

Practical Solutions for Employers After the FTC Banned Non-Compete Agreements

May 29, 2024

OBJECTIVES

- Understand the scope of the non-compete ban – *i.e.*, which businesses and workers are governed by the rule.
- Understand the exceptions to the ban.
- Understand the conduct that is prohibited.
- Understand the affirmative steps employers are required to take by the Effective Date.
- Develop alternatives to non-compete agreements that effectively protect the employer's business interests.

AGENDA

- Background/overview of the FTC non-compete ban and its impact.
- How the non-compete ban operates.
 - Which workers and businesses are covered?
 - What does the ban prohibit?
 - What affirmative steps does the ban require?
 - What distinctions does the ban make for pre-existing non-competes?
 - What are the exceptions?
- Steps to take now in preparation for the Effective Date.
- Alternatives to non-compete agreements, including how to draft enforceable non-solicitation and non-disclosure agreements.
- Status of the legal challenges to the ban.

BACKGROUND AND OVERVIEW OF 16 CFR 910

BACKGROUND: OVERVIEW

- On April 23, 2024, the U.S. Federal Trade Commission (FTC) promulgated its final rule banning non-compete agreements for nearly all employees with very limited exception.
- The final rule provides that it is an unfair method of competition (and therefore, a violation of section 5 of the Federal Trade Commission Act) for persons to enter into non-competes.
- A violation of the Act permits the FTC to obtain equitable remedies, injunctions, and civil fines.
- The final rule was published in the Federal Register on May 7, 2024 as **16 C.F.R. § 910**.
- The rule is set to go into effect on **September 4, 2024** (the “Effective Date”) unless successfully stayed or blocked by pending legal challenges.

BACKGROUND: THE RULE IN A NUTSHELL

In general, the rule:

- 1) Prohibits employers from entering into new non-compete agreements after the Effective Date, except in the narrow context of the *sale of a business*.
- 2) Renders existing non-competes unenforceable, except for narrowly-defined *Senior Executives*.
- 3) Requires employers to notify workers of the unenforceability of any existing non-compete agreement by the Effective Date.
- 4) Prohibits employers from enforcing or attempting to enforce (or representing to any worker that they are subject to) any non-compete agreement after the Effective Date, unless covered by the *sale of business* or *Senior Executive* exception.

BACKGROUND: WHY IS THIS IMPORTANT?

- The impact of the ban is nationwide and affects every type of business in nearly every type of industry.
- Approximately one in five workers are subject to a non-compete. The rule would retroactively invalidate 30 million agreements.
- If the rule goes into effect, then employers using non-competes must take certain affirmative steps by no later than **September 4, 2024** to be compliant.
- Employers will need to timely implement effective alternative methods to protect their business interests from the threats caused by post-employment conduct.

BACKGROUND: TIMELINE

JANUARY 5, 2023

The rule was first proposed.

APRIL 23, 2024

FTC finalized and promulgated the final rule.

Ryan LLC filed lawsuit in the Northern District of Texas to block the rule.

APRIL 25, 2024

Chamber of Commerce filed lawsuit in the Eastern District of Texas to block the rule.

ATS Tree Services, LLC filed lawsuit in the Eastern District of Pennsylvania to block the rule.

MAY 7, 2024

The final rule was published in the Federal Register.

SEPTEMBER 4, 2024

The final rule will go into effect (the “**Effective Date**”), unless delayed or barred by the pending litigation.

THE LANGUAGE OF 16 CFR 910 AND HOW IT OPERATES

THE RULE: WHICH BUSINESS ORGANIZATIONS ARE COVERED?

- The rule covers all types of business entities – corporations, LLCs, sole proprietors, individuals who have someone working for them.
- There is not an employee headcount or company annual revenue threshold requirement. The rule is not limited to businesses of a certain size.
- The rule does not cover employers that are outside the FTC's jurisdiction and therefore cannot be subject to the rule:
 - *Banks, savings and loan institutions, federal credit unions, common carriers, air carriers, and certain non-profits.*

THE RULE: WHICH WORKERS ARE COVERED?

The rule defines “worker” as:

*“A natural person who works or who previously worked, whether paid or unpaid, without regard to the worker’s title or the worker’s status under any other State or Federal laws, including, but not limited to, whether the worker is an **employee**, **independent contractor**, **extern**, **intern**, **volunteer**, **apprentice**, or a **sole proprietor** who provides a service to a person. The term worker includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.”*

16 C.F.R. § 910.1

THE RULE: WHICH WORKERS ARE COVERED? (CONT.)

- In short, the rule applies to ALL workers
 - Full-time and part-time
 - Paid or unpaid
 - Independent contractors
 - Interns and externs
 - Volunteers
 - Apprentices
 - Franchisee and franchisor employees

THE RULE: WHAT IS PROHIBITED?

It is an unfair method of competition for a person:

- (i) To **enter into** or **attempt enter** into a non-compete clause;
- (ii) To **enforce** or **attempt to enforce** a non-compete clause;
- (iii) To **represent** that the worker is subject to a non-compete clause.

16 C.F.R. § 910.2(a)(1) (“Unfair methods of competition”)

THE RULE: WHAT AFFIRMATIVE STEPS ARE REQUIRED?

For each existing non-compete clause, the person who entered into the non-compete clause with the worker must provide clear and conspicuous notice to the worker by the effective date that the worker's non-compete clause will not be, and cannot legally be, enforced against the worker.

16 C.F.R. § 910.2(b) ("Unfair methods of competition")

THE RULE: WHAT IS A “NON-COMPETE CLAUSE”?

The rule defines “non-compete clause” as:

“(1) A term or condition of employment that **prohibits** a worker from, **penalizes** a worker for, or **functions to prevent** a worker from:

(i) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or

(ii) operating a business in the United States after the conclusion of the employment that includes the term or condition.

(2) . . . term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral. ”

16 C.F.R. § 910.1

THE RULE: WHAT IS A “NON-COMPETE CLAUSE”? (CONT.)

- “Non-competes” can take one of three forms:
 - “**prohibit**” = standard non-compete restriction
 - “**penalize**” = liquidated damages or buyback provision
 - “**functions to prevent**” = overbroad and onerous non-disclosure or non-solicit
- The rule does not apply to restrictions while the employee is still employed.
 - *Active employee can be prohibited from working for competitor or starting a competing business while still employed.*
- Does not apply to competition outside of the United States.
 - *Worker can be restricted from working for a competitor, or starting a competing business, if such business is outside the U.S.*

THE RULE: WHAT IS THE “SENIOR EXECUTIVE” EXCEPTION?

- It is only an exception for non-competes entered into **before** the Effective Date.
- If entered before the Effective Date, a non-compete with a “Senior Executive” is grandfathered in and can be enforced after the Effective Date. *(Therefore, the notice requirement does not apply).*
- Non-competes entered with Senior Executives **after** the Effective date are unenforceable and subject to the same prohibitions and with non-Senior Executives, meaning you cannot:
 - (1) enter into or attempt to enter into a non-compete clause after the Effective Date;
 - (2) enforce or attempt to enforce a non-compete clause entered into after the Effective Date;
 - (3) represent that a Senior Executive is subject to a non-compete clause entered into after the Effective Date.

THE RULE: WHO IS A “SENIOR EXECUTIVE”?

The rule defines “Senior Executive” as a “worker” who:

1. Was in a “policy-making” position (Job Duties Test), and
2. Made at least \$151,164 in total compensation in the preceding year (Compensation Test)

16 C.F.R. § 910.1

THE RULE: WHO IS A “SENIOR EXECUTIVE”? (CONT.)

- The Job Duties test requires the worker to have been in a “policy-making position.”
- “Policy-making position” means:

A business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority.

- **Does not include** officers of subsidiaries or affiliates of a common enterprise unless that person has policy-making authority over the common enterprise. **Policy-making authority over the subsidiary or affiliate alone is not enough.**
- **Does not include** the head of a division within a business if the decision-making is limited to the worker's division.

THE RULE: WHO IS A “SENIOR EXECUTIVE”? (CONT.)

- “Policy-making authority” means:

Final authority to make policy decisions that control significant aspects of a business entity or common enterprise and **does not include authority limited to advising or exerting influence over such policy decisions** or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise.

THE RULE: WHO IS A “SENIOR EXECUTIVE”? (CONT.)

- The Compensation Test requires the worker to have made at least \$151,164 in the preceding year.
- “Preceding year” can be the most recent: 52- week year, calendar year, fiscal year, or the most recent anniversary of hire year.
- Compensation can be annualized if the worker did not work full year.
- Total compensation may include:
 - *Salary, commissions, nondiscretionary bonuses, equity compensation, and other compensation agreed to that the worker knows of and can expect.*
- Total compensation does not include:
 - *Board and lodging, payments for medical insurance, payments for life insurance, contributions to retirement plans.*

THE RULE: WHAT IS THE “SALE OF BUSINESS” EXCEPTION?

- The rule does not apply when a non-compete is entered into by a person pursuant to a bona fide sale of:
 - 1) a business entity;
 - 2) the person's ownership interest in a business entity; or
 - 3) all or substantially all of a business entity's operating assets.
- This is limited to an agreement between the buyer and seller.
- The seller can agree to a non-compete individually, but not for any of the seller's workers (such as “key employees”).
- A bona fide sale is one that is made between **two independent parties at arm's length**, in which **the seller has a reasonable opportunity to negotiate** the terms of the sale.

16 C.F.R. § 910.3

THE RULE: ARE THERE ANY OTHER EXCEPTIONS?

1. Existing causes of action.

- *The rule does not apply “where a cause of action related to a non-compete clause accrued prior to the effective date.”*

2. Good faith.

- *A violation of the rule does not occur “where a person has a good-faith basis to believe that [the rule] is inapplicable.”*

3. Franchisor-Franchisee agreement.

- *The rule does not apply to non-compete agreements between a franchisor and a franchisee. However, the rule does apply to any workers employed by a franchisor or franchisee.*

IMPACT BEFORE VS. AFTER THE EFFECTIVE DATE

Before the Effective Date:

- Breaches of existing non-compete agreements that occur prior to the Effective Date can be enforced *after* the Effective Date.
- New non-compete agreements can be entered into, though they will only be enforceable after the Effective Date if they meet the Senior Executive or Sale of Business exceptions.

On and after the Effective Date:

- All pre-existing non-competes are void, unless meet Senior Executive or Sale of Business exception.
- No new on-compete agreements can be entered into, except for the seller in the sale of business.
- Employers must notify employees of unenforceability of existing non-competes by the Effective Date.

FTC'S THREE-STEPS TO COMPLY WITH THE RULE

- 1) Do not include non-competes in future employment contracts, paperwork, or websites.**
- 2) If you have active non-competes, give notice to those current and former workers who are not senior executives that their non-competes are unenforceable by the Effective Date.**
- 3) Do not enforce existing non-competes going forward for workers other than Senior Executives.**

See *FTC's Noncompete Clause Rule: A Compliance Guide for Businesses and Small Entities*: https://www.ftc.gov/system/files/ftc_gov/pdf/Business-and-Small-Entity-Compliance-Guide-updated.pdf

STEPS EMPLOYERS SHOULD TAKE NOW

STEPS TO TAKE NOW: CHECKLIST

1. Audit non-competes currently in place for Senior Executives.
2. Audit non-competes currently in place for non-Senior Executives.
3. Audit non-disclosure, non-solicit, and similar agreements.
4. Audit former employees' compliance with non-competes currently in effect.
5. Draft notice of unenforceability and identify method of communication.
6. Develop and implement alternative methods of protecting the business interests that the non-competes were aimed at protecting.

STEP 1: INVENTORY AND ASSESS UNIVERSE OF CURRENT NON-COMPETES WITH SENIOR EXECUTIVES

- Are there any Senior Executives currently not under a non-compete that should be?**
 - If YES, enter into the non-compete agreement *before September 4, 2024*.

- Are your pre-existing Senior Executive non-compete agreements enforceable under state non-compete law?**
 - If NO, make any necessary amendments *before September 4, 2024*.

- Do your pre-existing Senior Executive non-compete agreements contain sufficient and up-to-date restrictions?**
 - If NO, make any necessary amendments *before September 4, 2024*.

SIDE BAR: ENFORCEABILITY UNDER TEXAS COVENANTS NOT TO COMPETE ACT

- Ancillary to or part of an otherwise enforceable agreement**
- Consideration must be “reasonably related” to an “interest worthy of protection”**
- Reasonable time scope limitation.**
- Reasonable geographical area limitation.**
- Reasonable limitation on scope of activity to be restrained.**
- Restrictions cannot impose a greater restraint than necessary to protect the goodwill or other legitimate business interest of the employer**

Tex. Bus. & Com. Code Ann. § 15.50(a)

STEP 2: INVENTORY AND ASSESS UNIVERSE OF CURRENT NON-COMPETES WITH NON-SENIOR EXECUTIVES

- ❑ **Are there any non-competes currently in effect that will not meet the Senior Executive or Sale of Business exception? If YES:**
 - ❑ Identify all such workers (including former workers) who will need to receive notice on or before September 4, 2024.
 - ❑ Assess whether the current agreement has sufficient alternative protections (e.g., non-solicit and non-disclosure restrictions) and severability clauses.
 - ❑ If the current agreement does not have sufficient alternative protections, develop an alternative method of protection and implement on or before September 4, 2024.

STEP 3: INVENTORY AND ASSESS UNIVERSE OF CURRENT NON-SOLICIT AND NON-DISCLOSURE AGREEMENTS

- ❑ **Will the company rely on any current non-solicit and/or non-disclosure agreements with its workers in the future? If YES:**
 - ❑ Assess whether the terms and conditions are so restrictive that they operate as a non-compete to prevent the worker from getting a new job or starting a new business.
 - ❑ If the agreement “functions” as a non-compete:
 - (A) you cannot enforce these restrictions after Sept. 4.;
 - (B) you are required to provide notice of the unenforceability; and
 - (C) you should consider developing an alternative method (or amended agreement) to protect business interests by Sept. 4.
 - ❑ Assess whether the agreements meet state enforceability requirements for non-solicit and non-disclosure agreements.

STEP 4: AUDIT FORMER WORKERS' COMPLIANCE WITH NON-COMPETES CURRENTLY IN EFFECT

- Are there any former workers currently in breach of their non-compete ? If YES:**
 - Document breach before September 4, 2024 by cease/desist letter, lawsuit, or otherwise.

STEP 5: DRAFT NOTICE OF UNENFORCEABILITY AND IDENTIFY METHOD OF COMMUNICATION

- **WHO?** The notice must be provided to all workers subject to an existing non-compete (except Senior Executives).
 - *This includes former employees, independent contractors, consultants, etc.*
 - *You can send the notice to an over-inclusive group – e.g., **a mass company-wide email***
- **WHAT?** The notice must:
 - Be clear and conspicuous.
 - State that the non-compete will not be, and cannot legally be, enforced against the worker.
 - Identify the person/company that entered into the non-compete with the worker.

You are not required to formally rescind existing non-competes.
- **WHEN?** The notice must be communicated by the Effective Date.

STEP 5: DRAFT NOTICE OF UNENFORCEABILITY AND IDENTIFY METHOD OF COMMUNICATION (CONT.)

- **HOW?** The notice must be on paper and delivered via any of the following methods (at the company's discretion):
 - Hand delivery
 - Mail delivery at the worker's last known personal street address
 - Email delivery at an email belonging to the worker (including, work or personal)
 - Text message delivery at a mobile number belonging to the worker
- **If you do not have contact information for the former worker (i.e., no record of a street address, email address, or mobile phone number), you do not have to provide the notice.**

STEP 5: DRAFT NOTICE OF UNENFORCEABILITY AND IDENTIFY METHOD OF COMMUNICATION (CONT.)

- **SAFE HARBOR.** 16 CFR 910.2(b)(4) provides model language for the notice. If the company uses the model language, the company has complied with the notice requirement.
 - The FTC has a Word version of the model language on its website that can be used.
 - The FTC's website also includes versions of the model language in 6 languages in addition to English: *Spanish, Arabic, Tagalog, Simplified Chinese, Vietnamese, Korean.*
 - The company is not required to use a language other than English. However, if the company uses a language other than English, a copy must also be provided in English.

A new rule enforced by the Federal Trade Commission makes it unlawful for us to enforce a non-compete clause. As of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE], [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] following your employment with [EMPLOYER NAME].

The FTC's new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit ftc.gov/noncompetes. Complete and accurate translations of the notice in certain languages other than English, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean, are available at ftc.gov/noncompetes.

STEP 6: DEVELOP AND IMPLEMENT ALTERNATIVE METHODS OF PROTECTING THE BUSINESS INTERESTS THAT THE NON-COMPETES WERE AIMED AT PROTECTING

TO BE COVERED IN THE NEXT SECTION . . .

PRACTICAL SOLUTIONS: ALTERNATIVES TO NON-COMPETES

ALTERNATIVE SOLUTIONS

STEP 1: Identify the legitimate business interest worthy of protection that the non-compete was put in place to protect.

- Examples:
 - Confidential and proprietary information, such as:
 - Information concerning acquisition strategies, compensation and benefits formulas, and payment rates
 - Trade secrets
 - Business goodwill
 - Customer relationships
 - Employee relationships
 - Specialized training.
 - Customer information, such as:
 - Knowledge of a unique customer base and knowledge of the equipment or products used by each of the employer's customers

ALTERNATIVE SOLUTIONS

STEP 2: Is there an alternative agreement or policy that can protect that same interest?

Confidential and proprietary info.	<ul style="list-style-type: none"> • Non-disclosure agreement. • Return of company property agreement. • Invention assignment agreement. • Rigorous internal policies and procedures to safeguard confidential information.
Trade secrets.	<ul style="list-style-type: none"> • <i>Same as above, plus:</i> <ul style="list-style-type: none"> ○ Federal and state trade secret misappropriation law. ○ Inevitable disclosure doctrine.
Business goodwill, customer and employee relationships.	<ul style="list-style-type: none"> • Non-solicitation of customer covenants. • Non-solicitation of employee covenants. • Garden leave
Specialized training.	<ul style="list-style-type: none"> • Term employment agreement. • Training repayment agreement.

ALTERNATIVE SOLUTIONS – CONFIDENTIALITY AGREEMENTS, POLICIES, AND PROCEDURES

Non-Disclosure Agreements

(A) Non-disclosure agreement cannot be a *de facto* non-compete.

- Cannot be so broadly written that it effectively precludes the worker from working in the same field post-employment.
- Examples of *de facto* non-competes from the FTC guidance:
 - An NDA that defined “confidential information” “so broadly to prevent [the plaintiff] in perpetuity from doing any work in the securities field.”
 - “An 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.”
 - “[A]n NDA that bars a worker from disclosing any information or knowledge the worker may obtain during their employment whatsoever, including publicly available information.”

ALTERNATIVE SOLUTIONS – CONFIDENTIALITY AGREEMENTS, POLICIES, AND PROCEDURES (CONT.)

Non-Disclosure Agreements

(B) How to draft an enforceable & effective non-disclosure agreement.

1. Identify the Company's confidential information with some specificity.
 - **Exclude** information that
 - (a) is (or becomes) publicly available (other than by a breach), is generally known in the industry, was already known by (or available to) recipient on a non-confidential basis, or that the recipient develops without use of the confidential information;
 - (b) the Company does not take safeguards to protect;
 - (c) is not valuable to the Company.
 - Expressly include customer information, to the extent such information does not fall within (a), (b), or (c) above.

ALTERNATIVE SOLUTIONS – CONFIDENTIALITY AGREEMENTS, POLICIES, AND PROCEDURES (CONT.)

Non-Disclosure Agreements

2. Specify what the worker is prohibited from doing - unauthorized use and disclosure of the confidential information.
 - Include: prohibited disclosure to others within the organization who do not have a business purpose for the confidential information.
 - Do not prohibit the worker from disclosure of information that:
 - (a) arises from the worker's general training, knowledge, skill or experience, gained on the job or otherwise;
 - (b) is readily ascertainable to other employers or the general public;
 - (c) cannot be legally prohibited from disclosure (e.g., sexual harassment and assault, by court order, etc.

ALTERNATIVE SOLUTIONS – CONFIDENTIALITY AGREEMENTS, POLICIES, AND PROCEDURES (CONT.)

Non-Disclosure Agreements

3. Specify where confidential information may be stored and who is permitted to have access rights.
4. Include a return of company property agreement.
5. Include an invention assignment agreement.

ALTERNATIVE SOLUTIONS – CONFIDENTIALITY AGREEMENTS, POLICIES, AND PROCEDURES (CONT.)

Implement strong policies and procedures for keeping information confidential.

- Computer use and access policies
- Policies for downloading and emailing to personal email
- Policies for use of personal devices
- Telework policy for remote access to confidential information
- Off-boarding policy for exiting employees
- Social media policy

ALTERNATIVE SOLUTIONS – INEVITABLE DISCLOSURE DOCTRINE

- The FTC guidance identified the doctrine as a potential alternative remedy.
- Allows a court to enjoin a former worker from working for a competitor in a position where it is “inevitable” that the worker will use or disclose the employer’s trade secrets in the worker’s new position. *Some Texas cases have applied the doctrine when it is “probable” the former employee will use the information.*
- Does not require proof that the worker misappropriated the employer’s trade secrets or confidential information. Some cases apply the doctrine merely when the worker is in “possession” of the confidential information, even if obtained lawfully.
- In the absence of an enforceable non-compete agreement, the injunction restricts the employee from working for a competitor in a position where there is an inherent risk of disclosure. Thus, no contractual obligation required. The court essentially implies a non-compete agreement where none exists.
- Texas appellate courts vary in applying the inevitable disclosure doctrine when granting injunctive relief under TUTSA.

ALTERNATIVE SOLUTIONS – ENFORCEABLE NON-SOLICITATION COVENANTS

- Non-solicitation of customers and employees covenants are not subject to the FTC rule and are enforceable if (1) they do not “function” as a non-compete, and (2) meet state law enforceability requirements (e.g., Texas Non-Compete Act reasonable limitations).
- “Non-solicitation agreements are generally not non-compete clauses under the final rule because, while they restrict who a worker may contact after they leave their job, they do not by their terms or necessarily in their effect prevent a worker from seeking or accepting other work or starting a business.” – FTC Guidance.
- However, a non-solicit is **not enforceable** if it spans such a large scope of activity that it functions to prevent the worker from seeking or accepting other work or starting a business.

ALTERNATIVE SOLUTIONS – ENFORCEABLE NON-SOLICITATION COVENANTS (CONT.)

Drafting effective and enforceable non-solicit covenants.

- Follow reasonableness requirements of Texas Covenants Not to Compete Act.
 - Ancillary to or part of an otherwise enforceable agreement
 - Consideration must be “reasonably related” to an “interest worthy of protection”
 - Reasonable time scope limitation.
 - Reasonable geographical area limitation.
 - Reasonable limitation on scope of activity to be restrained.
 - Restrictions cannot impose a greater restraint than necessary to protect the goodwill or other legitimate business interest of the employer
- The non-solicit should be tailored to give the worker the maximum amount of freedom to seek or accept new work, or start a business, while still protecting the employer’s customer and employee relationships.

ALTERNATIVE SOLUTIONS – ENFORCEABLE NON-SOLICITATION COVENANTS (CONT.)

Non-solicit of customers:

- When the protectable interest is the customer base, such as when the non-solicit is applied to a worker in a personal services occupation (e.g., business development, sales, etc.), the worker should only be prohibited from contacting customers (and prospective customers) that the worker **had contact with** (or **knew confidential information about**) **during a reasonable timeframe** before he/she left employment.
 - *“In the case of covenants applied to a personal services occupation, such as that of a salesman, a restraint on client solicitation is overbroad and unreasonable when it extends to clients with whom the employee had no dealings during his [or her] employment.”* John R. Ray & Sons, Inc. v. Stroman, 923 S.W.2d 80, 85 (Tex. App.–Houston [14th Dist.] 1996, writ denied)
- The off-limits customer list can potentially be broader in the case of an executive when the protectable interest is not just the customer base, but also trade secrets such as competitive technology. - See M-I LLC v. Stelly, 733 F. Supp. 2d 759 (S.D. Tex. 2010).

ALTERNATIVE SOLUTIONS – ENFORCEABLE NON-SOLICITATION COVENANTS (CONT.)

Non-solicit of customers – key terms:

1. Identify the off-limits customers.

(A) “any client or customer of Company with whom Employee had contact with for the purpose of the Company providing services or products to such client or customer, or whom Employee had access to Confidential Information about, during the twenty-four months prior to Employee’s termination with the company;” and

(B) “any person or business entity with whom Employee spent time and resources courting or developing as a potential purchaser of Company’s services or products during the twenty-four months prior to Employee’s termination with the Company.”

ALTERNATIVE SOLUTIONS – ENFORCEABLE NON-SOLICITATION COVENANTS (CONT.)

Non-solicit of customers – key terms:

2. Identify the prohibited activity.
 - *Ex. “Employee is prohibited from contacting the Customers for the purpose of selling a Competing Business’ services or products to such Customers, to the extent such services or products are the same or similar to the services and/or products Employee sold to (or attempted to sell to) the Customer during Employee’s employment with the Company.”*
3. Define the Restricted Period.
 - *Should be a reasonable duration that is not longer than necessary to protect the employer’s business interest of maintaining its customer.*
 - *If customers frequently change or are on short-term contracts, the duration should be proportional to the duration that the employer should expect to maintain the customer relationship absent solicitation.*
4. Define the Competing Business.

ALTERNATIVE SOLUTIONS – ENFORCEABLE NON-SOLICITATION COVENANTS (CONT.)

Non-solicit of employees – key terms:

1. Identify the off-limits employees.

- Should not be a blanket no hire list.
- Should be limited to the employees that the worker:
 - (A) directly worked with at the Company at any time during a reasonable time period preceding termination of employment, or
 - (B) knew or had access to competitive information about (for example, pertaining to the employee's work habits/ethic, compensation, network, specialized skills and knowledge).

ALTERNATIVE SOLUTIONS – ENFORCEABLE NON-SOLICITATION COVENANTS (CONT.)

Non-solicit of employees – key terms:

2. Identify the prohibited activity.

- *Ex. “Prohibited from attempting to induce any Employee (defined per criteria above) from terminating his or her employment with Company to work for a Competing Business.”*
- *Exclude: general marketing/advertising/mass solicitation that is not aimed at the individual*

3. Define the Restricted Period.

- *Should be a reasonable duration that is not longer than necessary to protect the employer’s business interest of maintaining its employee base.*

4. Define the Competing Business.

ALTERNATIVE SOLUTIONS – GARDEN LEAVE

- The FTC rule only applies to **post**-employment restrictions.
- In a typical garden leave agreement, the employee remains employed by the company and continues to receive salary and benefits, but he is relieved of all or some of his job duties during the garden leave period .
- The FTC rule allows employers to continue to restrict current employees from working for a competitor while still employed.
- Therefore, because a worker on garden leave is still employed, the rule allows the employer to enforce a non-compete restriction.

*Per the FTC in its webinar and in the supplementary guidance : “If under a garden leave agreement, the employee is receiving **the same annual compensation and benefits** on a pro rata basis – it would not be a non-compete agreement.”*

ALTERNATIVE SOLUTIONS – TRAINING REPAYMENT AGREEMENTS

- Training Repayment Agreements (“TRAPs”): worker agrees to repayment of training expenses if the worker leaves employment before a designated time.
- FTC declined to categorically prohibit all TRAPs relating to leaving employment.
 - However:
 - TRAPs that impose out-of-pocket costs for leaving employment that are disproportional to the value of the training expenses may “function” as a non-compete and therefore be barred.
 - “A provision requiring the repayment of a bonus if the worker leaves before a certain period of time would not be a non-compete under § 910.1 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.”

CHECKLIST

1. Audit non-competes currently in place for Senior Executives.
2. Audit non-competes currently in place for non-Senior Executives.
3. Audit non-disclosure, non-solicit, and similar agreements.
4. Audit former employees' compliance with non-competes currently in effect.
5. Draft notice of unenforceability and identify method of communication.
6. Develop and implement alternative methods of protecting the business interests that the non-competes were aimed at protecting.

STATUS OF LEGAL CHALLENGES TO 16 CFR 910

STATUS OF PENDING LITIGATION

Northern District of Texas: *Ryan LLC v. FTC*

- Chamber of Commerce intervened (which stayed Chamber's case against the FTC in the Eastern District of TX)
- Plaintiff filed a motion for stay of the effective date of the rule and for a preliminary injunction

Arguments against the FTC rule

1. FTC Lacks the authority to promulgate regulations that define “unfair methods of competition.”
 - *Congress did not grant the FTC authority to decide the major question of whether non-compete agreements are categorically unfair and anti-competitive. FTC has no such rule-making authority.*
2. Non-competes are not categorically unlawful.
3. Retroactive application of the rule to void previously-executed agreements is unlawful.
4. FTC acted arbitrarily and capriciously.

STATUS OF PENDING LITIGATION

Northern District of Texas: *Ryan LLC v. FTC*

- Schedule:
 - **June 12** - Briefing deadline
 - **June 17** - Potential hearing date
 - **July 3** - Court will issue a decision on the merits of Plaintiff's Motion for Stay of the Effective Date and Preliminary Injunction

Eastern District of Pennsylvania: *ATS Tree Services, LLC v. FTC*

- A decision on the merits of Plaintiff's Motion for Preliminary Injunction and Stay of Effective Date by **July 23, 2024**

RESOURCES

RESOURCES

- FTC Compliance Guide for Businesses and Small Entities:
https://www.ftc.gov/system/files/ftc_gov/pdf/Business-and-Small-Entity-Compliance-Guide-updated.pdf
- FTC Final Rule with Supplementary Information:
https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf