



# Making Sense of the Non-Compete Landscape: FTC Fallout and What Comes Next



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## The FTC's Rule

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# FTC Non-Compete Rulemaking

For Release

## FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition

Agency estimates new rule could increase workers' earnings by nearly \$300 billion per year

January 5, 2023 | [f](#) [t](#) [in](#)

# FTC Approved Final Rule

On April 23, 2024, the FTC voted 3-2 to publish a proposed final rule that would:

- Ban almost all worker non-competes as “unfair methods of competition”
- Extend to other agreements that were *de facto* non-competes
- Be both prospective and retroactive
- Require written notice that most existing non-competes would no longer be enforced

## Uncertainty in the Rule

The FTC's proposed final rule left much uncertainty.

- Exception for then-existing non-competes with “senior executives”
- Limited sale-of-business exception
- *De facto* non-competes
- Certain non-profits?

## Litigation Challenging the Rule

- The same day the rule was announced, Ryan, LLC filed suit challenging the Rule in the Northern District of Texas
- Shortly after, the U.S. Chamber of Commerce joined the suit
- On April 25, 2024, ATS Tree Services, LLC filed suit in the Eastern District of Pennsylvania challenging the rule
- Other cases followed

## Initial Litigation Uncertainty

- On July 3, 2024, a federal judge in the N.D. Tex. issued a preliminary injunction prohibiting the FTC from implementing or enforcing the rule against Ryan, LLC and the other parties in the litigation
- On July 23, 2024, a federal judge in Pennsylvania denied the plaintiff's motion for preliminary injunction, in a decision that was directly contrary to the decision of the Texas court
- On August 14, 2024, a federal judge in Florida entered a limited preliminary injunction similar to that entered by the federal judge in Texas

## FTC Rule Struck Down

- On August 20, 2024 the Texas federal court ruled that the FTC exceeded its statutory authority in implementing the rule and found that the rule was arbitrary and capricious
- The rule was set aside nationwide

## What Comes Next for Non-Competes?

## FTC Likely to Appeal

- On September 24, 2024, the FTC filed a notice of appeal challenging the preliminary injunction entered by the federal judge in Florida.
- The FTC's appellate brief is due November 4, 2024.
- On October 18, 2024, the FTC filed a notice of appeal challenging the decision to set aside the rule by the federal judge in Texas.
- While the FTC's decision to appeal is unsurprising, the FTC is unlikely to succeed before the Fifth Circuit or the Supreme Court.

## FTC Enforcement

- FTC still may pursue individual employers arguing their non-competes are “unfair methods of competition”
- FTC previously signaled intent to pursue non-competes involving:
  - Large numbers of workers who are paid low wages,
  - Hold low-skill positions, or
  - Lack access to significant confidential information/customer relationships
- FTC enforcement actions likely to resume against individual employers

## NLRB Enforcement

- On May 30, 2023, NLRB GC opines that non-competes *generally* constitute an “unfair labor practice”
- Argument is that non-competes prevent employees from leaving employment or threatening to leave, either individually or collectively, infringing on their NLRA rights
- Applies to employees with unionized and non-unionized workforces
- Does not apply to employees in supervisory roles (assign/reward/discipline)

## NLRB Enforcement

- On October 7, 2024, NLRB GC issued a follow-up memorandum addressing non-competes and “stay-or-pay” agreements
- Further suggests NLRB interest in pursuing enforcement action
- Suggests NLRB seeking not only to void non-competes, but also seeking “make-whole remedies” for affected workers

## NLRB Enforcement

- NLRB GC proposed employees be compensated (difference in pay and/or benefits) if the employee can show:
  - There was a vacancy available for a job with a better compensation package;
  - They were qualified for the job; and
  - They were discouraged from applying because of a non-compete

## NLRB Enforcement

- NLRB GC also posited that former employees may be entitled to “make-whole relief” for time spent complying with a non-compete after exiting employment.
- NLRB GC suggests that former employees be made whole if:
  - The former employee shows (through the same criteria mentioned previously) they were out of work for longer than they otherwise would have been because of the non-compete
  - The former employees shows they accepted a job outside their industry for lesser compensation because of the non-compete
  - The former employee shows they needed to move outside of the geographic region covered by the non-compete
  - The former employees shows they needed to undertake new job training to be eligible for a position not restricted by the scope of the non-compete

## New State-Level Action

- Minnesota
  - In May 2023, Minnesota Legislature passed a new statute banning non-competes
  - The ban was signed into law by Gov. Tim Walz.
  - The law took effect on July 1, 2023
  - The law is prospective only
  - The law still permits non-solicits, confidentiality agreements/NDAs, and non-competes in sale-of-business context



## New State-Level Action

- New York
  - In June 2023, the New York State Legislature passed a bill banning non-competes
  - In December 2023, New York Governor Kathy Hochul vetoed the bill
  - Governor Hochul has signaled that she would support a future non-compete ban that was tailored to protect low-wage and middle-class earners while preserving the ability to protect interests related to highly-compensated workers

## Best Practices

## Overall Principles

- Who to worry about
  - State law - high concern
  - FTC / Congress / other agencies - lower concern, but monitor
- What to worry about
  - Non-competes - high concern
  - Non-solicits - medium/low concern
  - Confidentiality agreements/non-disclosure agreements - low concern

## Non-Competes

- Use sparingly
- Tailor appropriately - geography, time, activities prohibited
- Provide notice with offer/remind at termination
- Goals
  - Protect legitimate interests - confidential information, trade secrets, and customer relationships/goodwill
  - Have enforceable agreements
  - Avoid FTC, NLRB, or other regulatory scrutiny
- Not a panacea—feed and care for your workers!

## Non-Solicits

- Use where worthwhile
  - External-facing executives and management
  - Business development and sales roles
- Tailor appropriately
  - Not “all customers”
  - Based on business-related contact
  - Reasonable post-employment period ( $\leq 2$  years)
  - Reasonable lookback period ( $\leq 2$  years)

## Confidentiality and Trade Secrets

- The lowest-hanging fruit
  - Have a defensible confidentiality agreement
    - Signed by anyone with access to confidential information/trade secrets
    - Limited to confidential information
    - Contains DTSa safe harbor language
  - Address confidentiality and return of information in onboarding and offboarding
  - Limit access to confidential information based on need to know

## Confidentiality and Trade Secrets

- Advanced Options
  - Identify trade secret information
  - Trade secret policy
  - IT policies regarding access to and monitoring of trade secret information
  - Other advanced measures based on the information at issue

## Disclaimer 1: State Law Varies and Changes

- State laws continue to be divergent and complicated—no one-size-fits-all
- There was a lull while the FTC rule was in process
- Expect more state legislation, particularly in blue-leaning states
- Expect more state-specific statutory bans, wage thresholds and highly technical requirements (notice, required disclosures, etc.)

## Disclaimer 2: Who Knows What's Coming

- Federal changes
  - Harris or Trump administration?
  - Agency action?
  - Congressional action?
- Court scrutiny

## Q&A



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