



The Administrative State's Attack on Noncompetes

What the FTC's Rule Requires and Why it is Unlikely to Survive

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The FTC Noncompete Rule

- **FTC voted 3-2 on party lines to issue the final rule on April 23, 2024**
- **If not enjoined, the rule will go into effect 120 days following formal publication in the Federal Register**
 - However, it is likely, in our view, to be enjoined and ultimately struck down by the Supreme Court
- **Would ban virtually all post-employment noncompetes nationwide**
 - Only exception is *existing* noncompetes with “senior executives”
 - Requires written notice to all affected employees on or before the effective date
- **Does not cover:**
 - Noncompetes entered into with sellers in connection with bona fide sale of a business
 - Causes of action accrued prior to the effective date
 - Non-solicits, NDAs, training cost repayment requirements, garden leave provisions
 - *But . . . it could cover these things if they are too broad
 - Certain industries the FTC does not have authority over: nonprofits, banks, etc.
 - *But . . . the FTC may challenge nonprofit status
 - Good faith (but failed) attempts to comply are not unfair business practices



Why is the FTC Taking this Action?

1

“Noncompete clauses systemically drive down wages, even for workers who aren’t bound by one.”

- “By stopping this practice, the agency estimates that the new proposed rule could increase wages by nearly \$300 billion per year and expand career opportunities for about 30 million Americans.”

2

“[N]oncompetes reduce entrepreneurship and start-up formation.”

- “We have already seen what life looks like without noncompetes because they have been legally unenforceable in California since the 19th century. Somehow, that hasn’t kept the California economy — the world’s fifth-largest — stuck in the Stone Age. Some observers have even suggested that Silicon Valley became the epicenter of America’s tech industry precisely because noncompetes were unenforceable there.”

3

“[N]oncompetes lead to higher prices for consumers by reducing competition”



Source: <https://www.law360.com/articles/1569485/ftc-s-noncompete-proposal-is-based-on-misrepresentations>

Pending Legal Challenges to the Rule



- ***Ryan, LLC v. Federal Trade Commission, C.A. No. 3:24-cv-986 (N.D. Tex.)***
 - Filed on April 23, 2024
 - Motion for Stay of Effective Date and Preliminary Injunction filed on May 1, 2024
 - Order to be issued on or before **July 3, 2024**
- ***Chamber of Commerce of the United States of America, Business Roundtable, Texas Association of Business, and Longview Chamber of Commerce v. Federal Trade Commission and Lina Khan, C.A. No. 6:24-cv-00148 (E.D. Tex)***
 - Filed on April 24, 2024
 - Motion for Stay of Effective Date and Preliminary Injunction filed the same day
 - Case stayed pending *Ryan* litigation; Chamber has moved to intervene in that case
- ***ATS Tree Services, LLC v. Federal Trade Commission, Lina Khan, Rebecca Slaughter, Alvaro Bedoya, Andrew Ferguson, and Melissa Holyoak, C. A. No. 2:24-cv-1743 (E.D. Pa.)***
 - Filed April 25, 2024

Legal Arguments In Favor of Striking Down the Rule

- Non-Delegation Doctrine
- Major Questions Doctrine
 - *West Virginia v. EPA* (2022)
- *Chevron* Deference
- Administrative Procedure Act – Arbitrary and Capricious
- 5th Amendment Takings Clause

The image shows two overlapping web pages. The top page is a Law360 article titled "The FTC's Noncompete Rule Is Likely Dead On Arrival" by Erik Weibust and Stuart Gerson, dated April 26, 2024. The article discusses the FTC's final noncompete rule and its exceptions. The bottom page is a Washington Legal Foundation (WLF) blog post titled "AFTER 200+ YEARS UNDER STATE LAW, FTC PROPOSES TO SWEEP AWAY ALL NONCOMPETES IN UNAUTHORIZED FEDERAL POWER GRAB" dated January 11, 2023. The blog post includes a "Legal Backgrounders" section, a list of issues (Antitrust / Consumer Protection | Employment Law / OSHA Regulation | Government Regulation), a "Download the PDF" button, and a photo of three authors: Erik W. Weibust, Peter Steinmeyer, and Stuart Gerson. The authors' names are also listed below the photo. The WLF logo and tagline "Advocate for freedom and justice" are visible at the top of the blog post.

What Should Employers Do Now?



Stay the course and focus on compliance with evolving state laws and trends

- Compensation thresholds
- Notice requirements



Take a holistic review of restrictive covenant strategy and practices.

- Inventory current restrictions
- Consider overall strategy
- Review onboarding and offboarding policies and procedures



Focus on trade secret protection and securing customer relationships

- Consider a trade secret audit

TRADE SECRETS AND EMPLOYEE MOBILITY

50 State Noncompete Survey

STATE	Employee Noncompetes Permissible?	General Noncompete Statute?	Industry-Specific Statutes or Rules?	Other Excluded Employees?	Continued Employment: Sufficient Consideration?	Notice Requirements	Other Unique Requirements	Customer and Employee Non-Solicits Permissible?	Enforceable Against Terminated Employees?	Judicial Modification Permitted? (Blue Pencil and/or Reformation)	Tolling Permissible?
ALABAMA	Yes	Ala Code § 8-1-390-397 (effective January 1, 2018)	Lawyers (Ala R. Prof. C. 5.6); Mediators (Ala Code of Ethics for Mediators State 10)	N/A	Yes	N/A	Must be reduced to writing and signed by all parties	Yes	Unresolved	Yes	Yes
ALASKA	Yes	No	Lawyers (AK R. Prof. C. 5.6)	N/A	Unresolved	N/A	N/A	Yes	Unresolved	Yes	Unresolved
ARIZONA	Yes	No	Broadcasting Industry (Labor § 23-494); Lawyers (AZ R. Prof. C. 5.6)	N/A	Yes	N/A	N/A	Yes	Unresolved	Yes	Unresolved
ARKANSAS	Yes	AR Code § 4-75-101	Licensed medical professionals (Arkansas Code Title 17, Subtitle 3); Lawyers (AR R. Prof. C. 5.6)	N/A	Yes	N/A	N/A	Yes	Probably not	Yes	Unresolved
CALIFORNIA	No, with narrow exceptions in the sale of a business context or dissolution or dissociation relating to a partnership or LLC	Cal. Bus. & Prof. Code § 16600, et seq.	Entertainment Industry (Cal. Labor Code § 2895); Lawyers (Cal. R. Prof. C. 5.6)	N/A	N/A	N/A	N/A	No, with narrow exceptions in the sale of a business context or dissolution or dissociation relating to a partnership or LLC	No	N/A	Probably not
COLORADO	Yes	C.R.S. § 9-2-113 (Amendments effective August 10, 2022)	Physicians (C.R.S. § 9-2-103.03); Lawyers (Col. R. Prof. C. 5.6)	Minimum income thresholds for agreements entered into on or after August 10, 2022	Yes	For agreements entered into on or after August 10, 2022, before acceptance of an offer of employment for new or prospective workers, at least 14 days before the effective date of restrictions for existing workers. Must provide separate written notice in either case.	Penalties and potential criminal liability for violations of statute approved workers may seek injunctive relief and attorneys' fees, out-of-state choice-of-law and venue provisions are unenforceable.	Yes, subject to minimum income thresholds for agreements entered into on or after August 10, 2022	Unresolved	Yes	No
CONNECTICUT	Yes	No	Security Guards (Conn. Gen. Stat. Ann. § 31-50a); Broadcasters (Conn. Gen. Stat. Ann. § 31-50b); Physicians (Conn. Gen. Stat. Ann. § 30-49g); Home Health Care Companion, or Homebased Service Workers (Conn. Gen. Stat. Ann. § 20-69f); Lawyers (Conn. R. Prof. C. 5.6)	N/A	Generally no, but unsettled as to at-will employees	N/A	N/A	Yes	Yes	Yes, but only if agreement states that terms are severable	No
DELAWARE	Yes	No	Physicians (Del. Code Ann. tit. 6, § 1707); Lawyers (Del. R. Prof. C. 5.6)	N/A	Yes	N/A	N/A	Yes	Yes	Yes	Yes

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<https://www.ebglaw.com/50-State-Noncompete-Survey>



Questions?

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Attorney Stuart Gerson's respected trial and appellate skills and power of persuasion help him successfully represent health care, life sciences, and financial services clients in high-stakes civil and criminal matters nationwide.

Stuart has extensive experience litigating cases involving the cybersecurity of health care information, trade secrets, and other confidential data as well as civil and criminal fraud issues, particularly under the federal False Claims Act. He also defends various antitrust and securities matters for clients in the health care and financial sectors.

Stuart was appointed Acting Attorney General of the United States during the early Clinton administration, after having served as President G.H.W. Bush's appointee as Assistant Attorney General for the Civil Division of the Department of Justice (DOJ). He has also served as an advisor to several presidents.

Stuart writes a blog series on LinkedIn, about Supreme Court rulings and dynamics: SCOTUS Today.



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Companies of all sizes and in various industries call upon attorney Erik Weibust for his practical and thoughtful advice—and his aggressive representation in high-stakes trade secret, non-compete, and commercial litigation.

Many of the world's leading pharmaceutical, biotech, medical device, technology, financial services, staffing, and insurance companies look to Erik for thoughtful and practical advice concerning how best to protect their trade secrets and customer relationships from misappropriation by former employees, ex-business partners, competitors, and hostile actors in the United States and abroad, and to avoid liability when hiring from competitors. When necessary, clients rely on Erik for aggressive representation in litigation, where he has won substantial victories in court and at the negotiating table, including broad-reaching injunctive relief and multimillion-dollar payouts, in trade secret misappropriation, unfair competition, and breach of restrictive covenant cases.

Erik's national litigation practice provides him with particular insight into how courts and arbitrators in a variety of jurisdictions analyze relevant issues, keeping him abreast of cutting-edge legal arguments, industry trends, and litigation strategies that he brings to bear in all of his representations. In addition to serving as the immediate past Chair of the American Intellectual Property Law Association (AIPLA) Trade Secret Committee, Erik regularly publishes articles and speaks locally and nationally about trade secret and restrictive covenant law, and he has been quoted on these topics in publications such as *The Washington Post*, *Bloomberg*, *Law360*, *Business Insurance*, and *Financial Times*.

Erik serves as Co-Chair of Epstein Beker Green's Trade Secret & Employee Mobility Practice Group and as a member of the firm's national Litigation Department Steering Committee.

