

GET THE JOB

Recent Rulings

Noncompete clauses or noncompete agreements aren't new ideas in the American workplace. What is new is that the Federal Trade Commission issued a rule this spring that bans these instruments nationwide.

"Noncompete clauses keep wages low, suppress new ideas and rob the American economy of dynamism, including from the more than 8,500 new startups that would be created a year once noncompetes are banned," says FTC Chair Lina M. Khan. "The FTC's final rule to ban noncompetes will ensure Americans have the freedom to pursue a new job, start a new business or bring a new idea to market."

The FTC estimates nearly 30 million American workers are subject to a noncompete agreement.

WHAT IS IT?

A noncompete agreement specifies that an employee cannot enter into competition with an employer after the employment period is over. They may also prohibit former employees from revealing pro-



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prietary information to any other parties, be they competitors for the past employer or not.

"It's clear that the freedom to leave your job and take another job is fundamental to a free and fair economy," said FTC Commissioner Rebecca Kelly Slaughter. "It is so profoundly unfree and unfair for people to be stuck in jobs they want to leave not because they lack better alternatives, but because noncompetes would preclude another firm from fairly competing for their labor, requiring workers instead to leave their industries or their homes to make ends meet."

Most noncompetes have an end date, say three to five years after the end of the

employment period. Others may keep an employee out of a specific geographical area or job market, or prohibit work in certain industries.

WHAT DOES THIS RULE MEAN?

If you're one of the 30 million people working under a noncompete agreement, that agreement is probably (but not always) not enforceable. Existing noncompete agreements for senior executives are an exception. Employers are now banned from entering to or attempting to enforce any new noncompete clauses, even if they involve senior executives.

Employers must provide notice to workers other than

senior executives who are bound by an existing noncompete agreement that they will not be enforcing those agreements.

The rule is also not applicable to those outside of the FTC's jurisdiction. That includes, as Slaughter points out, employees of some non-profit corporations.

"I want to be transparent about the limitations of our jurisdiction and recognize that there are workers, especially health care workers, who are bound by anticompetitive and unfair noncompete clauses that our rule will struggle to reach," she says.

SO, WHY NOW?

The Federal Trade

Commission determined that noncompete agreements are an unfair method of competition and a violation of Section 5 of the FTC Act. Furthermore, it said noncompete agreements tend to negatively affect competitive conditions by inhibiting efficient matching between workers and employers, inhibiting new business formation and innovation, and may lead to increased market concentration and higher consumer prices.

The commission voted to approve the final rule was 3-2. Commissioners Melissa Holyoak and Andrew N. Ferguson voted no. The final rule became effective 120 days after publication in the Federal Register.

ARE THERE ALTERNATIVES?

Yes. The FTC found that employers can still seek protections behind trade secret laws and nondisclosure agreements (NDAs) to protect proprietary and sensitive information. Research shows that more than 95% of workers with a noncompete also have an NDA in place, the FTC says.

The commission also said that instead of using legal contracts to keep workers in their ranks, companies could instead "compete on the merits for the worker's labor services by improving wages and working conditions."