Legal Update: The Impact of the FTC's Ban on Non-Competes on Employers and Employees

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On April 23, 2024, the Federal Trade Commission (FTC) issued a final rule to ban non-compete agreements nationwide. As a law firm that works closely with both employers and employees, we know how important it is to help our clients understand this new rule and how it will impact their businesses and employment going forward. This article will delve into the details of the new rule, including when it takes effect and how it will affect both employers and employees.

What is the New FTC Rule?

The new rule bans new non-competes with all workers in the United States. The final rule provides that a non-compete agreement or clause is an unfair method of competition; and therefore, it is a violation of the Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practice for employers to enter into non-compete agreements with workers after the final rule's effective date.

A non-compete clause is defined under the final rule as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition."

The effective date of the final rule is 120 days after publication in the Federal Register.

Does This Mean for Existing Non-Competes?

According to the rule, all existing non-compete agreements or clauses will not be enforceable after the final rule's effective date. The only exception to this rule is that existing non-competes for senior executives are not covered under this new rule. Those agreements will still be enforceable.

The rule provides that for an employee who is not categorized as a senior executive, it is considered an unfair method of competition for "a person to enter into or attempt to enter into a non-compete clause; to enforce or attempt to enforce a non-compete clause; or to represent that the worker is subject to a non-compete clause."

With respect to senior executives, it is considered an unfair method of competition for "a

person to enter into or attempt to enter into a non-compete clause; to enforce or attempt to enforce a non-compete clause entered into after the effective date; or to represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after its effective date."

Impact on Employers

While the new rule may seem harmful to businesses, there are alternatives to non-competes to help protect proprietary information which we cover later in this article. In addition to that, the FTC expects the new rule to lead to a significant increase in new business formation with an estimated 8,500 additional businesses created annually. The projected 2.7% annual growth rate is said to be attributed to the ability of workers to explore opportunities and create new businesses. The FTC also estimates that there will be an annual average increase of 17,000 to 29,000 new patents in the next decade.

This can be beneficial to employers because they'll have access to a more experienced, entrepreneurial workforce from which to recruit and with whom to partner. Attracting talent with diverse experiences can help foster innovation and business growth.

Impact on Employees

Without the restriction of non-compete agreements or clauses, employees can freely move to different companies and pursue different job opportunities. The ability to explore different opportunities as well as negotiate salaries, raises, and benefits is projected to result in a $524 increase in earnings per year for the average worker.

Alternatives to Non-Competes

While employers may worry about their ability to protect their proprietary information without the option to enter into a non-compete agreement with new employees, there are several alternatives available. Trade secrets law and non-disclosure agreements (or NDAs) are designed to protect proprietary and sensitive information. In fact, according to the FTC, research estimates that nearly 95% of workers with an existing non-compete agreement already have an NDA in place. With that piece of mind in place, employers can continue to protect their businesses without requiring noncompete agreements.

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Whether you are an employer who needs help protecting your business's proprietary information and assets or an employee interested in protecting your rights, our experienced employment litigation team can help. Contact us today to schedule a consultation with one of our employment lawyers.

