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To: Martin Shenkman <Shenkman@shenkmanlaw.com>
Subject: Martin M. Shenkman, Alan Gassman, Jonathan Blattmachr, Anthony Del Rosario and Netzy Preciado: FTC Bans Non-Competes Steve Leimberg's Business Entities Newsletter

Steve Leimberg's Business Entities Email Newsletter - Archive Message #294

Date:	**01-May-24**
From:	**Steve Leimberg's Business Entities Newsletter**
Subject:	**Martin M. Shenkman, Alan Gassman, Jonathan Blattmachr, Anthony Del Rosario and Netzy Preciado: FTC Bans Non-Competes**

"The new FTC Rule will widely impact American business and the American public. Workers should know their rights and understand how the final decision in the lawsuit the FTC just filed will affect them. Companies should immediately start considering the notice provisions and implementing restrictions on senior executives and reviewing their NDAs and non-solicitation agreements before the effective date. In some situations, it may be possible to change the job description of an individual so that he or she has policy making authority, and receives over $151,164 a year in compensation in order to assure that a non-competition covenant does not become unenforceable when the new rules apply beginning 120 days after publication in the Federal Register. For some reason it does not seem to have been published in the Federal Register yet."

Martin M Shenkman, **Alan Gassman**, **Jonathan Blattmachr**, **Anthony Del Rosario** and **Netzy Preciado** provide members with commentary that examines the issues raised by the FTC's recent ban of non-competition agreements.

Martin M. Shenkman is an attorney in private practice in New York who concentrates on estate planning. He is the author of 42 books and more than 1,200 articles. He is a member of the NAEPC Board of Directors (Emeritus), served on the Board of the American Brain Foundation, the American Cancer Society's National Professional Advisor Network, Weill Cornell Medicine Professional Advisory Council, and is active in other charitable organizations.

Alan S. Gassman, J.D., LL.M. is a partner at the Clearwater, Florida law firm of **Gassman, Crotty & Denicolo, P.A.** He is a frequent contributor to LISI and has published numerous articles in publications such as BNA Tax & Accounting, Estate Planning, Trust and Estates, and recently co-authored an article entitled *Community Property Planning in Non-Community Property States & Understanding the Florida Community Property Trust Act Opportunities, Developments and Traps for the Unwary* in the Stetson Business Law Review. Mr. Gassman is a board certified Trust and Estate lawyer. Alan Gassman, and others are working together to improve EstateView Estate and Estate Tax Planning Software. His e-mail address is alan@gassmanpa.com.

Jonathan G. Blattmachr is **Director of Estate Planning** for **Peak Trust Company**, formerly Alaska Trust Company and a Director of Pioneer Wealth Partners, LLC in a boutique wealth advisory firm in Manhattan. He is a Principal at Interactive Legal Services Management, LLC and a retired member of Milbank Tweed Hadley & McCloy LLP. He is recognized as one of the most creative trusts and estates lawyers in the country and is listed in The Best Lawyers in America in New York, Alaska and in California. He graduated from Columbia University School of Law, where he was recognized as a Harlan Fiske Stone Scholar. He has written and lectured extensively on estate and trust taxation and charitable giving. He is author & co-author of five books and more than 500 articles on estate planning and tax topics. Jonathan served two years of active duty in the US Army, rising to the rank of Captain and was awarded the Army Commendation Medal. He is an instrument rated land and seaplane pilot and a licensed hunting and fishing guide in the Town of Southampton, New York.

Anthony Del Rosario is a 3rd-year law student at Stetson University College of Law. Anthony graduated from USF with a Bachelor of Arts in Philosophy and works as the head law clerk at Gassman, Crotty & Denicolo, P.A., in Clearwater, Florida. In spring 2023, Anthony had the privilege of interning in the Middle District of Florida s Bankruptcy Court for Judge Robert A. Colton. Anthony has a passion for bankruptcy, tax law, and estate planning.

Netzy Preciado is a 3rd-year student at Stetson University College of Law currently pursuing a joint law degree and MBA. She graduated from USF with a Bachelor's degree in Accounting. Netzy also interned at the IRS Office of Chief Counsel over the summer and was an extern for the Honorable Judge Honeywell at the United States District Court for the

Middle District of Florida. She plans to work for the IRS OCC after graduation.

Here is their commentary:

EXECUTIVE SUMMARY:

On April 23, 2024, the Federal Trade Commission (FTC) issued its final rule, 16 CFR Part 910, banning the use of non-compete agreements nationwide.[1] The FTC's new rule will be effective 120 days after publication into the Federal Register.[2] As of April 26, 2024, it does not appear that it was yet published in the Federal Register. The regulations were first proposed in January of 2023 and follow hearings and lobbying since then.

Non-compete agreements are agreements that prohibit employees from working for competitors of the ex-employer for a stated period of time, and are typically limited to a specific location/geographic area, "following the separation of employment."[3] The Final Rule defines the non-compete clauses that will be banned as being:

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) For the purposes of this part 910, term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.[4]

The actual definition is, however, broader because under the Regulations arrangements that have the effect of a non-compete can be considered to be one, even if structured differently. Therefore, restrictions on using or

disclosing confidential information, hiring other personnel, etc. may all be banned under certain circumstances under these new rules.

Under these rules, the enforcement of non-compete agreements will be considered to be an "unfair method of competition" and a violation of section 5 of the Federal Trade Commission Act ("FTC Act"), which governs "Unfair or Deceptive Acts or Practices."

The rule was issued with the stated purposes of "protecting the fundamental freedom of workers to change jobs, increasing innovation, and fostering new business formation."[5]

According to FTC Chair Lina M. Khan:

> The FTC's final rule to ban non-competes will ensure Americans have the freedom to pursue a new job, start a new business, or bring a new idea to the market.[6]

Others take an opposing view that, in many cases, restrictions or prohibitions on using non-competes restrict the freedom to contract and will cause irreparable harm to many businesses.

The FTC expects new business formation to grow at a rate of 2.7% per year (8,500 more businesses created each year) more than would otherwise have occurred, higher earnings for workers ($524 more per year per worker on average), and to increase innovation, with an average increase of "17,000 to 29,000 more patents each year for the next 10 years" as a result of these rules.

This newsletter will explain both this new law, and what practitioners can expect when assisting clients who are employees and employers.

FACTS:

Overall, the final rule affects existing non-competes, subject to limited exceptions, prevents the enforcement of future non-competes, and imposes notice requirements on employers who are currently in non-compete with their employees.

General Rule

Under 16 CFR 910, for non-competes that existed prior to the effective date of the final rule, employers will no longer be able to enforce these restrictive covenants since such a practice is banned as an unfair method of

competition unless the employee is a "senior executive." Key language of the new rules reads as follows:

> 910.2(a)(1) *Workers other than senior executives*. With respect to a worker other than a senior executive, it is an unfair method of competition for a person:
>
> (i) To enter into or attempt to enter into a non-compete clause;
>
> (ii) To enforce or attempt to enforce a non-compete clause; or
>
> (iii) To represent that the worker is subject to a non-compete clause.[7]
>
> 910.1(2) *Senior executive* means a worker who:
>
> (1) was in a "policy-making position"[8] and,
>
> (2) Received from a person for the employment:
>
> (i) Total annual compensation of at least $151,164 in the preceding year; or
>
> (ii) Total compensation of at least $151,164 when annualized if the worker was employed during only part of the preceding year; or
>
> (iii) Total compensation of at least $151,164 when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete clause.[9]

Even if the employee is a senior executive, employers are not permitted to enter into or enforce any new non-competes unless the senior executive makes policy and earns more than $151,164 a year under one of the three (3) prongs above.[10]

> 910.2(a)(2) *Senior executives*. With respect to a senior executive, it is an unfair method of competition for a person:
>
> (i) To enter into or attempt to enter into a non-compete clause;

(ii) To enforce or attempt to enforce a non-compete clause entered into after the effective date; or

(iii) To represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date.[11]

The preamble to the Rule provides that: “For example, many executives in what is often called the “C-suite” will likely be senior executives if they are making decisions that have a significant impact on the business, such as important policies that affect most or all of the business. Partners in a business, such as physician partners of an independent physician practice, would also generally qualify as senior executives under the duties prong, assuming the partners have authority to make policy decisions about the business, but medical doctors working for hospitals as physicians will generally not be considered to be senior executives so that non-competes against thousands of physicians in the United States of America may disappear in approximately 120 days.

The specific language of the preamble to the Regulation, which describes the type of "policy-making authority" that is needed for a senior executive’s non-competition covenant to not be struck down by the Regulation includes the following:

> Section 910.1 defines "policy-making authority" as final authority to make policy decisions that control significant aspects of a business entity or a common enterprise. The definition further states that policy-making authority 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.
>
> Accordingly, for a worker to be a senior executive, in addition to meeting the compensation threshold, the worker must be at the level of a president, chief executive officer or the equivalent, officer (defined in § 910.1) or in a position that has similar authority to a president or officer. Further, an officer or other qualifying person must have policy-making authority. Presidents, chief executive officers, and their equivalents are presumed to be senior executives (i.e., employers do not need to consider the further element of

"policy-making authority"). The term "chief executive officer or the equivalent" was added to the definition of "policy-making position" to increase clarity on who was included and to reflect the wider range of businesses with various structures that are subject to the final rule (as compared to SEC Rule 3b-7). The definition of "policy-making position" includes workers with equivalent authority because job titles and specific duties may vary between companies. This ensures that the term "senior executive" is broad enough to cover more than just a president or chief executive officer, especially for larger companies, as others may have final policy-making authority over significant aspects of a business entity.

For example, many executives in what is often called the "C-suite" will likely be senior executives if they are making decisions that have a significant impact on the business, such as important policies that affect most or all of the business. Partners in a business, such as physician partners of an independent physician practice, would also generally qualify as senior executives under the duties prong, assuming the partners have authority to make policy decisions about the business. The Commission notes that such partners would also likely fall under the sale of business exception in § 910.3 if the partner leaves the practice and sells their shares of the practice. In contrast, a physician who works within a hospital system but does not have policy-making authority over the organization as a whole would not qualify.

The Commission changed some aspects of SEC Rule 3b-7 to fit the context of this rulemaking. First, because § 910.2(a)(2) will extend to non-public companies, unlike SEC regulations, the final rule's definition of "policy-making position" does not include the phrase "any vice president of the registrant in charge of a principal business unit, division or function (such as sales, administration or finance)" in the definition of "executive officer." The Commission believes that in the context of this final rule, in which the definition is relevant to a broader array of entities than public companies, that phrase would encompass workers who, despite their titles, are among those who are likely to be coerced or exploited by non-competes. For example, this aspect of the definition can be too easily applied

to managers of small departments, who the Commission finds are unlikely to have bargained for their non-competes. At the same time, a manager who does in fact have policy-making authority would meet the definition of "officer" in § 910.1 and thus be included in the definition of senior executives (if the manager also meets the compensation threshold). Similarly, depending on the organization, a vice president may have final policy-making authority over significant aspects of a business entity. The adapted definition is based on functional job duties rather than formal job titles.

Second, SEC Rule 3b-7 uses the term "policy making function" as part of its definition of the types of job duties that could classify a person as an "executive officer." While the term "policy making function" is undefined in SEC Rule 3b-7 and other SEC regulations, the Commission believes that defining the term "policy-making authority" in § 910.1 would provide greater clarity and facilitate compliance with the final rule. The final rule applies to a wider range of business entities than SEC rules, and the Commission seeks to minimize the need to consult with counsel about the meaning of this term. The Commission is also concerned that if the term is left undefined, employers could, inadvertently or otherwise, label too many workers who have any involvement in the employer's policy making as senior executives, especially workers without bargaining power.

*** * ***

The Commission defines "policy-making authority" in the final rule as "final authority to make policy decisions that control significant aspects of a business entity and does not include authority limited to advising or exerting influence over such policy decisions." Adding this definition provides stakeholders with additional clarity as to what type of authority meets the definition of "senior executive" and prevents overbroad application of the definition. It expressly does not include workers who merely advise on or influence policy, as a wide range of workers in an organization can advise on or influence policy without being a senior executive.

In order to ensure that lower-level workers, whom the Commission finds likely experience exploitation and coercion, are not included in the definition of senior executive, policy-making authority is assessed based on the business as a whole, not a particular office, department, or other sublevel. It considers the authority a worker has to make policy decisions that control a significant aspect of a business entity without needing a higher-level worker's approval. For example, if the head of a marketing division in a manufacturing firm only makes policy decisions for the marketing division, and those decisions do not control significant aspects of the business (which would likely be decisions that impact the business outside the marketing division), that worker would not be considered a senior executive. Similarly, in the medical context, neither the head of a hospital's surgery practice nor a physician who runs an internal medical practice that is part of a hospital system would be senior executives, assuming they are decision-makers only for their particular division. The definition is limited to the workers with sufficient pay and authority such that they are more likely to have meaningful bargaining power and actually-negotiated their non-competes.

For the same reason, the Commission added language to the definitions of "policy-making authority" and "policy-making position" to exclude from the definition of "senior executives" workers with policy-making authority over only a subsidiary or affiliate of a common enterprise who do not have policy-making authority over the common enterprise.

*** * ***

Therefore, the definitions of policy-making authority and policy-making position include provisions whose purpose is to exclude those executives of a subsidiary or affiliate of a common enterprise from being considered senior executives. For example, if a business operates in several States and its operations in each State are organized as their own corporation, assuming these businesses and the parent company meet the criteria for a common enterprise, the head of each State corporation would not be a senior executive. Rather, only the senior executives of the parent

> company (or whichever company is making policy decisions for the common enterprise) could qualify as senior executives for purposes of this final rule, because they are the workers with the highest level of authority in the organization and most likely to have bargaining power and a bespoke, negotiated agreement. However, a worker could qualify as a senior executive even if they were an executive of one or more subsidiaries or affiliates of the common enterprise, so long as that senior executive exercised policy-making authority over the common enterprise in its entirety. These provisions are consistent with the approach taken elsewhere in this final rule to focus on real-world implications and authority rather than formal titles, labels, or designations.

The commission further notes that individuals who are considered to be "physician partners" of an independent physician practice would also likely fall under the sale of business exception in § 910.3 if the partner leaves the practice and sells their shares of the practice. It appears that an individual who works for a company and has the ability to give management input or to manage a small division or department of the company will not be considered to have policy making authority.[12] Nevertheless, this will be a fact intensive test that will be a close call in many cases.

For example, five (5) doctors who are partners in a medical practice may each have significant input on the practice as senior executives making policy decisions, but what if there are twenty-five (25) of them? However, the preamble of the Rule included some further clarification stating that “to ensure that lower-level workers, whom the Commission finds likely experience exploitation and coercion, are not included in the definition of senior executive, policy-making authority is assessed based on the business as a whole, not a particular office, department, or other sublevel.”[13] Additionally, the Commission further clarified that language was added “to the definition of ‘policy making authority’ and ‘policy-making position’ to exclude from the definition of “senior executives” workers with policy-making authority over only a subsidiary or affiliate of a common enterprise who does not have policy-making authority over the common enterprise.”[14]

The FTC estimates that only about 1% of existing non-compete clauses or agreements are with Senior Executives, so this carve-out for policy making senior executives will not be relevant to many such arrangements. Because

pre-existing restrictions on Senior Executives may be enforceable, employers may be well advised to attempt to require employees to be more involved with policy making and assure that they earn more than $152,000 per year to attempt to have non-compete agreements, non-disclosure agreements, or similar arrangements be enforceable before the new rules take effect.[15] In many cases, executives and professionals are required to effectuate such duties as are reasonably requested by an employer. Employers who, for example, are only having their physician clients practice medicine may wish to quickly implement policy making participation duties and protocols without delay. Consulting firms will be very busy over the next 4 months!

The Notice Requirement

For all non-competes that are being neutralized, employers are required to, "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] unless the "person that is required to provide notice… has no record of a street address, email address, or mobile telephone number for the impacted individuals."[17]

Consider the implications of this to a large employer. It has been common to have non-compete, non-disclosure, and other agreements survive retirement or other terminations. So, some employers will have to identify all prior (i.e., not current) employees who may now be subject to a non-compete or similar agreements that are becoming unenforceable and to notify them.

Is it sufficient that the employer have no record of contact information for a former employee? What might that actually mean? Will old offsite storage copies of former employee personnel files have to be searched? Will detectives need to be hired to find ex-employees? What steps must, or should, be taken to confirm "no record"? Is there any obligation to at least try an internet search to identify contact information? It does not appear so but given the ambiguities perhaps those efforts should both be made and documented to show good faith.

The preamble to the Rule provides: "Several commenters emphasized the importance of notice, especially for former workers who may be actively refraining from competitive activity (in compliance with a non-compete), and who may continue to do so if they are not informed that their non-compete

is no longer in effect. One commenter highlighted the importance of notice, because a non-compete may be coercive regardless of its enforceability."

When Must Notice Be Given

The preamble to the final Rule provides: "The final rule also requires covered businesses to provide notice by the effective date, rather than 45 days thereafter, to simplify the final rule and to secure its benefits for competition in labor markets and product and service markets as soon as practicable." This might mean that employers should immediately begin searching records to identify former employees who may have in the past been subject to non-compete agreements, as well as current employees subject to such restrictions.

This is separate and apart from the vague differentiation as to which of those many employees may be characterized as "Senior Executives." And, given that the FTC has indicated that non-disclosure and other arrangements may also be covered by the new rule if they are tantamount to a non-compete, employers may be advised to search those records and employee files as well.

The question then is whether a legal analysis will be required to determine whether those other types of restrictions arise to the level of a non-compete under the Rule? If the employer wants to forgo the cost of such a legal analysis, and considering the cost involved, should they give notice to those employees that they may be subject to the Rule and that those other restrictions may not be binding? That type of vague notice may not comply with the notice requirement discussed in more detail below.

Consider the mechanics and burdens of all of the above. If an employer's employment records are all digitized they may be able to search key words such as: "non-compete," "noncompete," non-disclosure," "nondisclosure," etc. and identify employment agreements. But what if different terminology was used in prior agreements? How will those be identified? What of employers whose digitized records were not OCR'd? What of employers who never scanned old records? Is there a requirement to go to past records more than some number of years old? Might it be advisable for employers to review their document destruction policies now or is it already too late?

Will directors and officers liability insurance carriers be contacted and will claims against the policies be made in situations where the address cannot

be found and the officers and directors of a company have exposure for the lost earnings of a former employee who is not notified of the situation?

This exception exists because the notice must identify the employer and be on paper and delivered to the worker by hand, or by mail at the worker's last known personal street address, or sent to the worker's email address:

> 910.2(b)(2) *Form of notice*. The notice to the worker required by paragraph (b)(1) of this section must:
>
> (i) Identify the person who entered into the non-compete clause with the worker;
>
> (ii) Be on paper delivered by hand to the worker, or by mail at the worker's last known personal street address, or by email at an email address belong to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belong to the worker.[18]

The FTC provided model language, illustrating what can constitute a "clear and conspicuous" notice,

> 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. 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 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 [*link to final rule landing page*]. Complete and accurate translations of the notice in certain languages other than English,

including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean are available at [URL on FTC's website].[19]

Exceptions

The final rule provides exceptions for non-competes entered into pursuant to bona fide sales of businesses, existing causes of action, and for non-competes where the person has a good faith basis for believing that this Part 910 is inapplicable:

> 910.3(a) *Bona fide sales of business*. Non-competes entered into by a person pursuant to a "bona fide sale of a business entity, of the person's ownership interest in the business entity, or of all or substantially all of a business entity's operating assets,"[20]

One very important question that will arise when an employee has sold his business or an interest in the business and has continued employment is whether the non-compete enforcement is limited to a specific term, regardless of whether the employee continues in employment under a non-competition agreement that extends beyond the term. For example, in Florida, a non-competition agreement for the sale of a business is considered to be presumed reasonable, and thus enforceable for up to 3 years but unreasonable if it is more than 7 years.[21] However, for employment it is presumed to be reasonable until two (2) years after termination of employment.

For example, if Mary Singh sells her medical practice for a million dollars in 2018 and signed a ten year Employment Agreement along with a non-compete that applied for five years after the purchase (until 2023) and until two years after her last date of employment. Under state law, the non-compete from the sale of assets agreements is no longer enforceable but the non-compete from the Employment Agreement is still enforceable. Do the Regulations invalidate the non-compete that is otherwise enforceable under the Employment Agreement because the Employment Agreement was the result of a sale of assets, or not?

If so, then a great many practice management companies that paid significant amounts to purchase and now operate medical and other professional practices are going to risk suffering significant losses, when the former owner professionals who are not paid less than fair market value walk across the street to compete against the organization that paid them the premium.

Does the above exception for the sale of a business or an interest therein apply if the business is not sold in its entirety and only the affected employee sells his or her interests in the business? The example from the Preamble to the Regulations above about a physician selling his or her interest in a practice certainly suggests that it is sufficient for an employee to merely sell their share of the business. Might that provide a means to circumvent the new Rule by providing some equity to an employee, and when a sale is triggered, a restrictive non-compete could then be applied? What percentage of a business or company would need to be sold to make this enforceable?

The preamble further provides that: "To address commenters' concerns that employers will use sham transactions, stock-transfer schemes or other mechanisms designed to evade the rule, § 910.3(a) requires that to fall under the exemption, a non-compete must be entered into pursuant to a bona fide sale." Again, this is another vague fact-sensitive standard that will be difficult to interpret. But clearly, if the equity and its sale are a "sham" to endeavor to attach restrictions that would otherwise not be permitted, under the Rule that would not be permitted:

> 910.3(b) *Existing causes of action*. Existing causes of action that "accrued prior to the effective date,"[22] and
>
> 910.3(c) *Good faith*. For non-competes that were entered into or enforced "where a person has a good-faith basis to believe that this part 910 is inapplicable."[23]

COMMENT:

The FTC estimates that approximately 18% of the work force, or 30 million American workers, are bound by non-compete agreements, a number they say is a conservative estimate.[24] That figure translates to one in five Americans, which is an overwhelming number. Therefore, many people are affected by non-compete agreements.

Non-compete agreements have often been used to keep people without negotiating clout stuck in those positions. They are favored by companies, since it helps safeguard their existence by reducing competition, but of course are disfavored by employees. Many workers that have been bound by non-compete agreements have said it severely limited their freedom and ability to secure a new job, start a business, and to thereby generate income to support their families. Some employers abused the situation by

waiting until an employee was in an unfavorable position to unfairly negotiate a non-compete or similar restriction.

An example of a situation where a non-compete had detrimental effects for a worker was included in the background provided under the supplementary information the FTC released with the final rule.[25] In that example, a person stated that he was not informed that he had signed a non-compete until he put in his four weeks' notice. He had apparently been unaware that he signed the agreement when he interned for the company while completing his engineering degree. After completing his degree and working for the company for four years, he found a better opportunity in a different state. That is when he was informed about the agreement and that it prevented him from working in the whole industry, regardless of location, so his whole career was at risk if he left the company.

The supplementary information listed multiple similar stories where this happened to hard working Americans. According to the FTC many average Americans carry the grunt of the labor and work hard to succeed but are stuck under the thumb of larger employers because of non-compete agreements they were often times unaware they had signed. Many were not represented by independent counsel and those agreements were not negotiated but can more aptly be characterized as contracts of adhesion.

However, non-compete agreements have been an important tool for companies to preserve their clientele and their wealth, so many commentators in favor of allowing freedom to contract have vocally condemned the rule. Also, don't workers have the right to sell their competitive rights in a free market? One person who supports freedom to contract is the president and CEO of the U.S. Chamber of Commerce, Suzanne P. Clark, who stated that the decision "sets a dangerous precedent for government micromanagement of business and can harm employers, workers, and our economy."[26]

The U.S. Chamber of Commerce called the rule "unnecessary, unlawful, and a blatant power grab."[27] The same day the rule was released the Chamber of Commerce announced that it would sue the FTC over the rule, and it made true to that promise by filing suit in the federal court in Texas the very next day.[28] According to the Chamber of Commerce, the FTC does have the power to enforce existing antitrust laws passed by Congress but does not have the power to adopt sweeping rules such as this one that bans non-compete agreements.[29] While the FTC might view non-compete

agreements as anticompetitive, the power to shut down those agreements falls on Congress and not the FTC.

It is worth noting that the law applies strictly to non-compete agreements, so companies may still have some ways to protect themselves, although as discussed above those situations are quite limited and the Rule is vague. Protective measures may include having employees sign long term employment agreements, to structure deferred compensation that rewards longevity and causes loss of moneys if a person does not stay with the employer a requisite time, and using offshore labor that can be bound to non competes or artificial intelligence instead of US based labor, which will have a detrimental impact on US employment to the extent that these other strategies are used. Other methods of preventing competition that may not assuredly be affected by the rule are Non-Disclosure Agreements (NDAs) and non-solicitation agreements, both subject to certain limitations.

As referenced above, the FTC's view is that NDAs that prevent workers from working for another employer in the same industry have the same impact as non-competes, and are therefore barred. Therefore, employers should ensure that their NDAs are narrowly tailored to ensure they are still enforceable in the future. The same also applies for non-solicitation agreements. Non-solicitation agreements can fall under the definition of a non-compete in § 910.1 when they "prevent a worker from seeking or accepting other work or starting a business after their employment ends."[30] However, whether a non-solicitation agreement constitutes a non-compete agreement is a fact-specific inquiry and as mentioned above, the legal analysis required to determine whether it gives rise to a non-compete agreement can be costly and should be considered when employers are looking at options to protect their company.

Additionally, one commentator has noted that complexity and possible uncertainty may occur if a non-competition or alleged non-compete agreement calls for, or requires, dispute resolution by arbitration. In such event, it seems clear that the federal law must be controlled, but the determination of an arbitration panel as to whether a provision is a non-compete covenant under federal law may be binding upon the parties.

Conclusion

The new FTC Rule will widely impact American business and the American public. Workers should know their rights and understand how the final decision in the lawsuit the FTC just filed will affect them. Companies

should immediately start considering the notice provisions and implementing restrictions on senior executives and reviewing their NDAs and non-solicitation agreements before the effective date. In some situations it may be possible to change the job description of an individual so that he or she has policy making authority, and receives over $151,164 a year in compensation in order to assure that a non-competition covenant does not become unenforceable when the new rules apply beginning 120 days after publication in the Federal Register. For some reason it does not seem to have been published in the Federal Register yet.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Martin M. Shenkman

Alan Gassman

Jonathan Blattmachr

Anthony Del Rosario

Netzy Preciado

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[1] *FTC Announces Rule Banning Noncompetes*, FTC, (April 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

[2] Non-Compete Clause Rule, FTC, RIN 3084-AB74 ("DATES: The final rule is effective [INSERT DATE 120 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*").

[3] Justin A. Steiner, Efficient and Effective Non-Compete Agreements in A Down Economy, 53 Advocate 26 (2010).

[4] 16 CFR §910.1 Definitions

[5] *Id.*

[6] *Id.*

[7] 16 CFR 910.2(a) *Unfair methods of competition*.

[8] 16 CFR 910.1 ("*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").

[9] 16 CFR 910.1 Definitions.

[10] RIN 3084-AB74, pg 269. (Policy-making authority 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. Accordingly, for a worker to be a senior executive, in addition to meeting the compensation threshold, the worker must be at the level of a president, chief executive officer or the equivalent, officer (defined in § 910.1), or in a position that has similar authority to a president or officer.")

[11] 16 CFR 910.2(a)(2) *Senior Executives*.

[12] RIN 3084-AB74, pgs 269-270.

[13] RIN 3084-AB74, pg 272.

[14] RIN 3084-AB74, pg 273.

[15] RIN 3084-AB74, pg 80. ("an NDA would not be a non-compete under § 910.1 where the NDA's prohibitions on disclosure do not apply to information that (1) arises from the worker's general training, knowledge, skill or experience, gained on the job or otherwise; or (2) is readily ascertainable to other employers or the general public. However, NDAs may be non-competes under the "functions to prevent" prong of the definition where they span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job.)

[16] 16 CFR 910.2(b)(1) *Notice required.* For each existing non-compete clause that it is an unfair method of competition to enforce or attempt to enforce under paragraph (a)(1)(ii) of this section, 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.

[17] 16 CFR 910.2(b)(3) *Exception*. If a person that is required to provide notice under paragraph (b)(1) of this section has no record of a street

address, email address, or mobile telephone number, such person is exempt from the notice requirement in paragraph (b)(1) of this section with respect to such worker.

[18] 16 CFR 910.2(b)(2) *Form of notice*.

[19] 16 CFR 910.2(b)(4) *Model language*.

[20] 16 910.3(a) *Bona fide sales of business*.

[21] Fla. Stat. § 542.335 Valid restraints of trade or commerce.

[22] 16 910.3(b) *Existing causes of action*.

[23] 16 910.3(c) *Good faith*.

[24] RIN 3084-AB74, pg 14.

[25] Id.

[26] Erika Ryan, FTC Bans Noncompete Agreements, NPR (Apr. 23, 2024), https://www.npr.org/2024/04/23/1246655366/ftc-bans-noncompete-agreements-lina-khan.

[27] Id.

[28] Docket number 6:24-cv-00148.

[29] Daniel Wiessner, U.S. Ban on Worker Noncompete Agreements Faces Lawsuit by Major Business Group, REUTERS (Apr. 24, 2024), https://www.reuters.com/legal/us-ban-worker-noncompete-agreements-faces-lawsuit-major-business-group-2024-04-24/.

[30] RIN 3084-AB74, pg 81.

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