncompete agreements – regardless of whether the employee is a senior executive – violate Section 5 of the FTC Act because they are “restrictive and exclusionary.” The FTC also found that noncompetes with employees other than senior executives violated Section 5 because they were “exploitative and coercive.” As to senior executives, the FTC found that senior executives are the individuals most likely to start new businesses and create jobs – therefore, according to the FTC, even noncompetes with senior executives harm the public.

The Final Rule leaves in place existing noncompetition provisions with senior executives because these existing noncompetes are more likely to have been the subject of negotiation and undoing them would unduly burden the employer. The Final Rule defines “senior executives” as those who earn more than \$151,164 annually and are in “policy-making positions” (a term that is inartfully defined in the Final Rule as executive officers and others with “policy-making authority for the business entity similar to an officer”). Employers will be required to provide “clear and conspicuous



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notice” to non-senior executives by the Final Rule’s effective date (again, 120 days from publication in the *Federal Register*) that the worker’s existing noncompete will not be, and legally cannot be, enforced. The Final Rule provides a template that includes notice language such as, “You may seek or accept a job with any company or person – even if they compete with [EMPLOYER NAME]” and, “You may run your own business – even if it competes with [EMPLOYER NAME].”

During yesterday’s voting session, there was a significant difference of opinion among the Commissioners on the scope of the FTC’s constitutional rulemaking mandate. The two Commissioners who voted against the Final Rule – Melissa Holyoak and Andrew N. Ferguson – questioned the FTC’s constitutional authority to issue a substantive rule banning noncompetes under the FTC’s general rulemaking power. Commissioner Holyoak went so far as to express disapproval of the use of resources in putting together the Final Rule, given that it is most likely to be the subject of constitutional attack.

In this regard, at least one [lawsuit](#) has already been filed challenging the Final Rule. The suit was filed in federal court in the Northern District of Texas. One of the attorneys for the plaintiff is Eugene Scalia, who was President Trump’s Secretary of Labor and is now in private practice. In addition, the U.S. Chamber of Commerce has announced its intent to challenge the Final Rule in court perhaps as early as today. One thing is certain: for employers and attorneys practicing in the noncompete area, the debate over this issue is anything but “final.”

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