FTC's Non-Compete Ban Reportedly Delayed Until 2024: Your 7-Step Guide While Waiting

Insights
5.25.23

A recent report from Bloomberg Law indicated that the Federal Trade Commission's vote to formally ban non-compete agreements in most employment agreements won't take place until April 2024. While this delay could be welcome news for those dreading the ban, it also leaves employers throughout the country playing a painful waiting game to determine if the proposed rule will ever take effect – and unsure what to do in the interim. What should you be doing to prepare while waiting for the other shoe to drop? Here is a seven-step guide for employers to follow.

Update on Timing and Next Steps

The recent news from Bloomberg Law reporting the year-long delay was surprising to many. After all, this issue has become a top priority for the FTC, the culmination of many efforts dating back at least to a January 2020 workshop on the subject. It also comes on the heels of President Biden's July 2021 Executive Order that took direct aim on restrictive covenants. When the FTC's proposal was announced in January, most observers assumed the agency would fast-track the rule and we would see finalization steps soon after the notice-and-comment period expired in March.

But according to Bloomberg Law, the agency needs to grapple with a massive number of public comments – nearly 27,000 – that will tie it up for many months. Add to that the widespread impact of the rule (it would ban the use of non-competes in almost all employment situations and require the sending of notices to current and former employees of the effect of the rule) and it would appear that the agency wants to move deliberately and cautiously if it has any hope of having the rule survive the inevitable court challenge. Bloomberg reported, in fact, that several dozen personnel retained by the FTC have collectively spent more than six thousand hours on rulemaking in the month after it released the rule, demonstrating the attention that the comments are receiving.

Once agency leaders cull through and review all of the comments received, high-level staff will consider possible alterations in order to satisfy any notable concerns in and smooth the path towards finalization.

What Should You Do? Your 7-Step Plan

1. Use the next year to **take an inventory of all existing restrictive covenant agreements**, including those that currently restrict former employees. Also make sure you have a method for

tracking all non-competes you put into effect over the next year so your list is complete when the proposed rule is finalized. This will enable you to move swiftly if and when the time calls for you to act related to your agreements. Also, it is a generally good idea to be aware of what agreements are in place and where there might be holes.

2. When it comes to existing non-compete agreements, ask yourself whether you can protect your interests with a **less burdensome covenant** such as a properly tailored customer non-solicitation or confidentiality provision. You may find that you can achieve the same goals with less vulnerable agreements.
3. Review your **non-solicitation, confidentiality, and non-disclosure clauses** to see whether they will withstand the scrutiny that could be brought down on them if the rule is finalized as proposed. They should be reasonably tailored with the help of your Fisher Phillips counsel to protect your legitimate interests. Remember, the proposed rule uses a functionality test that goes beyond just pure "non-compete" agreements and could invalidate additional provisions if they are found to be *de facto* non-competes. Employers will still have a right to protect confidential information and customer relationships, as well as the poaching of employees by other employees, but you need to make sure your agreements are carefully tailored to accomplish these goals.
4. Make sure you **understand the impact that the federal Defend Trade Secrets Act and state trade secret statutes** could have on your operations in protecting your trade secret information. These laws could play a critical role in your overall defense posture. Talk with your Fisher Phillips legal counsel about how they could be deployed if necessary.
5. Get your **trade secrets** house in order. This is perhaps more important now than ever. The FTC cites the availability of trade secret protection as a factor that mitigates the harm of abrogating non-competes. You should identify your trade secrets and ensure that you have proper policies and procedures in place to protect them. Limit trade secret access only to those who need it; train employees how to handle trade secrets and protect against theft; and implement suitable technological controls. In short, think through what your answer would be under oath to the question "tell me everything you have done to prevent your trade secrets from falling in the hands of a competitor."
6. To make sure you are up to speed on what the proposal entails, you should read **our comprehensive FAQs** summarizing the key points.
7. Finally, you should ensure you are **subscribed to Fisher Phillips' Insight system** to gather the most up-to-date information directly to your inbox, as we will be monitoring the situation and providing updates as the FTC works to finalize the proposed non-compete ban.

Conclusion

If you have questions, please contact the author of this Insight, your Fisher Phillips attorney, or any attorney in our Employee Defection and Trade Secrets Practice Group.

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