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, www.ftc.gov. You can also contact the FTC with questions about the rule at noncompete@ftc.gov. 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.

Additionally, existing noncompetes will become unenforceable on September 4th for the vast majority of workers. Only noncompetes with senior executives, as defined by the rule, will continue to be enforceable after September 4th. Briefly, to be a senior executive that meets this exception for existing agreements, a person must earn more than $151,164 dollars in a year and must be in a policy-making position for the entire business.

For all existing noncompetes that are unenforceable after the effective date—in other words, noncompetes with all workers who are not senior executives—employers must notify those workers in writing that their noncompetes are no longer enforceable. As discussed later, the FTC provides model language for that notice on our website. Next slide please.

The FTC adopted this rule to promote competition. Evidence shows noncompetes suppress wages; reduce new ideas and innovation; and prevent the formation of new businesses. The rule will ensure individuals have the freedom to choose where they work, to start a new business, and to bring a new idea to market. Likewise, businesses will have the freedom to hire workers that match their needs. The FTC adopted this rule because rulemaking is much more efficient and effective than case by case enforcement to address noncompetes. Rulemaking allowed the FTC to consider the economy-wide effects of noncompetes on workers, businesses, and innovation. And rulemaking allowed all market participants a much more inclusive opportunity to participate, by submitting public comments. In fact, over 26,000 commenters did so, with over 25,000 supporting a complete ban on noncompetes. We extend our thanks to all the members of the public and organizations that participated in this process.
Next slide please.

Compliance with the rule is simple and straightforward. There are essentially three simple steps to comply. First, do not include non-competes in employment contracts, paperwork, or websites after the effective date. Second, if you have active noncompetes, give notice no later than the

effective date to those current and former workers who are not senior executives that their noncompetes are unenforceable; and third, do not enforce existing noncompetes after the effective date for workers other than senior executives.

We will now dig a little deeper and my colleagues will help answer questions about the specifics of the rule. Next Slide Please. Brian O'Dea is going to answer some questions about who is covered by the rule. Brian, first, which employers are covered by the rule?

Brian O'Dea: The Rule covers all types of businesses in nearly all industries—corporations, LLCs, partnerships, sole proprietorships—really any type of organized business. It also covers individuals or natural persons who have someone working for them. And the rule is not limited to businesses of a certain size, it applies to businesses large and small.

Ben Cady: Our next question is, if I am a nonprofit, does that mean I'm exempt from the rule?

Brian O'Dea: The rule applies to the full extent of the FTC's jurisdiction, which covers most employers. Some employers are outside the FTC's jurisdiction and therefore not subject to the Rule. This includes, for example, banks, savings and loan institutions, federal credit unions, and certain bona fide non-profits.
If you believe that your company is outside the FTC's jurisdiction and you wish to continue to use noncompetes, you should confirm carefully that your company is in fact outside the FTC's jurisdiction. For nonprofits, while tax exempt status is a relevant consideration, further inquiry into a business's operations and goals may be needed to understand whether it is excluded from the FTC's jurisdiction. Courts have found, for example, that simply claiming tax-exempt status as a non-profit is not enough to place an entity outside the FTC's jurisdiction. The rough test for the FTC's jurisdiction is whether the corporation operates for its own profit or that of its members. Also note that while certain nonprofits may be outside of the FTC's jurisdiction, the service providers a nonprofit contracts with may not be. If those service providers are for profit entities, then they are within the FTC's jurisdiction and the rule applies to them. There is a lot more information about this topic in the rule, so for more on this, please refer to the rule itself. The relevant discussion starts on p. 51 of the pdf we published on our website, or p. 38357 of the Federal Register version. And even if you are outside the FTC's jurisdiction, we would still encourage employers not to use these harmful agreements.

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 workers. The Rule prohibits non-competes for workers, including in a sale of business context. You can find the provision addressing this exception for the sale of a business in § 910.3(a) of the final rule.

Ben Cady: Let's move on to workers. Which workers are covered by the rule?

Brian O'Dea: The Rule applies to noncompetes with all workers, whether they are full-time or part-time and whether they are paid or unpaid. The definition of worker in the rule, which can be found in § 910.1 of the final rule, includes employees, independent contractors, interns, externs, volunteers, apprentices, and others. As mentioned in the beginning of today's presentation, there are different requirements for senior executives when it comes to existing non-competes, but senior executives are workers under the rule as well.

Ben Cady: Thanks a lot. Next slide. Now let's answer some questions about senior executives. Brian, who is a senior executive under the rule and why does that matter?

Brian O'Dea: The definition of senior executive can be found in section 910.1 of the final rule. If a worker meets the definition of a senior executive, their existing noncompete agreement is not affected – it remains enforceable after the rule takes effect. However, new non-competes with

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 be a non-compete if it "prohibits a worker from," "penalizes a worker for," or "functions to prevent a worker from" seeking or accepting work or starting their own business. Second, the definition includes the phrase "after the conclusion of the employment." So it does not apply to terms or conditions that restrict a worker's ability to work for someone else or start a business while they

are still employed. That's particularly important, because it means if for example you know you need to retain someone for a couple years to recoup your training investment in them, you can simply agree to a fixed term of employment for that period of time. The rule doesn't prevent that.

Under the "prohibits" prong, a term or condition is a non-compete if it expressly prohibits a worker from seeking or accepting other work or starting a business after their employment ends. Most of the non-competes out there currently fall under this prong.

Under the "penalizes" prong, a term or condition is a non-compete if it requires a worker to pay a penalty for seeking or accepting other work or starting a business after their employment ends. An example would be a term that requires a worker to pay liquidated damages if they work for a competitor or start a business after they leave their job.

Under the "functions to prevent" prong, the definition applies to terms and conditions that restrain such a large scope of activity that they function to prevent a worker from seeking or accepting other work or starting a new business after their employment ends. Basically, if an employer adopts a term or condition that is so broad or onerous that it has the same functional effect as a term or condition prohibiting or penalizing a worker from seeking or accepting other work or starting a business after their employment ends, such a term is a non-compete under the final rule.

Ben Cady: Thanks Paige. So on the screen, in the right hand column, there's a list of different kinds of agreements an employer and worker might have. Can you walk us through how the definition of noncompete could apply to each of these types of agreements?

Paige Carter: As a general matter, forfeiture for competition agreements and non-competes in severance agreements are non-competes under the final rule. Such agreements penalize a worker for seeking or accepting other work or starting a business after their employment ends, because they extinguish an employer's obligation to pay promised compensation or benefits based on a worker doing so. Note that this doesn't mean you can't have a severance agreement. It just means you can't condition the payment of the severance on someone refraining from taking a competing job or starting a competing business.

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, because it would not function to prevent a worker from seeking or accepting other work or starting a business.

The same inquiry applies to training-repayment agreement provisions otherwise known as TRAPs. Where a TRAP is so broad or onerous that it functions to prevent a worker from seeking or accepting other work or starting a business, it can be a non-compete under the final rule. The final rule gives an example from the comments of a TRAP that requiring nurses to work for three years or else repay all of their earnings, plus paying the company's "future profits," attorney's fees, and arbitration costs.

In contrast, a provision merely requiring repayment of a bonus if the worker leaves before a certain period of time would not be a non-compete where the repayment amount is no more than the bonus that was received, and the agreement is not tied to who the worker can work for, or their ability to start a business, after they leave their job.

Finally, the definition does not apply to non-competes if they restrict only a worker's ability to work outside the U.S. or start a business outside the U.S. That's because the definition uses the language "seeking or accepting work in the United States" and "operating a business in the United States." That means, for example, that a U.S. business could continue to use non-competes that prevent a worker from taking a competing job in China.

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.

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?

Paige Carter: Yes. If the employer does not have a record of a street address, email address, or mobile telephone number for a worker, the employer is exempt from the notice requirement with respect to that worker.

Ben Cady: Can employer provide a notice in the language other than English?

Paige Carter: Yes. The rule does not require employers to provide the notice in a language other than English. However, the rule gives employers the option to provide the notice in a language other than English, as long as they also provide the notice in English. To assist employers with this, on the FTC's website, there are translations of the model notice in six other common languages: Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean.

Ben Cady: Final question, does the rule require rescission (i.e., legal modification) of existing noncompetes?

Paige Carter: No. All employers need to do with respect to existing noncompetes is to not enforce them against workers other than senior executives, and to provide such workers the notice that we described. The rule does not require employers to formally rescind existing noncompetes.

Ben Cady: Thanks so much Paige. Next slide please. Zac Kaplan will now address some questions related to the effective date. Zac, when does the rule go into effect? And can you say a little bit about what effective date means?

Zac Kaplan: The rule goes into effect on September 4, 2024. When the rule goes into effect, covered workers other than senior executives will no longer be bound by existing noncompetes, allowing them to take other, potentially competing jobs or start their own businesses. It also means competing employers can hire these workers.

Ben Cady: The rule is currently being challenged in court. Does this mean the effective date of the rule is automatically delayed? How will I know if the effective date is delayed?

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: Thanks so much Zach. Next slide please. That brings us to the end of our questions and answers. We wanted to remind everyone of next steps and where to go for more information. First, remember that the effective date for the rule is September 4 of this year and that there are three easy steps to complying with the rule. First, don't include non-competes in employment contracts, paperwork, or websites after the effective date. Second, if you have active noncompetes, give notice no later than the effective date to those current and former workers who are not senior executives that their noncompetes are unenforceable; and third, don't enforce existing noncompetes after the effective date for workers other than senior executives.

Additionally, more information, including a compliance guide with frequently asked questions, as well as downloadable model notices can be found on our website. You can also send us questions at noncompete@ftc.gov. After the effective date, you can use that same address to report violations of the rule.

Next slide please. Thank you very much for joining us today. As staff working for the nation's regulator entrusted to protect competition, we believe addressing this issue—and ensuring that the American people can enjoy the benefits of choosing where they want to work across free and fair markets—is at the heart of the FTC's mandate. Brian, Paige, Zac, and I all thank you for your engagement and attention to this important rule. Thank you, that concludes our presentation.

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