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### **FTC Issues Final Rule Banning Non-Competes Nationwide in All Industries**

It's been a busy week for the Biden administrative machine (and it's only Wednesday). Yesterday morning, we woke up to the Department of Labor's new white collar exemption regulations ([which we covered yesterday](#)). By the afternoon, the Federal Trade Commission (FTC) was issuing the long promised nationwide ban on non-competition agreements. Here's the skinny:

The new FTC rule makes it illegal to enter or attempt to enforce an agreement which would prevent a former employee (or independent contractors) from working for a different employer or starting their own business.

The rule contains a grandfather clause that exempts pre-existing agreements with "senior executives" from the rule. "Senior executives" are those in policy-making positions who make at least \$151,164 per year. The cut-off date to fall under the grandfather clause is 120 days from the rule's publication – which should happen any day now, making the cut-off roughly August 23, 2024.

The rule also includes very narrow exceptions for non-competes entered in association with the sale of a business and those which are currently in enforcement proceedings (litigation).

But standing down on the threatening enforcement letters is not enough to comply. The rule requires that you take proactive measures to provide written notice to employees who have signed a non-compete to inform them that the restriction will not be and cannot legally be enforced. This applies to both current employees and former employees who are still in their restricted period. The FTC provides a model notice which will satisfy the requirement, but, in our opinion, the model notice goes much further than the rule requires.

Notably, the rule does not prevent you from requiring non-solicitation agreements (which prohibit the solicitation of your customers) or confidentiality agreements (which protect competitively sensitive information). However, the FTC previously indicated that such agreements could be considered non-competes if they are so broad as to prevent the employee from obtaining employment in the same industry.

We expect immediate legal challenges to the rule. The U.S. Chamber of Commerce has signaled that it's ready to file suit today. But the outcome of those challenges is far from certain. We recommend that you prepare to comply. Shore up your non-competes with persons who qualify as a "senior executive." Identify persons who will be entitled to notice that their non-compete is void, but hold off on sending until closer to the Rule's effective date (around August 23rd) to review the progress of any legal challenges in your jurisdiction(s).

If you have any questions or would like additional information, please contact Al Vreeland and 205-323-9266 or [avreeland@lehrmiddlebrooks.com](mailto:avreeland@lehrmiddlebrooks.com).