

FTC Compliance Webinar on The Noncompete Clause Rule

May 14, 2024

Ben Cady: Good morning and thank you for joining the FTC's Noncompete Rule Compliance Webinar.

My name is Ben Cady, and I am an Attorney Advisor in the Office of Policy Planning at the FTC. I am joined today by my colleagues Paige Carter, Zac Kaplan, and Brian O'Dea. Together we look forward to providing helpful information and answering questions to assist you in complying with the noncompete rule. Thank you to those who submitted questions in advance of the webinar. The discussion that follows incorporates questions we received. For those questions we're not able to get to, there is a lot of helpful information about the rule – including links to the rule itself, a compliance guide, and model notices – on the FTC's website, <u>www.ftc.gov</u>. You can also contact the FTC with questions about the rule at <u>noncompete@ftc.gov</u>. Please note, however, that we are unable to provide individual legal advice.

This webinar is being recorded. The recording and a transcript will be available on the FTC's website for your reference in the future. We will not be taking live questions from viewers during the webinar.

One final disclaimer: this presentation represents the views of FTC staff and is not binding on the Commission. This presentation is not a substitute for the final rule. Only the final rule itself can provide complete and definitive information regarding its legal requirements. With that, let's get started. Next slide please.

This webinar will discuss in greater detail who is covered by the rule; what a noncompete is; what you need to do to comply with the rule; information about the effective date; and, finally, alternatives to noncompetes. To summarize, the Noncompete Rule bans the issuance of new noncompetes for all workers as of the effective date, which is September 4th, 2024. Beginning on that date, it is unlawful for any person covered by the rule to enter into or attempt to enter into a new noncompete with a worker.

Ben Cady: Thanks Brian. How about franchise agreements -- does the rule apply to noncompetes in franchise agreements?

Brian O'Dea: The rule does not apply to noncompetes in franchise agreements—meaning the rule does not apply to a noncompete agreement between a franchisor and a franchisee. However, the rule does apply to workers employed by any franchisor or franchisee. Please note that while a noncompete agreement between a franchisor and a franchisee is not covered by the rule, it may still be unlawful on a case-by-case basis under the antitrust laws, including the FTC Act.

Ben Cady: Continuing with coverage, what if I sell my business? Can I enter into a noncompete with the buyer?

Brian O'Dea: The Rule doesn't apply to non-competes between a buyer and seller of a business. The seller can agree to a non-compete individually, but not for any of the business's mpetes for w* applen4(es-o)5.4(mpetes for workers, is1af but TD .0012 Tc -.0003 Tw [(: The1wisio6.2(anyddr

senior executives cannot be entered into after the effective date. To be a senior executive, a worker must satisfy both parts of the two-part test in the rule. That's a very important detail that we don't want people to overlook.

A worker is a senior executive if they earn more than \$151,164 in compensation a year and are in a "policy-making position." First, let's talk about compensation. Compensation can include salary, commissions, performance bonuses, equity compensation, and any other compensation agreed to that the worker knows and can expect. Compensation does NOT include items like benefits, such as health care or retirement contributions. It also does not include board and lodging. Additionally, if the worker only worked for part of the year, you can annualize their earned compensation to see if they meet the threshold. And in considering annual compensation, you can use the preceding calendar year or fiscal year for the calculation whichever is easier for you. If a worker meets the compensation threshold, the next step in the two-part test is to inquire about their job duties. To qualify as a senior executive, the worker must be in what is defined in the rule as a "policy-making position." This includes the president, CEO, or someone else with authority to make policy decisions for the company. Importantly, it does not include, for example, the head of a division within a business if their decision-making authority is limited to their division.

Ben Cady: Thanks very much. We are now going to move on to the next topic which is the definition of noncompete. Next slide please. Paige will now help us answer some questions-first on the topic of what noncompetes are under the rule. Paige, let's start with the basics. What is a noncompete under the rule?

Paige Carter: Hello Ben, just confirming you can hear me?

Ben Cady: Yes, we can hear you.

Paige Carter: Great. Excuse me one moment. The language will be discussing is on the screen. I want to point out two key things about the definition. The language we'll be discussing is on the screen. I want to point out two key things about the definition. First, an agreement can

With respect to garden leave, that term can be used to refer to a wide variety of arrangements. But the key point on garden leave is that the final rule applies only to post-employment restrictions. So if, under a garden leave agreement, a worker is still employed and receiving the same total annual compensation and benefits on a pro rata basis, the agreement would not be a non-compete under the definition, because it is not a post-employment restriction.

An NDA or non-solicitation agreement could be a non-compete under the final rule only if it spans such a large scope of activity that it "functions to prevent" workers from seeking or accepting other work or starting a business after they leave their job. In the final rule, we give the example of a NDA that bars a worker from disclosing, in a future job, any information that is "usable in" or "relates to" the industry in which they work. But a garden-variety NDA in which a worker simply agrees not to disclose certain confidential information in future employment—or a garden-variety non-solicitation agreement—would not be a non-compete under the final rule,

Ben Cady: Thanks Paige. And now we'll turn to compliance with the rule. Next slide please. Paige, can you walk us through what is prohibited by the rule and what is needed to comply with it?

Paige Carter: The rule both prohibits employers from engaging in certain conduct and requires employers to send a notice under certain circumstances. Let's start with the prohibited practices. On the screen is the language from the final rule defining what is prohibited. All these prohibitions apply as of the effective date.

Let's look at the column on the left, which describes prohibited practices with respect to workers other than senior executives. The rule prohibits employers from entering into, or attempting to enter into, noncompetes with these workers as of the effective date. An example of "attempting to enter into" a noncompete would include presenting the worker with a noncompete, even if the employer and worker do not ultimately execute it.

The rule also prohibits employers from enforcing or attempting to enforce existing noncompetes with workers other than senior executives after the effective date. An example of "attempting to enforce" would be taking steps toward initiating legal action to enforce the noncompete, even if the court does not ultimately enter a final order enforcing the noncompete.

Finally, as of the effective date, the rule prohibits employers from representing to workers other than senior executives that they are subject to a noncompete. Examples of prohibited representations would include telling a worker that the worker is subject to a noncompete; threatening to enforce a non-compete against a worker; and advising a worker that, due to a noncompete, they should not pursue a particular job opportunity.

Now let's look at the column on the right, which describes prohibited practices with respect to senior executives. The rule prohibits employers from entering into, or attempting to enter into, noncompetes with senior executives as of the effective date. That's the same as for all other workers. However, as we mentioned earlier, employers may enforce noncompetes with senior executives that were entered into prior to the effective date. For that reason, employers may also represent that senior executives are subject to noncompetes, where the noncompete was entered into prior to the effective date.

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Ben Cady: Thanks Paige. Next slide please. I'm now going to walk us through a series of questions on the final rules notice requirement. Paige, what is the final rule's notice requirement?

Paige Carter: The final rule requires employers to provide notice to workers with existing noncompetes, other than senior executives, that the worker's noncompete will not be, and cannot legally be, enforced against the worker. This notice must be clear and conspicuous, and it must be provided by the effective date.

Ben Cady: Is there model language that can be used for the notice?

Paige Carter: Yes. Section 910.2(b)(4) of the final rule provides model language that employers can use for the notice. And section 910.2(b)(6) of the rule states that if employers provide this model language to their workers, they satisfy the rule's notice requirement. So all you need to do to comply with the notice requirement is to send this model language to your workers using one of the permissible methods, which I'll describe in a moment. To make this really easy, we've provided the model notice on our website in Word format so that you can simply copy and paste it. And we've provided it in English and six other common languages.

Note that the language in the model notice is not specific to workers with noncompetes, so you don't even need to identify which of your workers have noncompetes. Employers can, for example, comply with the notice requirement by simply copying and pasting the model notice and sending it in a mass email.

Ben Cady: Next comment what are the permissible methods for providing the notice?

Paige Carter: Under the rule there are four permissible methods for providing the notice, and you can choose whichever one is easiest for you. The notice may be provided: first, on paper delivered by hand to the worker; second, by mail, at the worker's last known personal street address; third, by email, at an email address belonging to the worker, including the worker's current work email address or last known personal email address; or fourth, by text message at a mobile telephone number belonging to the worker.

Ben Cady: Are there any exemptions from the notice requirement?

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Zac Kaplan: Legal challenges to the rule have been filed in court, but the filing of a legal challenge to the rule does not automatically pause or delay the effective date of the rule. Currently the effective date of the rule is September 4, 2024. If a court rules that the effective date of the rule is paused or delayed, the FTC will provide updated information on its website and through social media channels. And regardless of whether the effective date is delayed, we would still encourage employers not to use these harmful agreements. As we'll turn to momentarily, there are many alternatives you can use to protect your legitimate business interests that don't harm competition, our economy, or honest workers.

Ben Cady: Next slide please. We also received questions about what alternatives to noncompetes employers can use. Zach, what can I do to protect confidential business information without using a noncompete?

Zac Kaplan: Non-disclosure agreements or NDAs and intellectual property law, like trade secret law, are tools designed for the very purpose of protecting truly confidential business information. Employers can use these tools instead of noncompetes to protect such information. NDAs in which a worker agrees not to disclose certain confidential information are unaffected by the rule. These tools are much more appropriate for protecting sensitive business information than trapping workers with noncompetes, that are really overbroad and unnecessary for this purpose.

In fact, California has long banned noncompetes for all workers and is home to a large and successful tech industry, which is highly reliant on intellectual property. The same is true with respect to the energy industry in Oklahoma and North Dakota, which like California have categorically banned non-competes since the 1800s. The key point is that, in states where non-competes are unenforceable, companies have been able to use NDAs and trade secret law to protect their investments without unduly burdening competition.

Ben Cady: What about investments I made in training? How do I protect those?

Zac Kaplan: To keep those workers they've invested in, employers can enter employment agreements where both they and the worker agree to a fixed period of employment that's appropriate to the training investment. Employers can also compete on the merits to retain workers through higher wages and better jobs instead of using noncompetes—as many employers already do. It's also worth noting that employers will have access to a bigger pool of

workers without non-competes and are more likely to find new workers that best fit the position they are trying to fill when workers aren't bound by noncompetes.

Ben Cady: Finally, what can I do to keep former workers from taking clients or customers with them when they leave?

Zac Kaplan: I refer to Paige's discussion of the definition of noncompete and note that garden variety non-solicitation agreements are not prohibited by the rule. Employers can also compete on the merits to retain clients and customers by offering a better product, better service, or a better price.

Ben Cady