

## Cantor Colburn Client Alert: FTC Bans Most Employee Non-Compete Agreements

### Summary

On April 23, 2024, the Federal Trade Commission (“FTC” or “Commission”) voted to finalize the “Non-Compete Clause Rule” (“Rule”), pursuant to its authority under Section 5 of the FTC Act. [Non-Compete Clause Final Rule \(ftc.gov\)](#). Subject to exceptions, the Rule generally states that entering into a non-compete clause with a worker after the Rule’s effective date, including senior executives, is an unfair method of competition. Barring successful legal challenges to the Rule, its effective date will be 120 days from date the Rule is published in the Federal Register.

### Overview of the Rule

In January 2023, pursuant to its authority under Section 5 and Section 6(g) of the FTC Act, the FTC published a notice of proposed rulemaking about non-compete clauses. Over a year later, the Commission issued and ultimately voted to adopt the “Non-Compete Clause Rule” (“Rule”). The requirements in the Rule are largely reflected in 16. C.F.R. §910.

The Rule institutes “a comprehensive ban” on employers entering into non-compete clauses with all workers, including senior executives, after the Rule’s effective date. The Rule, however, treats existing worker and senior executive non-compete clauses differently.

#### Workers

The Commission gave a lot of consideration to who should be included in the definition of a “worker” between the Commission publishing the notice of proposed rulemaking about non-competes and the Commission’s issuing of the Rule over a year later. The FTC ultimately declined a narrow definition of a “worker.” A worker, according to 16. C.F.R. §910.1 includes, “an employee, independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a person.”

The Rule bans and renders unenforceable existing non-compete clauses between workers other than senior executives and employers as well as non-competes entered after the Rule’s effective date.

#### Senior Executives.

The Commission also addressed the classification of “senior executives” (in contrast to workers) as defined in 16. C.F.R. §910.1. The Rule holds that non-competes involving senior executives are also unfair methods of competition. Thus, any non-compete clause entered into with a senior executive after the Rule’s effective date is ineffective. However, any non-compete clause entered into with a senior executive before the Rule’s effective date may remain in force.

The Rule includes a notice requirement for existing non-compete clauses for workers who are not senior executives, requiring employers to give those workers “clear and conspicuous notice” of the date the non-



compete will no longer be effective against the worker. The Commission also outlined what must be included in that notice.

There are three exceptions to the Rule. First, the requirements listed in 16. C.F.R. §910 do not apply to, “a noncompete clause that is entered into by a person pursuant to a bona fide sale of a business entity, of the person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets.” In addition, 16. C.F.R. §910 does not apply to a cause of action arising from a non-compete agreement entered into prior to the effective date of the Rule. Lastly, it is not a violation of Section 5 of the FTC Act to attempt to enforce a non-compete or “make representations” related to a non-compete when the individual is doing so under a good faith belief that 16 C.F.R. §910 does not apply to the present situation.

Lastly, the Rule will not restrict enforcement of existing state law that limits non-compete clauses if the state law does not conflict with the Rule, however the Rule will preempt state law that does conflict with the Rule.

#### Rationale Behind the Rule

The Commission cited the preservation and protection of fair competition as the primary reason for the Rule. Further, the Commission pointed to empirical research over the years that demonstrates the negative effects of non-compete clauses on labor markets as well as constraints on product and service markets, which limited the blossoming of new businesses and innovation more generally.

#### Takeaways

The Rule becomes effective 120 days after it is published on the Federal Register. There have already been lawsuits instituted against the FTC related to the Rule, one of the first of which, was by Ryan LLC, a global tax services and software provider. [Ryan Challenges New Non-Compete Rule Issued by Federal Trade Commission \(FTC\)](#). While it is unclear at this time how this and other legal challenges will impact the Rule, employers should consider taking steps to be in compliance with the Rule, including with respect to any notice requirements.

#### For Further Information and Assistance

Attorneys in Cantor Colburn’s [Litigation Practice Group](#) and [IP Transactional Practice Group](#) have substantial experience representing clients in these types of matters. Primary contacts are: [Steven Coyle](mailto:scoyle@cantorcolburn.com), Partner and Litigation Practice Co-Chair, [Mike Rye](mailto:mrye@cantorcolburn.com), Partner and Litigation Practice Co-Chair, [Charlie O’Brien](mailto:cobrien@cantorcolburn.com), Partner and IP Transactional Chair, [cobrien@cantorcolburn.com](mailto:cobrien@cantorcolburn.com)

We welcome your questions regarding this matter and any other regarding your IP in general.

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