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FTC Issues Final Rule Banning Noncompete Agreements

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On Tuesday, April 23rd, the Federal Trade Commission voted to enact a final rule banning most non-compete agreements between employers and employees. Generally, non-compete agreements prohibit employees from engaging in business in direct competition with their former employer after leaving. The FTC's final rule prohibits employers from entering into noncompete agreements with any employee on or after the final rule's effective date. Thus, the FTC has adopted a comprehensive ban on new non-competes with all employees. For existing noncompete agreements, the treatment of the agreement varies depending on the type of employee subject to the agreement. Existing noncompete agreements for senior executives (a high-level executive in a policy-making position earning at least \$151,164 annually) can remain in force. For employees who are not senior executives, existing non-competes are no longer enforceable after the final rule's effective date, unless the employee is a high-level executive in a policy-making position earning at least \$151,164 annually. The final rule effectively voids existing noncompete agreements for employees who are not senior executives that do not fall under the exception. Pursuant to the final rule, employers will be required to send a notice to current and past employees under noncompete agreements to notify them that the agreement will not be enforced.

The final rule is not set to take effect until 120 days after publication in the Federal Register. Further, the future of the rule is uncertain due to legal challenges from pro-business lobbying groups. The United States Chamber of Commerce has already filed a lawsuit seeking an injunction against enforcement of the rule in Texas federal court. More lawsuits are expected to follow.

We will continue to review this legal development. In the meantime, employers who use non-compete agreements should review their existing agreements and practices to determine if they should make changes to employment agreements if the final rule withstands legal challenge. Employers are also encouraged to confer with legal counsel regarding other methods to protect confidential information and business relationships that employees could use to compete against an employer.