

# Time to Prepare? FTC Can Enforce Non-compete Ban According to Pennsylvania U.S. District Court

August 2, 2024

On July 23, 2024, the U.S. District Court for the Eastern District of Pennsylvania refused to enjoin enforcement of the U.S. Federal Trade Commission’s final rule banning most non-competes in the United States. Our May 2024 [alert memo](#) summarizing the final rule is available here. This decision is in direct contradiction to the decision published in early July by the Northern District of Texas, which granted a preliminary injunction preventing the final rule from going into effect for the specific plaintiffs in that case (summary available [here](#)). The Texas court is scheduled to issue a final decision on that injunction, including whether it will apply nationwide, no later than August 30.

***With uncertainty as to whether the final rule will become effective – with one court saying yes and the other (preliminarily) saying no – and with the final rule’s effective date scheduled for September 4, what should employers do now?***

- *Employers should begin preparing notices, verifying contact information and determining which workers are considered “senior executives” under the final rule.*
- *Employers should also consider, for future hires, what modifications may be needed to offer letters, employment agreements and restrictive covenant agreements.*

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

NEW YORK

**Alan M. Levine**  
+1 212 225 2810  
[alevine@cgsh.com](mailto:alevine@cgsh.com)

**Michael J. Albano**  
+1 212 225 2438  
[malbano@cgsh.com](mailto:malbano@cgsh.com)

**Julia M. Rozenblit**  
+1 212 225 2814  
[jrozenblit@cgsh.com](mailto:jrozenblit@cgsh.com)

**Emily C. Barry**  
+1 212 225 2128  
[ebarry@cgsh.com](mailto:ebarry@cgsh.com)

**Eitan Agagi**  
+1 212 225 2001  
[eagagi@cgsh.com](mailto:eagagi@cgsh.com)

**Irene Kwon**  
+1 212 225 2196  
[ikwon@cgsh.com](mailto:ikwon@cgsh.com)



## Prepare Notices and Verify Contact Information

The final rule requires employers to issue a notice to all current and former employees subject to non-competes informing them that their post-termination non-competes are no longer enforceable and that they are free to compete with the employer following their termination of employment. Such notices must be sent by September 4, but should not be sent until it is certain that the final rule will take effect. Please see our form of notice to employees generally (attached hereto as [Appendix A](#)), which is based on the FTC's safe harbor notice but is updated to clarify that the employer will not enforce any non-compete solely to the extent that it would prevent the individual from competing with the employer *in the U.S.* following termination of employment. Prohibitions on competition *outside the U.S.* are not subject to the final rule and thus remain enforceable (subject to local law). In addition, non-competes entered into in connection with the sale of a business are carved out from the notice, as they too are carved out from the FTC ban.

Employers should also prepare a list of addresses, emails and cell phone numbers which can be used to send these notices either physically or digitally (via email or text message) to current and former employees affected by the final rule.

## Determine the Employer's Senior Executives

Although not required by the final rule, we recommend that, prior to the distribution of the notices, employers determine which employees are considered senior executives under the final rule. See our May 2024 [alert memo](#) for guidance on determining this group. Non-competes with individuals in this group are grandfathered, such that their non-competes (either currently in existence or entered into prior to September 4) will remain enforceable after September 4. Once the senior executive group is identified, a different notice (attached hereto as [Appendix B](#)) should be sent to them informing them that their non-compete remains enforceable.

## Future Hires

Although revisions to pre-existing arrangements are not required because of the notice requirement, if the final rule takes effect, employers will not be permitted to include non-competes in offer letters, employment agreements or restrictive covenant agreements (or other documents) after September 4. As a result, employers should review their form documents to prepare for compliance with the final rule (e.g., for new hires, against whom post-termination non-competes will not be enforceable).

Please contact any of the authors or your regular Cleary Gottlieb contacts if you have questions on how to prepare to comply with the final rule and whether there are any useful alternatives for an employer to consider. We will continue to update you as the situation changes.

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CLEARY GOTTLIEB

APPENDIX A:

General Notice for Affected Employees

A new rule enforced by the Federal Trade Commission (the “FTC”) makes it unlawful for us to enforce a non-compete clause in the United States against employees working or operating a business in the United States. If you are such an employee, then as of September 4, 2024, [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of September 4, 2024:

- You may seek or accept a job with any company or any person in the U.S. – even if they compete with [EMPLOYER NAME];
- You may run your own business in the U.S. – even if it competes with [EMPLOYER NAME]; and
- You may compete with [EMPLOYER NAME] in the U.S. following your employment with [EMPLOYER NAME].

[Please note that the FTC’s new rule and this notice do not apply to non-competes entered into in connection with the sale of a business.]<sup>1</sup>

The FTC’s new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit: [Federal Register :: Non-Compete Clause Rule](#).

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<sup>1</sup> In the event any employees are subject to non-competes covered by the sale of business exception in the Rule, employers should consider including modifications to the model notice referring to such exception, as delivery of the model notice verbatim to a worker covered by such exception could serve to end enforcement of a valid non-compete. In order to avoid a chilling effect on workers who are unable to determine if they continue to be bound by a non-compete, this language should be included only for populations who are subject to the sale of business exception rather than in the notice delivered to the general employee population.

APPENDIX B:

Notice for Senior Executives

A new rule enforced by the Federal Trade Commission (the “FTC”) makes it unlawful for us to enforce a non-compete clause against employees who are not determined to be senior executives. As of September 4, 2024, [EMPLOYER NAME] will not enforce any non-compete clause against such employees. However, this new rule does not affect the enforceability of non-compete clauses already in place against senior executives.

This [communication] is to notify you that pursuant to the terms of the FTC’s new rule, [EMPLOYER NAME] has determined that you are a senior executive of [EMPLOYER NAME] and that [EMPLOYER NAME] considers any non-compete to which you are currently subject to remain enforceable in accordance with its terms.

The FTC’s new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit: [Federal Register :: Non-Compete Clause Rule](#).