# The Ban on Noncompetes

## What does the FTC's decision mean for your business?

by: Greg Goldberg, Incoming BTA General Counsel

On April 23, 2024, the Federal Trade Commission (FTC) issued a final rule banning noncompete agreements in the United States. This month, I'll outline the FTC's new rule, explain how it may affect your business and discuss what resources remain at your disposal going forward.


### The History

Until last month, noncompete agreements were a common tool employers used to protect their businesses from direct competition against current and former employees. Courts determining the validity of noncompete agreements historically considered two factors — whether the restrictions on competition were reasonable in geography and duration. In general, courts endorsed noncompete agreements so long as the terms were limited to a 100-mile radius around a worker's territory and a two-year term after the conclusion of a worker's employment.

The FTC's new rule arrives as the use of noncompete agreements has exploded in recent years. Currently, noncompete agreements cover an estimated 30 million workers in the United States — nearly one in five. In one famous example, state attorneys general in New York and Illinois sued the sandwich chain Jimmy John's for requiring minimum-wage workers to sign noncompete agreements, apparently in fear of sandwich makers fleeing en masse to Subway or Jersey Mike's. The case settled out of court after Jimmy John's agreed to end the practice.

The purpose of the FTC's new rule is to rebalance the lopsided noncompete scale in favor of workers, enabling employees to take on roles with rival employers or start new businesses of their own. The FTC reasons that eliminating restrictions in noncompete agreements will result in numerous benefits to workers, not limited to increasing wages, lowering health-care costs and driving innovation. Specifically, workers no longer facing the consequences of violating noncompete agreements can avoid changing industries, relocating to different markets, retiring from the workforce or defending against costly enforcement litigation.

### The Rule

The FTC's rule bans new noncompete agreements for all roles at all levels of all organizations, beginning 120 days from the date of the rule's publication in the Federal Register (which is imminent). Prohibited noncompete agreements include any provision that restricts a worker's ability to seek or accept work or to operate a business following the termination of the worker's employment. The rule construes the term "worker" broadly to include any person "who works for an employer."

The rule includes a limited exception whereby existing noncompete agreements with senior executives — defined as those employees earning at least $151,164 per year and who occupy policy-making roles — will remain intact. All other existing noncompete agreements, including those covering both employees and independent contractors, will no longer be legally enforceable. The FTC's rule also requires employers to provide "clear and conspicuous" notice to workers of the effective date when existing noncompete agreements will expire.

### The Future

Already, a coalition that includes the U.S. Chamber of Commerce and other trade groups has brought a federal lawsuit in U.S. District Court in Texas seeking to declare the FTC's rule invalid and unenforceable. The lawsuit argues the rule represents an unconstitutional interference with private parties' rights to enter contracts. Regardless of whether the coalition's efforts are ultimately successful, at a minimum, the legal challenge may delay implementation of the FTC's rule in the short term.

Meanwhile, employers preferring not to rely on the outcome of the Texas litigation may still consider several other measures to protect their businesses from unfair competition. For example, the FTC's new rule does not bar employers from using confidentiality or nonsolicitation agreements. Confidentiality agreements, including nondisclosure agreements, will remain valid and enforceable to safeguard employers' sensitive and proprietary nonpublic information. Existing trade secret laws will also continue to protect employers' confidential information. Additionally, employers may still utilize nonsolicitation agreements to prevent current and former employees from poaching clients or otherwise meddling with existing business relationships.

Check out the legal documents available at www.bta.org/LegalDocuments to review and download samples. ■

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